MID Modesto Irrigation District
Water and Power

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April 1, 2002

Mr. Arthur Baggett, Chair
State Water Resources Control Board
Division of Water Rights
P.O. Box 2000
Sacramento, CA 95812-2000

Re: Legal Issues Relating to Professor Sax's Report on State Board Jurisdiction Over Groundwater

Dear Mr. Baggett:

In his "Review of the Laws Establishing the SWRCB's Permitting Authority Over Appropriations of Groundwater Classified as Subterranean Streams and the SWRCB's Implementation of Those Laws" (hereinafter, the "Report"), Professor Sax states that the State Water Resources Control Board (the "State Board") should have expanded jurisdiction over groundwater. He recognizes that the enactment of such legislation would be impractical, if not impossible. Accordingly, he suggests that the State Board adopt "clear criteria to implement the existing statutory purpose, by taking jurisdiction henceforth over groundwater uses that diminish appreciably and directly the flow of a surface stream."

The State Board could implement Professor Sax's recommendation by (1) adopting regulations expanding the State Board's authority over groundwater; or (2) informally accomplishing the same objective under the guise of guidelines, criteria, orders, or the like. As the following demonstrates, however, neither method is legal. The State Board is prohibited from adopting regulations that would enlarge its authority beyond the literal, clear, and unambiguous language of Water Code section 1200, which limits the State Board's jurisdiction over groundwater to "subterranean streams flowing through known and definite channels." Similarly, informal implementation of standards of general application, whether cast as "criteria" or otherwise, is prohibited by the Administrative Procedure Act (Gov. Code, § 11340 et seq.) In addition to the legal impediments that preclude implementation of Professor Sax's recommendation, Professor Sax ignores the fact that implementation of his recommendation would result in a "taking" of vested rights, for which compensation must be paid.

1. Implementation of the Recommendation That The State Board Assume Jurisdiction Over Groundwater Would be Unlawful.

a. Assumption of Jurisdiction Over Groundwater Beyond the Literal Grant Under Water Code Section 1200 Exceeds the State Board's Lawful Jurisdiction.

The State Board has only such jurisdiction and powers as are granted to it. by the Legislature. (*Ferdig v. State Personnel Board* (1969) 71 Cal.2d 96, 103.) "[T]he powers of pubic [agencies] are derived from the statutes which create them and define their functions." (*Imperial Irrigation District v. State Water Resources Control Board* (1990) 225 Cal.App.3d 548, 567.) Any actions beyond such authority, or inconsistent with it, are void. (*California Welfare Rights Organization v. Carleson* (1971) 4 Cal.3d 445, 455.)

The jurisdiction granted to the State Board with regard to waters within the state is very clear – the Board's jurisdiction extends only to "surface water, and to subterranean streams flowing through known and definite channels." (Wat. Code, § 1200.)

While we will not recount Professor Sax's detailed legislative history of that section here, suffice it to say that the Legislature purposefully chose the words "subterranean streams flowing through known and definite channels," with full knowledge of what that phrase meant. (Report, at p. 38.)

If the Legislature was unsure of the limits it placed on the State Board in 1913, there can be no doubt that it is presently content with those limits. Professor Sax notes that "in a variety of statutory provisions as well as legislative studies, the legislature's posture toward statewide groundwater has been set down unambiguously". (Report, at p. 42.)

For example, Professor Sax cites the following:

> In 1962, an Assembly Interim Committee Report, concluded:
>
> "The committee agrees that local management is desirable and...provides simplified solutions to many of the ground water basin management problems."
>
> In 1984, area-of-origin legislation was careful to distinguish between surface water appropriations dated by the time of "applications [before the Board] to appropriate," and groundwater appropriations, dated by the time they are "initiated" [outside of any permitting process].
>
> The legislature also added Water Code section 1221, stating "this article shall not be construed to authorize the board to regulate groundwater in any manner."
>
> The provision that grants Board authority over general adjudications of stream systems specifically excludes "an underground water supply other than a subterranean streams flowing through known and definite channels." (Water Code § 2500)

(Report, at p. 42.)

> Professor Sax concluded the foregoing review with the following: "This brief review makes clear that the legislature has repeatedly been made aware of the Board's limited jurisdiction over groundwater under Water Code § 1200, and has shown no inclination to expand that jurisdiction beyond the legislative goals that led to the language in the 1913 statute."

(Report, at p. 44.)

Thus, the jurisdiction granted by the Legislature to the State Board with regard to groundwater is clear – it has jurisdiction over, and only over, subterranean streams flowing through known and definite channels.

b. Any Attempt by the State Board to Expand Its Jurisdiction Beyond That Granted by the Legislature is Void.

The California Supreme Court has made clear that an administrative agency has no discretion to exceed the authority conferred upon it by statute. (*California Welfare Rights Organization v. Brian* (1974) 11 Cal.3d 237, 242.) And if a court determines that an agency's administrative action has altered or amended its enabling legislation, or enlarged or impaired its scope, that action must be declared void. (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 391.)

The foregoing holdings also extend to regulations. "Administrative regulations that violate acts of the Legislature are void, and no protestation that they are merely an exercise of administrative discretion can sanctify them." (*Henning v. Division of Occupational Safety and Health* (1990) 219 Cal.App.3d 747, 759.)

Professor Sax recognizes that the Legislature has granted the State Board jurisdiction only over "subterranean streams flowing through known and definite channels." He also recognizes that legislation would be required to extend that jurisdiction to other groundwater, and that such legislation is not forthcoming. Moreover, Professor Sax even admits that his recommendation would "enlarge Board jurisdiction somewhat." (Report, p. 7, fn. 10.) Because the Legislature has limited the State Board's jurisdiction over groundwater, the State Board is without the power adopt regulations extending its jurisdiction to other groundwater, and any attempt to do so would be void.

c. The State Board May Not Do Informally What It Cannot Do Formally.

The fact that the recommendation is phrased in terms of "adoption of criteria to implement the existing statutory purpose" (Report, at p. 92) does not cure the lack of jurisdiction of the State Board.

Under the APA, "[n]o state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State . . ." (Gov. Code, § 11340.5.) The term "regulation" is broadly defined. It includes "every . . . standard of general application . . . adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it." (Gov. Code, § 11342.600.)

What Professor Sax recommends is unlawful. He recommends that the State adopt "criteria," one of the categories expressly enumerated in Government Code section 11340.5. Moreover, the "criteria" are intended to provide a "standard of general application" within the meaning of section 11342.600. As such, the recommended action is prohibited by the APA, absent formal proceedings under that act. Of course, because those proceedings would impermissibly enlarge the State Board's jurisdiction over water beyond the narrow authority granted to it by the Legislature under Water Code section 1200, they are proscribed as well.

Nor may the State Board simply "interpret" its existing statutory authority by fiat. Any attempt to establish a uniform, expansive interpretation of the State Board's jurisdiction would require formal action under the APA. (Gov. Code, § 11342.600.)

2. The Assumption Of Jurisdiction By The State Board Over Groundwater Beyond The Grant Of Water Code Section 1200 Would Result In A Taking Of Vested Property Interests In Violation Of The Fifth Amendment To The United States Constitution.

Under California law, water rights in an underground basin are classified as overlying, appropriative or prescriptive. An overlying right is analogous to that of a riparian right in a surface stream. The right to take water from beneath the land for use on the overlying parcel is a right based on the ownership of land, and is appurtenant thereto. (*City of Barstow, v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1240.) Overlying rights are paramount to the rights of appropriators. (*California Water Service Co. v. Edward Sidebotham & Son* (1964) 224 Cal.App.2d 715, 725.)

The courts of this state have made clear that a right to use water is a property right. "[O]nce rights to use water are acquired, they become vested property rights. As such, they cannot be infringed by others or taken by governmental action without due process." (*United States v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82, 100.

Despite the well-established principle that a groundwater rights holder has a vested property right to the use of that water, Professor Sax urges the State Board to assume jurisdiction over "groundwater uses that diminish appreciably and directly the flow of a surface stream." The import of this recommendation is that one who utilizes groundwater that flows into a surface stream will suddenly be subordinated to the rights

holders to that stream. Even the most senior groundwater right holder will be junior to the most junior surface water appropriator.

Even assuming that the reallocation of water rights serves a public purpose, and can therefore justify a taking, such reallocation will require compensation of the groundwater rights holders who have been deprived of their property rights. (*United States v. State Water Resources Control Board, supra*, 182 Cal.App.3d at p. 100.) As the United States Supreme Court noted, when the public welfare requires riparian rights holders to sacrifice their benefits for the broader benefits of "higher utilization" of that water, the law does not require "that their loss be uncompensated any more than in other takings where private rights are surrendered in the public interest." (*United States v. Gerlach Live Stock Co., supra,* 339 U.S. at p. 752.

Professor Sax notes the difficulty that re-ordering itself would create. "[S]ettling priorities would be a deeply troublesome issue." (Report, at p. 91, fn. 303.) Even that statement, however, does not fully come to grips with the problems engendered by his recommendation that the State Board assume jurisdiction over those groundwater uses that "diminish appreciably and directly the flow of a surface stream." A groundwater rights holder would have no notice as to whether the State Board might assume jurisdiction over his pumping, or not. Not only would the implementation of such a nebulous program have a chilling effect on farming and other operations, it would make land-based lending programs, not to mention the sale of any potentially affected land, virtually impossible where groundwater is a significant source of supply. The uncertainty caused by the lack of a clear line of demarcation may well create more chaos than the absolute re-ordering of water rights priorities.

Establishing the compensation for such the devaluation of property that would be occasioned by that re-prioritization, that would result from the "fear" factor of the uncertainty of the State Board's reach, would cast the State Board into a morass from which extrication would be virtually impossible in the foreseeable future, and would cost the State untold millions of dollars. When the turmoil that those takings would cause, and the dollars it would cost, are balanced against the purely speculative gain to be had from more closely unifying the water rights structure under one regulatory umbrella, the compelling conclusion is that Professor Sax's recommendation should be rejected.

CONCLUSION

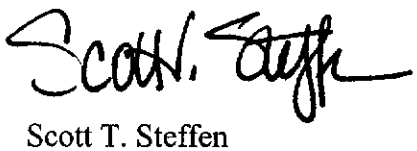
Professor Sax has carefully reviewed the history and development of California water rights law, and has concluded that the legislature limited the State Board's jurisdiction over groundwater to subterranean streams flowing through known and definite channels. Undaunted by his own conclusion, he recommends that the State Board adopt "clear criteria" to assume broader groundwater jurisdiction.

As discussed above, the Legislature has carefully prescribed the limits of the State Board's jurisdiction, and Professor Sax's recommendation exceeds those limits. Accordingly, adoption of that recommendation would be unlawful.

Even if the State Board were to find a way to legally adopt Professor Sax's recommendation, that act would wreak havoc on water rights as we know them today. Sorting out priorities under the new regime would, in Professor Sax's own words, be "deeply troublesome." And, because those whose rights are impaired would be entitled to compensation, the expense would be enormous, not only in compensation, but in the energies required to resolve the issues raised by that action, not to mention the economic disruption that would result.

For each of the foregoing reasons, Professor Sax's recommendation should be rejected.

Respectfully,



Scott T. Steffen
Assistant General Counsel

MID Modesto Irrigation District
Water and Power

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March 25, 2002

Honorable Arthur Baggett
Chairman
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000

Re: Professor Sax's Report on the State Board's Groundwater Jurisdiction

Dear Mr.Chairman:

Modesto Irrigation District requests that the State Water Resources Control Board reject the recommendations contained in Professor Sax's recent report on the State Board's jurisdiction over groundwater.

The Board will be receiving our detailed comments on the report through the San Joaquin River Group. This letter addresses separately the overriding concern that the report seeks expansion of the Board's water rights jurisdiction over groundwater, whether through regulations, interpretations, adjudications or aggressive use of the Public Trust and Reasonable Use doctrines – all without legislative oversight. While the report concludes that "Water Code § 1200 is [not] suited to resolve California's 21st Century water problems," the only justification for bypassing the legislative process to enact this view is that the Legislature has been withholding this jurisdiction from the State Board for almost a century and the report concludes that it will not grant such authority today. (Report, pp. 44, 91.)

We believe that such legislative refusal, far from being a signal to the Board to evade that policy judgment, ought to be a signal for the State Board to refrain as well.

As the State Board has recognized, 40 percent of all water used in this state is groundwater. Our economic and social systems depend today on the stability of groundwater rights. Any changes that render waters that are today considered groundwater into surface water immediately transfer the rights of the most senior groundwater appropriators into rights of the most junior surface water appropriators. Only the Legislature can protect existing groundwater rights and the uses that depend upon them from being eroded or eliminated in this process.

Action by the State Board to overtly or subtly alter, evade or interpret away a long-established and legislatively prescribed water allocation system would be dangerous and ill-advised.

Sincerely yours,

Allen Short

Allen Short
General Manager
Modesto Irrigation District

cc: The Honorable Gray Davis
The Honorable Winston Hickox
The Honorable William J. Lyons
The Honorable Thomas Hannigan
The Honorable Jim Costa
The Honorable Dick Monteith
The Honorable Dave Cogdill
The Honorable Dennis Cardoza
The Honorable Joe Canciamilla
The Honorable Dick Dickerson
Ms. Susan Kenndedy
Mr. Vincent Harris
Ms. Linda Adams
Ms. Celeste Cantu
Mr. Paul Murphey

Statement of Allen Short on Professor Sax's Report

Mr. Chairman and members of the Board, I am Allen Short, General Manager of the Modesto Irrigation District.

Because our District relies on both its surface water rights and on its groundwater rights, I feel that I can speak without bias about the need to protect both.

Protecting groundwater rights, however, means more than stopping wells from draining a stream from below, or stopping surface water appropriations from interfering with an aquifer's recharge. Like any property right, the value of a water right depends on its stability.

Professor Sax argues that the Legislature did not correctly express its intent in 1913, and that after 89 years this Board should take action to broaden its jurisdiction to issue permits for groundwater appropriations. I will not argue whether Professor Sax is right about history, or whether the Board can legally broaden its own jurisdiction.

What I am here to say is that there are millions more Californians than there were in 1913, and 40 percent of the water they use comes from groundwater. Much of our state's economy, and our society, has been built in reliance on the legitimacy and stability of groundwater rights.

Whether the Board could create a better system, or better protect its

licensees, by asserting jurisdiction over groundwater appropriations beyond the traditional "underground streams" is beside the point. Any such attempt by the Board will fail to protect existing uses.

The real issue is this: If the Board simply declares that any of what we thought of as groundwater is really surface water, it is also saying the most senior rights holder has no rights at all, unless it receives a license from this Board. This would mean we all become junior to the most junior surface water appropriators.

Any such reforms – if they are reforms – must come from the Legislature, which has the power to protect existing rights.

In conclusion, I urge the Board not to take any action to broaden its jurisdiction to issue permits for groundwater appropriations, as I believe that action would create great strife.

CHINO BASIN WATERMASTER

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JOHN V. ROSSI
Chief Executive Officer

TRACI STEWART
Chief of Watermaster Services

April 1, 2002

Paul Murphey
Division of Water Rights
State Water Resources Control Board
P. O. Box 2000
Sacramento, California 95812-2000

Subject: Subterranean Streams

The Chino Basin Watermaster ("Watermaster") appreciates the opportunity to provide comments regarding the State Water Resources Control Board's ("SWRCB") ongoing process to interpret its grant of authority under Water Code section 1200. The Watermaster commends Professor Sax for his conclusion that comprehensive basin management as exemplified by Southern California's successfully adjudicated basins, is the most promising tool to achieve genuine integration of surface water and groundwater administration in California. The Watermaster urges the SWRCB to follow this recommendation and refrain from expanding its jurisdiction into previously adjudicated basins such as the Chino Basin.

The SWRCB has Not Exerted Jurisdiction in the Chino Basin

The Chino Basin Watermaster is a collaborative entity created by the 1978 Judgment in *Chino Basin Municipal Water District v. City of Chino*, San Bernardino Superior Court Case No. 51010 ("1978 Judgment"), to administer the terms of the Judgment and to assist the Court in the exercise of its continuing jurisdiction.

The Chino Basin watershed contains almost no perennial surface streams, and with the exception of a small corner of the Basin through which the Santa Ana River flows, all surface flow in the watershed is composed solely of intermittent storm flows. None of the groundwater in the Chino Basin flows in what would traditionally be identified as a "known and defined channel," though the general gradient of the Basin does produce a gradual movement of Basin water from the San Gabriel Mountains on the northern side of the Basin, to the Prado dam at the southwestern side of the Basin. Prado Reservoir, the area just south of the city of Chino, is considered to be the outlet of the Basin. When water levels in the Basin are high enough, water can potentially exit the Basin through this outlet.

Over the past few years Watermaster has observed the process to define the scope of the SWRCB's jurisdiction over groundwater. Watermaster has observed that much of the commentary during this process has highlighted the apparent fact that the SWRCB has historically declined to assert jurisdiction over groundwater that is not part of the underflow of a surface water course. While it is possible to analyze the semantics of the "known and defined channel" standard in order to claim that the SWRCB's jurisdiction applies to a wide range of occurrences of groundwater, the SWRCB's historical practice has been to confine the application of that standard to underflow.

Under the SWRCB's historical application of the known and defined channel standard as the underflow of a surface stream, none of the Chino Basin would fall within the jurisdiction of the SWRCB. The many municipalities, special districts and private water users, however, are concerned about a possible trend by the SWRCB to expand the traditional reach of its authority in a way that would encompass basins such as the Chino Basin.

Subject: Subterranean Streams
Chino Basin Watermaster Written Comments

The Chino Basin Watermaster Process is an Effective Model of Local Self-Governance

The Chino Basin is one of eighteen adjudicated basins in California. The 1978 Judgment created a comprehensive governance structure to manage the water resources of the Basin in a manner protective of the rights of individual parties who use water in the Basin as well as in a manner that is protective of the public trust resources of the Basin. The adjudication of the Chino Basin, in fact, is one of the case studies highlighted in William Blomquist's book, *Dividing the Waters: Governing Groundwater in Southern California*, which is cited with approval in Professor Sax's Report.

Watermaster has undergone many changes during the past twenty-three years of its existence as the parties have spent countless hours and invested considerable resources to create a management plan for the Basin and an appropriate governance structure through which this management plan can be effectively implemented. As recently as June of 2000, the parties negotiated a Basin-wide agreement, commonly know as the Peace Agreement, which established a set of operating agreements that have enabled the implementation of the Basin's Optimum Basin Management Program ("OBMP"). The OBMP is a comprehensive program that is designed to maintain the productivity and general health of the groundwater Basin, focusing not only on water quantity issues, but also on water quality and long-term Basin use parameters.

Following the execution of the Peace Agreement, the Chino Basin parties thoroughly revised the Rules and Regulations for the Chino Basin. One aspect of this revision was to create a quasi-administrative process for hearing and resolving complaints and contests to activities by and between the many water producers in the Basin. All of these institutional structures exist and operate under the direct and active supervision of the Court in the exercise of its continuing jurisdiction under the 1978 Judgment.

Together all of these elements constitute a comprehensive self-governance structure that embodies the ideal of local self-governance of ground water resources. This governance structure has developed slowly since 1978 in response to local cultural conditions, and now has evolved to the point where Watermaster is proactively implementing measures to improve the health of the Basin.

The SWRCB Should Not Disrupt Effective Local Governance Institutions

It is impossible to determine what effect an assertion of SWRCB jurisdiction over the Chino Basin would have upon this institutional structure. A delicate institutional balance has been created in the Basin, and this new element would certainly change that balance. It is uncertain whether the measures that have been put in place to manage and improve the Basin would survive such a change.

The Chino Basin Watermaster, on behalf of the many cities, water supply entities, agricultural and industrial water users in the Chino Basin, thus urge the SWRCB to acknowledge that historically the SWRCB has declined to assert jurisdiction over groundwater resources in most areas of the State, and that in the absence of such SWRCB involvement alternative governance structures have developed. Many of these alternative governance structures are innovative and effective and should not be impaired.

Whatever the results of the current SWRCB process to determine the scope of its jurisdiction, some explicit provision should be made to so that the process does not cause harm to areas such as the Chino Basin that have developed effective local governance structures.

Respectfully submitted,

John V. Rossi
Chief Executive Officer

FDP/PGM

WATER RECLAMATION
SOLID WASTE MANAGEMENT

COUNTY SANITATION DISTRICTS
OF LOS ANGELES COUNTY

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JAMES F. STAHL
Chief Engineer and General Manager

TRANSMITTED VIA ELECTRONIC MAIL

April 2, 2002
File No.: 31-370.10

Mr. Paul Murphey
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000

Dear Mr. Murphey:

Comments to Professor Joseph Sax's Report
on the Legal Classification of Groundwater

The County Sanitation Districts of Los Angeles County ("LACSD") appreciates the opportunity to review Professor Sax's report ("Report") addressing the legal classification of groundwater. LACSD is a confederation of special districts which operate and maintain regional wastewater and solid waste management systems for over 5 million people who reside in 78 cities and unincorporated areas in Los Angeles County. LACSD owns and operates eleven wastewater treatment plants in Los Angeles County. Seven of the wastewater treatment plants discharge tertiary treated effluent to inland surface waters which are considered effluent dominated water bodies. A significant portion of the tertiary treated effluent is used for planned groundwater recharge projects in the San Gabriel Valley. Because of our involvement in groundwater recharge activities, we understand the concerns about the hydrological connection between surface and groundwater. We do not believe, however, that this Report is the proper way to address the issue. The subject report caused concern for one primary reason: the expansion of State Water Resources Control Board (SWRCB) jurisdiction without legislative approval, including authority over groundwater under the auspices of the public trust doctrine. LACSD is concerned about the ramifications this Report may have on the water appropriation system within the State of California and the direct impact to the operations of its facilities.

The SWRCB requested Professor Sax to address six questions relating to the legal and physical distinctions between surface water and percolating groundwater, focusing primarily on the SWRCB's water right "permitting authority" over groundwater. (Report at 3-4.) Professor Sax responded by addressing, among other things, the "management of groundwater outside Water Code § 1200" in Part V of the Report, although not a portion of SWRCB's requested task. Instead, Professor Sax opines about the SWRCB's authority to "regulate" uses of groundwater, including when uses violate the public trust doctrine, ignoring the initial charge of SWRCB's water right permitting authority. LACSD does not believe the SWRCB has

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authority over groundwater solely due to public trust impacts[1] and objects to the SWRCB providing a stage for Professor Sax to speculate about the status of the public trust doctrine. LACSD's concern is that the Report suggests that any impact to public trust resources is per se unreasonable and subject to regulatory control under Water Code § 275, regulating the discharge of effluent under both water quality and water right authority. (Report at 82 and 87.) This type of regulation was never intended nor is it necessary. This also has the effect of distracting from the original objective: reviewing the SWRCB's authority over appropriations of groundwater classified as subterranean streams.

The document as a whole provides a great resource of the history of subterranean streams and its statutory establishment, but merely provides the interpretation of one person. LACSD looks forward to an open discourse on the issue to ensure that an accurate enactment of the law occurs.

We appreciate the opportunity to comment on this document. If you have any questions regarding these comments, please contact the undersigned at extension 2801.

Very truly yours,

James F. Stahl

Victoria O. Conway

Victoria O. Conway
Head, Monitoring Section
Technical Services Department

VOC:drm

[1]The courts have never held the SWRCB has authority over groundwater solely due to the public trust doctrine. It is unclear whether Professor Sax and SWRCB legal staff believe the SWRCB has authority over percolating groundwater without the assistance of Water Code section 275.

Mr. Paul Murphey
Division of Water Rights
State Water Resources Control Board
P. O. Box 2000
Sacramento, California 95812-2000

Re: Comments Regarding Sax Report

Dear Mr. Murphey:

The Groundwater Resources Association of California (GRA) was formed in 1992 to promote the protection of groundwater resources and to serve as a forum for groundwater information, education and advocacy. Members come from government agencies, universities, consulting firms, non-profit organizations, businesses, specific interest groups, and the public.

GRA has been following the State Water Resources Control Board (SWRCB) process regarding the legal classification of groundwater, and the GRA membership has taken a great interest in the Report developed by Professor Sax. The matter is of critical importance to our membership and all of California. Any change in the regulation of groundwater can have serious water supply and financial consequences.

Accordingly, the GRA Board believes that any implementation of the recommendations in the Sax Report should be preceded by a technical stakeholder process to ensure the development of proper criteria and reasonable implementation guidelines. As a statewide entity that represents a diverse range of groundwater interests, GRA is well qualified and would welcome the opportunity to participate.

We hope the SWRCB will honor our suggestion and our offer. Please feel free to contact me at any time at 651-9224 regarding GRA's participation in this process.

Sincerely,

Timothy K. Parker, RG, CEG, CHG
Legislative Committee Chair
Board Member

Statement of Allen Short on Professor Sax's Report

Mr. Chairman and members of the Board, I am Allen Short, General Manager of the Modesto Irrigation District.

Because our District relies on both its surface water rights and on its groundwater rights, I feel that I can speak without bias about the need to protect both.

Protecting groundwater rights, however, means more than stopping wells from draining a stream from below, or stopping surface water appropriations from interfering with an aquifer's recharge. Like any property right, the value of a water right depends on its stability.

Professor Sax argues that the Legislature did not correctly express its intent in 1913, and that after 89 years this Board should take action to broaden its jurisdiction to issue permits for groundwater appropriations. I will not argue whether Professor Sax is right about history, or whether the Board can legally broaden its own jurisdiction.

What I am here to say is that there are millions more Californians than there were in 1913, and 40 percent of the water they use comes from groundwater. Much of our state's economy, and our society, has been built in reliance on the legitimacy and stability of groundwater rights.

Whether the Board could create a better system, or better protect its

licensees, by asserting jurisdiction over groundwater appropriations beyond the traditional "underground streams" is beside the point. Any such attempt by the Board will fail to protect existing uses.

The real issue is this: If the Board simply declares that any of what we thought of as groundwater is really surface water, it is also saying the most senior rights holder has no rights at all, unless it receives a license from this Board. This would mean we all become junior to the most junior surface water appropriators.

Any such reforms – if they are reforms – must come from the Legislature, which has the power to protect existing rights.

In conclusion, I urge the Board not to take any action to broaden its jurisdiction to issue permits for groundwater appropriations, as I believe that action would create great strife.

THE PUBLIC TRUST ALLIANCE

A Project of the Resource Renewal Institute
Pier One, Fort Mason Center
San Francisco, CA 94123

April 10, 2002

Paul Murphy
Division of Water Rights
State Water Resources Control Board
P.O. BOX 2000
Sacramento, CA 95812-2000

Dear Mr. Murphy and Members of the Board,

California water is a special kind of public resource. I represent a very new organization with a very old mission that is closely related to the special character of water. Our name is The Public Trust Alliance and our mission is to advocate responsible stewardship of resources that have always been treated as so important that property title is held in trust by the state for the benefit of all the people. We have a particular interest in the management of the waters of this state and ensuring that public trust values are adequately protected for future generations. This is the essence of the public trust doctrine. An increasingly sophisticated public is becoming ever more sensitive to protecting public values as we see public interests so blatantly disregarded in recent corporate accounting and energy deregulation scandals.

Our organization has an obvious interest in how the State Water Resources Control Board undertakes its duties to protect public trust values in the waters of California. Professor Sax has done an excellent job tracing the historical development of statutory language intended to protect surface waters from unacceptable groundwater pumping. We now have all too many situations in California where surface waters have completely vanished because of groundwater mismanagement. The legal disconnect in the treatment of two aspects of a water resource which is physically more like an integrated continuum is growing more brittle and untenable with each passing day. It is no longer publicly credible to maintain the fiction of "subterranean streams" which has no basis in the reality experienced by either the pumpers or the people relying on the State Board to protect surface streams for public uses.

The impact test suggested by Professor Sax is a useful first step that the Board might take to better manage the waters of this state. We will be more than glad to support the Board in this effort. But we will not stand idly by as public assets are gifted to private actors in a continued application of the current standard employing a fictional division between percolating groundwater and surface streams. Thanks very much for the opportunity to comment on Professor Sax's very practical analysis of historical materials related to this very important issue.

Sincerely,

Michael Warburton

Michael Warburton
Director

California Trout * Defenders of Wildlife * Literacy for Environmental Justice
Robin Mark Freeman, Chair, Merritt College Environmental Technologies and Environmental Justice Water Coalition Steering Committee
Natural Heritage Institute * Trout Unlimited

April 10, 2002

State Water Resources Control Board
Division of Water Rights
P.O. Box 2000
Sacramento, CA 95812-2000

Members of the Board:

This letter provides the comments of California Trout; Defenders of Wildlife; Literacy for Environmental Justice; Robin Mark Freeman, Chair, Merritt College Environmental Technologies and Environmental Justice Water Coalition Steering Committee, as an individual; Natural Heritage Institute; and Trout Unlimited on the "Review of the Laws Establishing the SWRCB's Permitting Authority over Appropriations of Groundwater Classified as Subterranean Streams and the SWRCB's Implementation of Those Laws" (hereinafter "the Report"), prepared for the Board by Professor Joseph L. Sax. We agree with the Report's central conclusion – that the Board has permitting authority over groundwater withdrawals that have a direct and appreciable impact on surface flows – and we urge the Board to take expeditious action to implement the Report's recommendations.

As the Report emphasizes from its very first page, groundwater and surface water are not separate resources, but are inextricably linked. This reality has very important consequences for aquatic biodiversity because excessive extractions of groundwater, particularly in close proximity to surface streams, tends to deplete the flows of those streams. This is a large and growing problem in areas of California with intensive groundwater development because California streamflows are variable and subject to periodic droughts. Depletion of flows from excessive groundwater pumping can irreversibly alter delicate riparian ecosystems and eliminate the refugia for rare and endangered aquatic species.

The Report provides strong legal, historical, and policy justification for a greater degree of integrated management of California's surface water and groundwater resources, especially as they affect riparian ecosystems and flow-dependent aquatic species. In particular, the impact test described by Professor Sax fulfills the legislative purpose of the Water Commission Act, provides a clearer line of demarcation than the previous emphasis on physical characteristics of "subterranean streams" such as bed and banks, and importantly, provides a tool that directly addresses the problems excessive groundwater pumping can create for aquatic species and riparian habitat.

We believe the Report provides the Board with a sturdy foundation for further action, and we urge the Board to establish a process for developing technical criteria for determining when groundwater uses are within the Board's permitting jurisdiction. Thank you for providing the opportunity to comment on the Report.

Sincerely,

Jim Edmondson
Conservation Director
California Trout

Brendan Fletcher
California Program Associate
Defenders of Wildlife

Jenn Sramek
Living Classroom Coordinator
Literacy for Environmental Justice

Robin Mark Freeman, Chair
Merritt College Environmental Technologies
and Environmental Justice Water Coalition Steering Committee

Gregory A. Thomas
President
Natural Heritage Institute

Charlton Bonham
California Staff Attorney
Trout Unlimited

NCWA Northern California Water Association 1992 - 2002 10 Years

To promote the economic, social and environmental viability of Northern California by enhancing and preserving the water rights and supplies of our members.

April 9, 2002

Mr. Arthur G. Baggett, Jr.
Chairman
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

RE: Legal Classification of Groundwater

Dear Mr. Chairman and Members of the Board:

The Northern California Water Association (NCWA) urges the State Water Resources Control Board (Board or SWRCB) to affirmatively rebuff the recommendations presented in the final report (SWRCB No. 0-076-300-0) regarding the legal classification of groundwater. At a minimum, the Board should affirmatively act to assure that the report is not cited nor in any other way relied upon in any administrative or judicial context, particularly by the SWRCB and its staff and legal counsel.

NCWA represents seventy agricultural water districts and agencies, private water companies, and individual water rights holders with senior rights and entitlements to the surface waters of the Sacramento Valley. NCWA's members also have overlying and appropriative water rights to groundwater resources in Northern California, from the northern reaches of Tehama County to Sacramento County, from the edge of the Sierra Nevada Mountains in El Dorado County to Glenn County which extends to the Coast range.

NCWA believes the preservation of Northern California's groundwater rights is critical to the long-term viability of the region's economic prosperity and environmental well-being. The region's economic and social fabric has been built and is dependent upon the stability of groundwater rights. Any changes that would transform today's groundwater rights into surface water rights would effectively turn the California water rights system upside down by commuting senior water rights into junior water rights that may not be available for use in many years. This would destabilize water rights and the local communities that depend upon these water rights and it would create additional uncertainty in California water management that would not be welcome at this time. For this reason, NCWA and its members are strongly opposed to any effort by the Board or its staff to expand jurisdiction over groundwater resources in California.

455 Capitol Mall, Suite 335 Sacramento, California 95814-4496 Telephone (916) 442-8333 Facsimile (916) 442-4035 www.norcalwater.org

Rather than focus upon the legal and hydrologic flaws in the report--which many others will pursue in detail--we believe it is important to view the report in the context of water management in California and particularly in the Sacramento Valley.

In Northern California, water users are undertaking an ambitious integrated water management program that includes a broad array of ecosystem and water supply improvements. The program is intended to integrate the numerous water rights and supplies in Northern California in a comprehensive fashion to broaden the water supply benefits that can be achieved by maximizing the total water resource mix that is available in Northern California. The goal of the program is to be able to meet 100 percent of existing and future M&I and agricultural demand within Northern California, while also optimizing the benefits for the environment and water users in other parts of the state.

As you know, this integrated program is the foundation for the Sacramento Valley Water Management Agreement, an unprecedented and exciting partnership involving water users throughout the state that will hopefully lead to resolution of Phase 8 of the Bay-Delta water rights proceedings and other similar proceedings. Sound groundwater management and the conjunctive management of surface and groundwater resources at the local level is an important part of the integrated program. This program, unlike many efforts that have failed in the past, includes projects that are all locally proposed, developed and managed in the Sacramento Valley. Significantly, in the absence of any federal or state interference, Sacramento Valley water users are integrating various types of surface and groundwater rights to maximize the water available for farms, cities and the environment and they are doing so in a constructive and politically viable manner.

There are many positive currents in California water management, including a collaborative effort to resolve the most contentious water rights dispute before the Board—the Phase 8 Bay-Delta proceedings. We encourage the Board to acknowledge that this positive approach to integrated water management will help meet the growing demands for water in the state and it will do so in a far superior manner to a forced, regulatory approach that would only breed conflict and serve as an undertow for these efforts. The report at hand was motivated by one flawed staff recommendation involving the San Luis Rey River in Southern California. It makes little sense to make the rest of the state suffer because of this flawed staff recommendation.

We thank the Board for its consideration of this perspective.

Sincerely yours,

David J. Guy
Executive Director

From: <siskfarm@snowcrest.net>
To: <WrHearing@Waterrights.swrcb.ca.gov>
Date: 4/9/02 6:09PM
Subject: Subterranean Streams

Copy of comments sent in the mail:

April 5, 2002

Attn: Paul Murphey
Division of Water Rights
State Water Resources Control Board
P.O. Box 200
Sacramento, CA 95812-2000

RE: Subterranean Streams

Dear Mr. Murphey,

The Siskiyou County Farm Bureau would like to make the following comments regarding Dr. Sax's report and recommendations:

(1) Siskiyou County does have actual volcanic features that create genuine subterranean Streams. (e.g. "lava tubes") In the Big Springs/Shasta Valley area. For instance, a great producing well and a dry well can be sunk within a few feet of each other. These conditions have been known since the mid-nineteenth century.

It is interesting to note that one of the original parties to the wording of the historic legislation came from Siskiyou County. So there is a definite possibility that the presence of these types of volcanic subterranean streams was known and was specifically being referenced in the language at that time.

(2) Dr. Sax's broad definition does not seem to take into consideration well depth and strata composition. A well 100 feet directly below the bed of a stream could be unrelated to flow in the stream surface. Also, there are clay, cap rock and other layers that could effectively separate surface and groundwater interchange.

(3) Groundwater is a riparian right. Shouldn't it be subject to the same requirements as surface riparian water or be considered an "appropriative" use?

· The parcel must physically touch the water source (can't "L" over to another parcel;)
· The water can only be used on the overlying riparian parcel;
· Riparian uses are correlative to a watershed;
· "Domestic" or "natural use" is entitled to preference in use of water over "commercial" or "artificial use." ("Domestic" refering to uses integral to the sustenance of human beings - (1) water for household convenience; (2) water for domestic gardens/orchards; and (3) water for the care of domestic livestock.; "commercial" referring to (1) watering of commercial herds of livestock; (2) the use of stream for power; and (3) recovery of gravel for commercial sale.)

(3) The Scott River adjudication in Siskiyou County does include a band of what was considered groundwater inter-related with surface water. Although the boundaries of that band are roughly drawn, the delineation was presumably based on some geological indication at the time of subterranean boundaries that paralleled, but exceeded those of the instream banks. As a fully appropriated surface stream, it is understood that no further wells can be drilled within the related area drawn by the adjudication

The Scott River is in an alluvial valley bordered by mountains. Under the expanded definition of interrelated groundwater advanced by Dr. Sax, it is apparent that the entire valley's groundwater resources could be claimed to be inter-related. It is alarming that DWR has recently made claims at meetings that ONLY the wells drilled within the adjudication's boundaries are allowable and that the many agricultural and domestic wells drilled outside of the boundaries are NOT allowable.

In the original adjudication, the Department of Fish and Game was denied an instream right for fish because they did not qualify as a water appropriation due to lack of physical control of the resource. Subsequently, there has been a listing under the federal Endangered Species Act (and petition under the California Endangered Species Act) for coho salmon. As the vested appropriative water rights in this area are largely pre-1914 and as this is a non-navigable stream to which "Public Trust" has questionable attachment, the expanded definition is perceived as a vehicle to leverage agency control over instream flow at the disenfranchisement of property owners without payment of just compensation.

As the availability of water resources is a limiting factor in Siskiyou County, the acceptance of Dr. Sax's recommendations and expanded definition would, in effect, transfer control to DWR over development and economic activity in the Scott Valley and Siskiyou County. ("The power to regulate is the power to destroy.")

In summary, the Siskiyou County Farm Bureau is very concerned about the effect of this proposal. We represent small family farmers and ranchers, (many who are fifth generation descendants of pioneer families,) who rely upon adjudicated long-vested surface water use rights and the potential for groundwater development to make a living. At this late date, the effect of redefining the ground/surface water regulatory relationship would likely have the effect of leaving these property owners with empty pockets (disenfranchised) and empty hands (devested.) The Siskiyou County Farm Bureau would prefer that our county retain its power of local self-determination through options such as watershed planning incorporated as part of a general plan element.

Thank you for this opportunity to comment.

Sincerely,

Marcia H. Armstrong
Executive Director

Comments of the Association of California Water Agencies
Report on the Legal Classification of Groundwater
Prepared by Professor Joseph L. Sax
University of California, Berkeley

April 10 and 11, 2002

1. *Introduction*

The Association of California Water Agencies ("ACWA") and its members appreciate the opportunity to submit these comments for the workshop regarding subterranean streams flowing through known and definite channels. As you know, ACWA includes over 450 public and private water agencies in California. Our members serve over 90% of the water delivered in the state for domestic, agricultural, and industrial uses. Many of our members rely totally or heavily on groundwater. Because of this keen interest in questions relating to groundwater, we have participated actively in the process organized by the State Water Resources Control Board (the "State Board" or the "Board") for over two years and look forward to continuing to work with the Board on these issues in the future.

ACWA wishes to begin its comments by thanking and commending the State Board for organizing an inclusive public process that has elicited input from a wide variety of stakeholders. Through this process, State Board has taken appropriate steps to listen to representatives of a broad range of interests and so is well discharging its responsibility to the people of California.

ACWA also wishes to thank Professor Sax for the untold hours of time that he has spent over the past year or more on the question of the appropriate legal classification of groundwater. As is described in more detail below, ACWA disagrees with the conclusions of Professor Sax's report; nonetheless, we wish to thank him for his efforts and for the light that his efforts have (and will) shed on one of the most important questions in California water law. ACWA understands the Professor Sax has announced that he will be retiring from the University of California, Berkeley at the end of this academic year; ACWA wishes him well in retirement and salutes an outstanding career.

The State Board asked Professor Sax to address six questions relating to the legal and physical distinctions between water flowing in subterranean streams and percolating groundwater.[1] Five of those questions (all but question number 5) focus on

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[1] The six questions posed by the State Board to Professor Sax were:

understanding, and perhaps improving, the State Board's administration of the present legal standard, which is set forth in Water Code section 1200. Only question number 5 addresses the question of whether the legal standard should be changed.

The focus of the Report, however, is to advocate for significant changes in law and in administration that are ostensibly needed to address California's alleged failings in implementing a rational system of groundwater management. In particular, the Report advocates the abandonment of the Legislature's test of a "subterranean stream flowing through known and definite channels" in favor of an ambiguous "impacts" test for all wells within 1,000 feet of a "stream recharge area." Further, the Report advocates that the State Board expand its use of the waste and unreasonable use authority in Water Code section 275 to regulate the pumping of groundwater. The Report also advocates a very significant expansion of the public trust doctrine to all groundwater that is hydraulically connected to any stream. Finally, the Report recommends increased use of comprehensive basin adjudications with seemingly little realization of the true costs – both economic and otherwise – that would be associated with such adjudications.

Careful review of the Report, though, suggests that no major changes to California law or the State Board's actions are necessary in order to implement the intent of the Legislature. The Report itself demonstrates that the Legislature had the opportunity to enact the type of "impacts" test advocated by the Report but instead chose to limit the State Board's jurisdiction to subterranean streams. Further, the Report demonstrates that – with the notable exception of the State Board's draft decision relating to the Pala and Pauma Basins – the State Board has generally had little difficulty in administering the provisions of Water Code section 1200. For these reasons, ACWA recommends that that the State Board should simply acknowledge its receipt of the Report and take no action to implement the Report's recommendations. In addition, ACWA requests that the State Board direct that its staff and legal counsel not cite or otherwise specifically rely on the Report in any administrative or judicial proceedings.[2]

1.) What is the scope of the State Water Resources Control Board's (SWRCB) water right permitting authority over groundwater?
2.) What is the current legal test for determining whether groundwater is subject to the SWRCB's permitting authority?
3.) Under this legal test, what physical characteristics should the SWRCB evaluate in distinguishing subsurface waters subject to the SWRCB's permitting authority from subsurface waters that are percolating groundwater?
4.) What factors has the SWRCB considered in its past decisions regarding groundwater classifications?
5.) Should the legal test for determining what subsurface waters are subject to the SWRCB's permitting authority be changed? If so, what legal test would be appropriate?
6.) Can quantifiable criteria be established to implement the legal test? What are the quantifiable criteria?

Report at 4.

[2] ACWA points out that counsel for the State Board have already cited the Report in one trial court as authority for the proposition that the State Board requires data on stream/groundwater interactions. ACWA cautions the State Board that such use of a report that has not even been formally approved by the

Finally, when the State Board makes case-by-case determinations as to whether it has jurisdiction over underground water, ACWA suggests that the State Board continue implementing Water Code section 1200 in the same fashion as it has for nearly a century. To aid in that implementation, ACWA has set forth factors in Appendix B that bring the power of modern geohydrology to the implementation of the Legislature's directive.

These comments are organized as follows. Section 2 of these comments addresses the question of whether the Report's premise – that California needs substantial changes in its system of groundwater regulation – is actually supported by the Report's analysis. The crux of the Report is the analysis of *Los Angeles v. Pomeroy*, *Katz v. Walkinshaw* and the legislative debates that led up to the enactment of Water Code section 1200. Review of these portions of the Report leads to the conclusion that the Legislature knew exactly what it was doing in enacting section 1200 – and that it squarely rejected the type of "impacts" test advocated by the Report. Section 2 further demonstrates that, until the *Pala/Pauma* decision, the State Board had not had major difficulties applying Water Code section 1200. Section 2 concludes by showing that – given basic principles of groundwater hydrology – the test contained in Water Code section 1200 and elaborated by the State Board in cases like the decision on Garrapata Creek (D-1639) is an entirely sensible way for California to address the intersection of groundwater and surface water.

Section 3 of these comments addresses the Report's discussion of the State Board's jurisdiction under Water Code section 275 and the public trust doctrine. In particular, section 3 focuses on the Report's recommendation that the State Board proactively use Water Code section 275 to limit groundwater extractions where there are adverse impacts to public trust resources. Section 3 concluded that these recommendations are without merit. It also discusses the Report's suggestion that the State Board extend the public trust doctrine to percolating groundwater, concluding that this would represent an unprecedented and unwarranted expansion of the public trust doctrine. The section concludes by pointing out the very significant problems associated with instituting additional comprehensive adjudications of the groundwater basins of California.

2. *The Report Misstates Its Own Conclusions*

a. Pomeroy, Katz *and Water Code Section 1200*

The central legal conclusion of the Report is that, in enacting Water Code section 1200, the Legislature intended to regulate groundwater when the extraction of that groundwater would have an impact on surface water. For instance, the Report states:

State Board constitutes an underground regulation forbidden by California law. Cal. Gov't Code § 11340.5

> My conclusion is that the legislation was designed to create an impact test (impact of pumping on surface stream flows), rather than seeking to identify a physical entity with a specific shape, despite the conventional "subterranean stream" language the law picked up from the old treatises. I conclude that a test designed to identify appreciable and direct impact of groundwater diversion on a surface streams represents a more faithful implementation of the legislative purpose than any catalog of physical characteristics.[3]

From this conclusion, the Report contends that the State Water Resources Control Board should proactively use the authority granted under Water Code section 275 to regulate groundwater that is hydraulically connected to surface water, should expand the public trust doctrine to regulate groundwater that has some impacts on public trust resources, and should more frequently use the device of comprehensive basin adjudications to manage groundwater that affects surface water.[4] The Report arrives at the conclusion that Water Code section 1200 was intended to regulate the extraction of groundwater when that pumping has an impact on surface water by examining several early California Supreme Court cases on groundwater, as well as the State Conservation Commission's debates on the proposed Water Commission Act. Close examination of the facts the facts cited by the Report, however, illustrates that its conclusion that the Legislature intended to create an impact test is simply wrong.

The foundation of the Report is its analysis of several early groundwater decisions, most notably *Los Angeles v. Pomeroy*[5] and *Katz v. Walkinshaw*.[6] In brief, the Report argues that the use of the phrase "subterranean stream" in *Pomeroy* was intended to ensure the City of Los Angeles of a secure water supply in the event that the Supreme Court subsequently determined that groundwater was subject to the absolute ownership of the overlying owner.[7] The Report describes the way in which the Supreme Court departed from the concept of absolute ownership of groundwater in *Katz* and then found the very concept of a subterranean stream to be unnecessary in deciding a groundwater dispute in *Los Angeles v. Hunter*.[8] As the Report quotes the Supreme Court, the decision in *Katz* "makes it to a large extent immaterial whether the waters in this land were or were not part of an underground stream, provided the fact be established that their extraction from the ground diminished to that extent, or to some substantial extent, the waters flowing in the stream."[9]

Building on this foundation, the Report then argues that the Conservation Commission debates on the proposed Water Commission Act reflect the Legislature's

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3 Report at 7.
4 Report at 11, 92.
5 124 Cal. 597 (1899).
6 141 Cal. 116 (1903).
7 *See* Report at 23.
8 156 Cal. 603 (1909).
9 Report at 23 (quoting *McClintock v. Hudson*, 141 Cal. 275, 281 (1903)).

wish to codify this "impacts" test for determining when groundwater should be regulated in conjunction with surface water. The Report concludes that Conservation Commission hearings regarding the difference between an underground stream and percolating water suggest that members of the Commission intended that "no water that directly effects [sic] a surface flow shall be [classified as underground water]."[10] Thus, the Report concludes, "the Commission bill sought to get rid of distinctions between groundwater and surface water legal regimes, and to institute integrated, parallel systems."[11] The Report argues that with regard to the "subterranean stream" language ultimately adopted in the Water Commission Act, "[t]he central concern was impact...not proximity."[12] Ultimately, according to the Report, the legislature was reluctant to institute an integrated management system due to concerns about the constitutionality of imposing a discretionary permit system on the use of groundwater on non-overlying land.[13]

In reaching the conclusion that Water Code section 1200 was intended to codify the "impacts" test, however, the Report ignores a settled canon of statutory construction as well as its own conclusions. It is well settled that "where the language of a statute uses terms that have been judicially construed, the presumption is almost irresistible that the terms have been used in the precise and technical sense that had been placed upon them by the courts."[14] The rationale for this presumption is that the Legislature is presumed to be "aware of existing laws and judicial constructions in effect at the time the legislation is enacted"[15] and so the use of those terms reflects the Legislature's intent to codify the judicial construction.

Here, despite the Report's extensive evidence of the initial desire of some Conservation Commission members to regulate groundwater broadly, the final legislation limited jurisdiction over groundwater to "subterranean streams." Because the final legislation reverted to the *Pomeroy* language, there is an "almost irresistible" presumption that the Legislature intended the final legislation to follow the subterranean stream concept enunciated in *Pomeroy* and the treatises, rather than the more expansive concept proposed by some Commission members.

The Report itself virtually acknowledges this conclusion. In concluding its discussion of the early Supreme Court cases on groundwater, the Report states:

> But – and this is the most important 'but' in this Report – as it turned out, the legislation upon which Water Code § 1200 rests did not follow in the path that Justice Shaw and the California Supreme Court's subsequent pueblo rights cases set out for it. Instead, by a circuitous path, the

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10 Report at 30.
11 Report at 28.
12 Report at 7.
13 Report at 35.
14 *People v. Lawrence*, 24 Cal.4th 219, 231 (2000) (quoting *People v. Weidert*, 39 Cal.3d 836, 845-846 (1985)).
15 *Wilson v. John Crane, Inc.*, 81 Cal.App.4th 847, 855 (2000).

> legislature was led back to the distinction and the formulation that the *Pomeroy* Court had used.[16]

Further, in its discussion of the legislative debates on section 42 of the Water Commission Act, the Report asks the key question:

> Why did the bill's draftsmen use the *Pomeroy*/Kinney language, rather than one of the formulations that had been suggested in the previous year's hearings? No documentation has been found to answer this question, or to explain the reasoning for any of the other amendments made to § 42 of the bill.[17]

The Report continues that the "likeliest explanation" is that the draftsmen "*simply plugged in familiar language* that was already a part of water law terminology."[18] The draftsmen recognized that they were not enacting an integrated regulatory regime for both surface water and groundwater and "*simply reconciled themselves to a bifurcated system*, and sought to make sure that they had prevented the most egregious opportunities for people to subvert the surface water permitting system. *The subterranean stream language of* Pomeroy *was the only established verbal tool* for doing so . . . ."[19]

In other words, the Report itself acknowledges that the language of section 42 of the Water Commission Act adopted the *Pomeroy* language of subterranean streams. The members of the Legislature – fully aware of the interconnection of groundwater and surface water – reconciled themselves to a bifurcated system, using the language of *Pomeroy* to express their intent. Accordingly, there is an almost irresistible presumption that, because the draftsmen "plugged in" familiar language, using an "established verbal tool" in a way that "reconciled themselves to a bifurcated system," the Legislature intended Water Code section 1200 to codify the *Pomeroy* "subterranean stream" standard. In so doing, the Legislature rejected the broader concept of an impact test set forth by the Supreme Court in *Katz*, *Hunter* and other similar cases.

If there were any doubt regarding this conclusion, the Report itself provides a very clear discussion of subsequent opportunities on the part of Legislature to discard the notion of subterranean streams and move towards a standard that is closer to the "impacts" standard that the Report alleges should govern.[20] The Report notes that after the Governor's Commission recommended local control over groundwater in 1978, the Legislature: "made clear its disinclination to enact comprehensive legislation or to expand the Board's permitting jurisdiction over groundwater. The subterranean stream provision of

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16 Report at 26.
17 *Id.* at 38 (footnote omitted).
18 *Id.* (emphasis added).
19 *Id.* (emphasis added).
20 *See id.* at 39-44.

Water Code § 1200 remains virtually unchanged from what it was in 1913."[21] Similarly, the Report states that the Legislature: "has repeatedly been made aware of the Board's limited jurisdiction over groundwater under Water Code § 1200, and has shown no inclination beyond the legislative goals [seeking to make sure that they had prevented the most egregious opportunities for people to subvert the surface water permitting system] that led to the language in the 1913 statute."[22]

Under these circumstances, and with this very clear history of the Legislature's disinclination to modify Water Code section 1200 since 1913, the conclusion is inescapable that the Legislature did not give the State Board authority to regulate any type of groundwater other than a "subterranean stream flowing in a known and definite channel." "When the Legislature amends a statute without changing those portions of the statute that have previously been construed by the courts, the Legislature is presumed to have known of and to have acquiesced in the previous judicial construction."[23] If one disagrees with this conclusion, the appropriate course is to ask the Legislature to amend Water Code section 1200. Such a major change in California law may not be made under the subterfuge of the State Board administratively "interpreting" Water Code section 1200.

b. *Past Decisions*

Part III of the Report appropriately examines the State Board's past decisions as part of the effort to understand the manner in which the State Board has interpreted the provisions of Water Code section 1200 to date. Such administrative construction of a statute is entitled to great weight and will be upheld against legal challenge if a court concludes that the construction is reasonable.[24] Although the Report reads many of those decisions as possibly supporting an "impacts" test for the interpretation of Water Code section 1200, the more straightforward interpretation of those cases is that the State Board and its predecessor agencies have recognized that their authority over groundwater is limited only to preventing "the most egregious opportunities for people to subvert the surface water permitting system."[25]

Indeed, the most plausible reading of the cases summarized in Part III is that they fall into four groups. The first group, which the Report characterizes as involving "most" of the older cases, are those that involve "streams in narrowly constricted canyons, or (similarly to *Pomeroy*) groundwater under a narrow strip of land at the entry or exit of a broad alluvial valley, where the groundwater was moving parallel to the stream."[26] In such cases, which the Report illustrates with Sheep Canyon in San Bernardino County,

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21 *Id.* at 41-42 (footnote omitted).
22 *Id.* at 44.
23 *People v. Blakely*, 23 Cal. 4th 82, 89 (2000).
24 *Henning v. Industrial Welfare Comm'n*, 46 Cal.3d 1262, 1269 (1988).
25 Report at 38.
26 Report at 56.

Stony Creek in Colusa County, and the recent decision by the State Board on Garrapata Creek, the State Board has consistently limited its jurisdiction to water that is within a narrow band of alluvium that is essentially the buried portion of the stream, is in hydraulic contact with the stream, and where the pumping of water is likely to have a direct impact on the stream.[27] These cases illustrate the classic understanding of a subterranean stream flowing in a known and definite channel, about which there is little dispute.[28] As the Report notes, the State Board's decisions in these cases have given "considerable weight to a well's capacity to have a direct and essentially immediate impact on the surface stream, rather than simply following out the expansive interpretations of the 'bed and banks' formulation."[29] These cases demonstrate that the State Board historically has appropriately read the *Pomeroy* standard of a subterranean stream as applying only to those very limited conditions where groundwater pumping would entirely undermine the surface water permitting system adopted by the Legislature.

The second group of cases discussed by the Report involves situations where the issue of State Board jurisdiction did not arise as part of the hearing. Such cases involve the Tia Juana River in San Diego County and the Carmel River in Monterey County. The Report appropriately notes that these cases have little precedential value because jurisdiction was not a disputed issue.[30]

The third group of cases involves those cases where the State Board has taken jurisdiction over wells that do not actually impact any surface stream. These cases are illustrated by Chorro and Morro Creeks in San Luis Obispo County and the Sacramento River Groundwater Transfer in Yolo County. The Report struggles to place these cases in its conceptual framework of hydraulic impacts to a stream, with limited success. The more natural reading of these cases is that the State Board has recognized that hydraulic impacts are not critical to the issue of its jurisdiction; instead, the appropriate inquiry is whether water is flowing in a known and definite channel.[31] As the Report states, in describing a case where the Board declined to find jurisdiction, "[i]mpact [to a surface stream] alone, however, is not understood to be sufficient, where there is nothing that can be characterized as a channel."[32] Such a finding is entirely inconsistent with the type of "impacts" test that the Report seeks to include within Water Code section 1200 and is entirely consistent with the State Board's historic interpretation of its limited jurisdiction over groundwater.

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27 *Id.* at 50 (discussing Garapata Creek). There is a similar discussion of Sheep Canyon at page 57 of the Report and a discussion of Stony Creek at page 58 of the Report.

28 *Id.* at 50.

29 *Id.* at 59 (footnote omitted).

30 *Id.* at 61 (discussing the Tia Juana River decision).

31 *Id.* at 60 (discussing Chorro and Morro Creeks) ("the Board took jurisdiction on the ground that there was a subterranean stream flowing through known and definite channels" despite the lack of information indicating whether there was any hydraulic continuity with the surface flows); *id.* at 63 (discussing Sacramento River Groundwater Transfer) (the State Board found that "the fact of 'direct surface stream impact' from pumping is *irrelevant* to the Board's jurisdiction over groundwater.") (emphasis added).

32 *Id.* at 58 (discussing Pilarcitos Creek in San Mateo County).

The final group of cases involves one stream system – the San Luis Rey River in San Diego County. The Report characterizes the State Board's early decisions on this stream system (in 1938 and 1962) as being within the mainstream of the Board's decisions in regulating underflow,[33] and so not particularly open to question. However, the Report notes – but does not discuss – a 1959 decision by the Superior Court of San Diego County that seems expressly to have found groundwater at issue in the 1938 and 1962 cases "does not constitute a subterranean stream flowing in a known and definite channel."[34] More recently, in discussing the State Board's draft decision in the Pauma and Pala basins, the Report acknowledges that the State Board (or at least its geologist) did not focus on protecting surface streams from pumping that immediately and directly affects them, which casts doubt on whether the water in question really was underflow.[35] Cases involving this one stream system seem to present difficult questions relating to the interpretation of Water Code section 1200, but those difficulties should not obscure the overall clarity of the manner in which the State Board has administered Water Code section 1200 on other stream systems.

In summary, it appears that most of the State Board's decisions in interpreting Water Code section 1200 have dealt with situations where there was little or no argument that there was a "subterranean stream flowing in a known and definite channel." The State Board has addressed these situations appropriately, with full recognition of its limited jurisdiction over groundwater. The case of the San Luis Rey River, for some reason, however, has presented continuing interpretive difficulty for the State Board. That difficulty, in the *Pala* and *Pauma* cases, led to a draft decision that the Report – quite diplomatically – describes as "an interpretive expansion of the Board's longstanding approach to Water Code § 1200." Under these circumstances, the State Board should acknowledge that – in the vast majority of cases – it has been able to consistently administer Water Code section 1200 in the manner directed by the Legislature and reject the "interpretive expansion" of its draft decision relating to the Pala and Pauma basins as unwarranted and contrary to past administrative practice.

c. *The Existing Test for Classifying Subterranean Streams Does Not Need to Change*

Any test for determining the State Board's permitting jurisdiction under Water Code section 1200 must be faithful to the statutory language: "... subterranean *streams flowing* through *known and definite channels*." (emphasis added). Unless the Legislature changes this standard by amending Water Code section 1200, application of any test that is not reasonably consistent with this language would be beyond the State Board's authority. When reasonably applied, moreover, the *Pomeroy* test currently used by the State Board is entirely appropriate for determining appropriate Board permitting jurisdiction over groundwater. The State Board's analysis in its 1999 *Garrapata*

33 *Id.* at 66.
34 *Id.* at 65.
35 *Id.* at 54 (discussing testimony from the State Board's geologist).

Decision, for instance, is an excellent example of the appropriate test for determining a subterranean stream.[36] Attached as Appendix "A" is a brief discussion of general considerations relating to distinguishing percolating groundwater from a subterranean stream. Attached as Appendix "B" is a discussion of factors that modern scientific techniques and analysis use to distinguish subterranean streams from percolating groundwater. These techniques and considerations are consistent with (and have been presented to) the State Board in the past and are, in part, the reason that the State Board has been able to successfully administer Water Code section 1200.[37]

3. *The State Board Should Not Attempt to Establish Independent Authority Over Percolating Groundwater*

Part V of the Report analyzes whether, and to what extent, the State Board has authority to regulate percolating groundwater in situations where the State Board does not have permitting jurisdiction under Water Code section 1200. The State Board did not ask Professor Sax to analyze the State Board's "independent authority over percolating groundwater."[38] Moreover, the Report's discussion of the law regarding this separate issue proposes a significant extension of the State Board's authority over percolating groundwater, which is not supported by either judicial decisions or legislative direction. Indeed, if the State Board's "independent authority over percolating groundwater" were as expansive as the Report suggests, then the debate about the Board's permitting jurisdiction under Water Code section 1200 would be academic. ACWA does not believe that the Legislature intended Water Code section 275 to provide an end-run around the limitations imposed by section 1200.

a. *Water Code Section 275 Does Not Provide the State Board with Independent Authority to Regulate Percolating Groundwater*

The Report notes that the Board's attorneys believe that the State Board has independent authority to regulate percolating groundwater under article X, section 2 of the California Constitution and Water Code section 275, and to protect public trust

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36 Report at 50. Ironically, the Report suggests that the *Garrapata* case is a poor test case because "there was no dispute over the presence of a channel and flow" and because there was no "controversy about the meaning and application of Water Code § 1200." *Id.* ACWA submits that these facts make the Garrapata basin a perfect example of a "subterranean stream flowing in a known and definite channel." If the test cannot be easily satisfied in a given case, the State Board should not assert jurisdiction under section 1200.

37 Even if the State Board did have authority to apply the Report's "impacts" test to determine its permitting jurisdiction under Water Code section 1200, the "test" suggested by the Report on page 13 of the Report is unworkable. Appendix "C" discusses the difficulties and errors associated with the Report's "impacts" test.

38 Report at 87. The Report appears to acknowledge that the Report was only "to deal... with the Board's *permitting* jurisdiction" under Water Code section 1200. Report at 82 (emphasis added). Part V is not concerned with the Board's "permitting jurisdiction," however, but with "the scope of the Board's asserted independent authority over percolating groundwater that threatens surface instream values in violation of the values protected under Water Code § 275." Report at 87.

uses.[39] The Report notes that this view presents substantive and procedural issues.[40] Part V focuses on the procedural issue, namely, whether the State Board can directly regulate the pumping of percolating groundwater that adversely affects stream flow and public trust uses, or whether the State Board must (or may) go to court to obtain an order to enjoin such pumping. ACWA agrees with the Report's conclusion that Water Code section 275 authorizes the State Board to go to court to enforce the reasonable use mandates of article X, section 2 of the California Constitution. ACWA disagrees, however, with the suggestion that section 275 provides the SWRCB "independent authority over percolating groundwater."[41]

The Report cites *Imperial Irrigation District v. State Water Resources Control Board (IID II)*[42] for the proposition that section 275 provides the State Board with independent authority over pre-1914 appropriative rights. The Report then advises that it is logical to assume that the State Board also has independent authority over other types of water rights not subject to the State Board's permitting authority, such as rights to percolating groundwater. ACWA submits that the Report overstates the court's holding in *IID II*, and fails to appropriately recognize several important legal distinctions between percolating groundwater and surface water.

The holdings in the *IID* cases do not address the distinction between the State Board's authority over permitted rights and pre-1914 water rights. The only reference to pre-1914 rights was a footnote in *IID I*, which acknowledged that the Board had "informed" the court that IID had pre-1914 appropriative rights, which IID did not dispute.[43] There is no indication, however, that IID's pre-1914 water rights were relevant to the courts' discussion of section 275, particularly because the State Board's jurisdiction in its underlying decision was based at least in part on IID's water right permits from the Board.[44] Rather, the case dealt only with the question of whether

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[39] Report at 81. The Report (and State Board attorneys) apparently believe that the Board's authority to regulate percolating groundwater under section 275 is far more expansive than the Board's authority to regulate groundwater under the Water Code's permitting system. Not surprisingly, the State Board is sponsoring legislation (A.B. 2267) to expand its authority to issue and enforce State Board "orders and decisions" in cases where the State Board is without permitting authority under Water Code section 1200, *et seq*. The State Board should not attempt to establish Water Code section 275 as a *de facto* permitting system for the regulation of percolating groundwater and other water rights over which the State Board has no statutory permitting authority. This is clearly a matter for the Legislature, which has chosen not to expand the State Board's authority over percolating groundwater except in the narrowest circumstances. *See e.g.*, Water Code §§ 1200 and 2500, and *compare* Water Code §§ 2100 and 2500.5.

[40] Report at 81-82. The Report does not address the substantive questions of "what constitutes waste and unreasonable use, or what constitutes a violation of the public trust." Report at 82.

[41] Report at 87.

[42] 225 Cal.App.3d 548 (1990). The court's holding in *IID II* affirmed its earlier decision in *Imperial Irrigation District v. State Water Resources Control Board*, 186 Cal.App.3d 1160 *(IID I)* and discussed several other cases.

[43] *See* IID I, 186 Cal.App.3d at 1163, fn. 4.

[44] *See* State Board Decision 1600, p. 17 ("In addition to contractual rights to the delivery of water by the USBR, IID holds appropriative water right permits from the State"), including fn. 5 (expressly referencing the applications upon which IID's water right permits are based).

section 275 operates as a limitation on the State Board's authority. Thus, the nature of the water right involved – i.e., permit vs. pre-1914 – was simply not relevant to the court's holding.

Cases cited in *IID I* and *IID II* depict several common themes regarding the State Board's authority under Water Code section 275. First, the State Board has authority under section 275 to prevent waste and unreasonable use of surface water diverted under a permit or license from the State Board.[45] Second, in appropriate cases, the State Board can adjudicate "reasonable use" issues when a proceeding is properly brought under Water Code section 2500, *et seq.*[46] Of course, proceedings under section 2500, *et seq.* are limited to "stream systems," which "does not include an underground water supply other than a subterranean stream flowing through known and definite channels."[47]

Although the Courts have not spoken to the issue of what the Report refers to as the Board's "independent authority over percolating groundwater,"[48] the Legislature has certainly indicated that the Board's jurisdiction is limited in this regard. As noted above, Water Code sections 1200, *et seq.* (appropriations) and sections 2500, *et seq.* (statutory adjudications) expressly exclude percolating groundwater from regulation by the State Board. But the Legislature knows how to grant authority to the State Board when it comes to percolating groundwater. For example, section 2100, *et seq.* authorizes the State Board to commence or intervene in court actions for the protection of groundwater quality. With Water Code section 2500.5, the Legislature authorized the Board to adjudicate rights to "interconnected" percolating groundwater in one isolated statutory adjudication proceeding -- the Scott River basin in Siskiyou County.[49] If section 275 provided the State Board with "independent authority"' over percolating groundwater, Water Code sections 2100 and 2500.5 would be entirely superfluous.[50]

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45 *See e.g., Environmental Defense Fund v. East Bay Municipal Utility District*, 20 Cal.3d 327 (1978), *National Audubon Society v. Superior Court*, 33 Cal.3d 419 (1983), and *United States v. State Water Resources Control Board*, 182 Cal.App.3d 82 (1986).

46 *See e.g., In Re Water of Hallett Creek Stream System*, 44 Cal.3d 448 (1988); *see also, National Audubon Society*, 33 Cal.3d at 448-449. Even proceedings brought under section 2500, *et seq.* are subject to final judicial review and decree. Water Code §§ 2750, *et seq.*

47 Water Code § 2500.

48 Report at 87.

49 *See* Water Code §§ 2100 and 2500.5. Water Code section 2500.5(b) expressly limits the statute's application to the Scott River system, and section 2500.5(c) recognizes that even that limitation may raise constitutional issues regarding the State Board's authority over percolating groundwater. Water Code section 2500.5 was added to the Water Code by S.B. 262 in 1971, which is the same bill that added the State Board to Water Code section 275. Prior to the 1971 amendment, Water Code section 275 only authorized the Department of Water Resources to take actions and proceedings to prevent waste and unreasonable use of water.

50 We assume that the reasonable use mandates of article X, section 2 and Water Code section 275 would apply to the extraction and use of percolating groundwater which results in the "destruction of or irreparable injury to the quality" of groundwater subject to a proceeding under Water Code section 2100, *et seq.* Even in that event, however, the State Board is authorized only to seek judicial remedies.

Extending the State Board's authority to percolating groundwater would raise perplexing substantive and administrative issues as well.[51] For example, the crux of The Report's hypothesis is that pumping of percolating groundwater that depletes stream flow is "unreasonable" when it adversely affects public trust resources.[52] In many stream systems, however, there typically are many surface water diversions and wells that cumulatively reduce stream flow to some extent, and not necessarily to the detriment of public trust resources.[53] In such cases, even if the State Board could determine that a particular well was contributing to the depletion of stream flow, it would not necessarily be an "unreasonable use" or "unreasonable diversion" if other diversions and extractions also affected stream flow. It also would make a difference if the pumping were for an overlying use, as opposed to a non-overlying use, or if the surface water diversions were made under riparian rights, as opposed to diversions under appropriative rights. Without adjudicating the entire basin supply (surface water and groundwater), there may well be no fair and reliable mechanism to determine whether a particular use or diversion of percolating groundwater is "unreasonable" simply because the pumping is affecting stream flow. But there is no mechanism for the Board independently to adjudicate groundwater rights.[54]

b. *The Public Trust Doctrine Has Not Been Applied to Percolating Groundwater, and the State Board is Without Authority to Extend California Common Law*

The Report further advises that the public trust doctrine may be an applicable legal principal in cases where pumping of percolating groundwater adversely affects public trust resources.[55] The Report suggests that the State Board may assert jurisdiction over the pumping of percolating groundwater under Water Code section 275 to prevent adverse impacts to public trust resources.[56] This suggestion implies that all diversions, whether surface or subsurface, are *per se* unreasonable if there is an adverse affect on public trust resources.[57] It is questionable whether the public trust doctrine would ever

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51 Of course, the determination of what constitutes a reasonable use "depends upon the facts and circumstances of each case." *Tulare Irrig. Dist. v. Lindsay-Strathmore Irrig. Dist.*, 3 Cal.2d 489, 567 ("What may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great scarcity and great need. What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time.")

52 Report at 81.

53 Similarly, the Report fails to explain how the State Board's jurisdiction under either Water Code section 275 or section 1200 would be integrated in basins where there already exists comprehensive groundwater basin management, specifically adjudicated basins. Report at 92.

54 *Compare* Water Code § 2500.5 (which uniquely defines the Scott River "stream system" in Siskiyou County to include "groundwater supplies which are interconnected with the Scott River," but excludes "any other underground water supply.")

55 Report at 82 and 87, fn. 290.

56 We do not read the Report as suggesting that the public trust doctrine allows the Board to assert jurisdiction over the pumping of percolating groundwater in the absence of jurisdiction under section 275.

57 In *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 447, fn. 28 (1983), the California Supreme Court expressly declined to resolve this issue, and no subsequent case has addressed this question. The answer to this important question must come from the Courts, not the State Board or the Report.

apply to the pumping of percolating groundwater, but it is clear that the State Board has no independent authority to administratively apply the public trust doctrine against the pumping of percolating groundwater. It is a matter for the Courts or the Legislature to determine whether the public trust doctrine should be extended in such an unprecedented manner.

The requirement that the State Board consider -- and perhaps reconsider -- the public trust in its water allocation decisions,[58] is founded on the premise that the State Board has a role in the planning and allocation of the resource (i.e., the granting of and continuing authority over permits and licenses). The Report, and apparently the State Board's attorneys, seemed to have lost sight of the fact that *National Audubon* can only be interpreted to apply to appropriative rights issued by the State Board, as those are the only water rights subject to the State Board's "planning and allocation decisions."[59] To suggest that the State Board has authority under the public trust doctrine to regulate the use of percolating groundwater would ignore the context of the Court's review in *National Audubon*. The State Board lacks authority to extend the application of the public trust doctrine to water rights and water uses over which the State Board has no permitting authority.

c. *The State Board Should Leave the Issue of Comprehensive Basin Management to Local Jurisdictions*

The Report believes that "comprehensive basin management (as with the most successful adjudicated/managed Southern California basins) is the most promising tool to achieve genuine integration of surface water and groundwater administration in California."[60] ACWA agrees that, in some areas of California, comprehensive basin management has been successful and that several existing groundwater management templates could be emulated under appropriate conditions. However, comprehensive management of groundwater basins must be accomplished at the local level based on local considerations, including, but not limited to: geology, hydro-geology, hydrology, water quality, availability of surface water, land uses, institutional frameworks, economic conditions, and political realities. It would be naïve, therefore, to suggest that the "most successful adjudicated/managed Southern California basins" provide a useful template for groundwater management in other areas of the state, such as the Sacramento and San Joaquin Valleys.[61]

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58 *National Audubon Society*, 33 Cal. 3d at 446.

59 *Id.*

60 Report at 92 (citations omitted); *see also*, Report at 11.

61 The Report correctly notes the cost, duration and complexity associated with groundwater adjudication as a groundwater basin management tool. Report at 92. In many areas of the state, particularly the Sacramento and San Joaquin Valleys, the advantages of adjudicating groundwater basins are typically outweighed by the costs, particularly when other, less expensive mechanisms are available for effective basin management.

4. *Conclusion*

The essence of what Professor Sax was asked to do was to analyze the State Board's existing jurisdiction over groundwater pumping under Water Code section 1200. Recognizing Water Code section 1200's limits, however, the Report instead attempts to redefine Water Code section 1200 and then addresses the much different question of the State Board's authority to regulate the pumping of percolating groundwater *outside of Water Code section 1200.* Not only is Water Code section 1200 limited by its composite terms ("known", "definite", "channel"), but expanding the State Board's "permitting jurisdiction" would be fraught with the difficulties noted in the Report (and more). Not the least of these difficulties is the fact that the Report's "impacts" test may not be implemented administratively by the State Board without an amendment of Water Code section 1200, and the Legislature is not about to expand the State Board's permitting jurisdiction under Water Code section 1200.

Recognizing the pitfalls with its construction of Water Code section 1200, the Report answers a question that wasn't asked, and recommends that the State Board look elsewhere for authority to tackle the issue of how the State Board can regulate pumping of underground water that affects streamflow (irrespective of "permitting jurisdiction"). After all, none of the messy difficulties of incorporating groundwater pumping into an existing permit system arise if the State Board can effectively assert jurisdiction to regulate groundwater pumping outside of section 1200.

The Report acknowledges[62] there are unresolved issues that affect the State Board's authority to simply proceed to assert jurisdiction under Water Code section 275, including:

- The courts have effectively dealt with issues of hydraulically interconnected groundwater and surface water for more than a century through private litigation[63]; and

- The courts have <u>not</u> held that the State Board has any independent authority to regulate groundwater pumping under Water Code section 275 (or any other provision of law); and

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62 Report at 82 *et seq.*

63 In a revealing comment, the Report states that it "may seem surprising that no Supreme Court case after 1914 has authoritatively interpreted the subterranean stream language of the Water Code." Report at 45, n. 144. The Report then proposes a theory to answer this question that undercuts the need for the State Board to act proactively under the auspices of either the public trust doctrine or Water Code section 275, stating that this lack of decisional authority is due to the fact that the Supreme Court "has shown itself willing to protect surface stream rights against groundwater pumping, and *vice versa*, the scope of Board permit jurisdiction over groundwater has not loomed large in terms of protecting rights." *Id.* If this characterization of judicial oversight on groundwater extraction is correct (and it accords with the authors' experience) then there is no need for Board action under either Water Code section 275 or the public trust doctrine.

- The Legislature has given the State Board only the authority to go to court to raise hydraulic interconnection issues, except where there the State Board has "permitting authority" under section 1200 (i.e., surface water and "subterranean stream flowing through a known and definite channel").

Despite its recognition of the State Board's limited "independent authority over percolating groundwater," and its recognition of the ample existing legal remedies for addressing issues of hydraulically interconnected water, the Report nonetheless urges the State Board to radically expand its own jurisdiction under section 275.

What should the State Board do now? With respect to its permitting jurisdiction under Water Code section 1200, the Board should do nothing now to change the existing *Pomeroy/Garrapata* test, including the "common sense" parameter, which has worked just fine for more than a century. Similarly, with regard to the implementation of Water Code section 275 and the public trust doctrine, the Board should not expand its actions to include percolating groundwater unless it wishes to engage in a long series of legal battles with water users across California. ACWA suggests that such litigation is not in the best interest of the public or the Board and that if changes are needed in California in order better to regulate groundwater extraction, it is the role of the Legislature to make that determination.

Respectfully submitted:

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Appendix A

CONSIDERATIONS RELATING TO SUBTERRANEAN STREAMS FLOWING IN KNOWN IN DEFINITE CHANNELS[64]

Geology of the Aquifer System - An accurate geologic description of the aquifer system in question, whether the aquifer system is immediately contiguous to a surface watercourse or in some clearly definable subsurface channel, is critical to the proper description of the physical occurrence of ground water. One substantial step that should be taken is to recognize the ability, and need, to clearly define the location and extent of any jurisdictional ground water based on modern geologic capability; in other words, "reasonably inferable" may have been appropriate to the state of the science 100 years ago, but the amount of historical subsurface exploration plus currently available geologic science make possible and necessary an exacting description and definition of the location and bounds of either underflow or any subterranean stream in a known and definite channel.

A range of geologic tools are available to describe and define an aquifer system that might be considered the underflow of a stream or a subterranean stream flowing in a known and definite channel. Water well driller's reports ("well logs"), surface and subsurface geophysical logs, surface and subsurface geologic mapping, and remote sensing techniques can all be used to describe the nature and define the limits of whatever aquifer system is in question. In the case of stream underflow, these geologic tools need to be able to define and describe the vertical and lateral extent of materials that form a streambed, and in which the subsurface component of the stream might flow. Those same tools need to be used to describe the presence and extent (vertical and lateral) of confining or other layers that might limit the streambed materials in which underflow can occur.

In the case of a subterranean stream flowing in a known and definite channel, the above geologic tools need to be able to describe the typically small and unique nature and extent of such a channel (to sufficient detail that an existing or prospective well owner can know whether his well is extracting water from such a channel). Again, current geologic science makes possible and necessary that level of definition; if it is not possible to achieve that level of definition with currently available science, a "known and definite" channel does not exist.

Groundwater Levels - Groundwater levels are key indicators of the physical occurrence of groundwater. In the case of stream underflow, groundwater levels need to demonstrably and continuously be connected to the surface watercourse. At the same time, the groundwater levels need to be uniquely indicative of the aquifer materials which form the streambed. Finally, for underflow, groundwater levels need to indicate a

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[64] Portions of Appendix "A" are extracted from the "Written Comments of Joseph C. Scalmanini, Dennis E. Williams, and David Keith Todd before the SWRCB on the Legal Classification of Ground Water (April 24, 2000 Workshop).

consistent gradient and a flow direction that is parallel to, and with the same hydraulic gradient as, the surface watercourse. While groundwater fluctuations need not always reflect surface water conditions (e.g., in the extreme, underflow could remain in the absence of surface flow), groundwater levels in underflow conditions need to consistently reflect a clear connection to the surface watercourse and the same direction and gradient flow.

In the case of subterranean streams in known and definite channels, groundwater levels again need to be uniquely indicative of the channel; and they need to indicate a hydraulic gradient and flow direction that are consistent with the direction and gradient of the channel. Variations in flow directions or gradients, for whatever reasons (e.g., flow directions changed by the presence of recharge from the adjacent groundwater basin or by pumping in the adjacent basin) are inconsistent with the concept of channelized subsurface flow with impermeable banks separating the channel from the adjacent groundwater basin. In other words, ground water simply "flowing in the channel", as has been the historical criteria, is insufficient; ground water should be fully confined within a definable channel, and flowing uniquely in the same direction and at the same gradient, in order to be classified as a subterranean stream in a known and definite channel.

Well and Aquifer Characteristics - Well yields and aquifer characteristics are useful indications of the physical occurrence of groundwater, as well as direct and indirect indications of hydraulic conductivity ("permeability") of aquifer materials and other less-permeable non-water bearing geologic materials. A major issue has been the historical use of the term "relatively" to describe impermeability when defining the presence of bed and banks forming a subterranean stream channel. Major concern arises in groundwater classification with the term "relatively" since hydrologists recognize a tremendous range of subjectivity potentially associated with it. Sand is "relatively impermeable" when compared to gravel, for example, but it hardly seems the intent to classify a sand formation as the "bed and banks" of a gravel channel (the concern, of course, is that preservation of such criteria leaves open such a possibility). It would seem that the intent regarding bed and banks, again of rare subterranean stream channels, is that they be "essentially" or "effectively" or "almost" impermeable. Any evidence to the contrary should undermine the existence of the confinement necessary to establish the bed and banks of a channel. Such physical conditions are further discussed below.

In the case of underflow, the yields of wells completed exclusively in the aquifer materials connected to the stream should typically be high, consistent with permeable porous media that would make up the stream channel and that would convey ground water in the same direction and under the same hydraulic gradient as the surface stream. Such well yields should also be under the direct influence of surface water (whenever it is present); and such influence should be demonstrated by pumped well testing. In order for underflow to be present, tested well yields cannot show aquifer confinement that would be indicative of physical separation between the stream and the aquifer.

In the case of a subterranean stream in a known and definite channel, wells completed near the "banks" should show negative (impermeable) boundary effects when tested (and should be required to do so); the absence of such effects undermines any conclusion that "banks" are present. Conversely, wells completed in the bed and banks materials ("basement") should have essentially no yield and, when tested, indicate aquifer transmissivity and hydraulic conductivity values that are several orders of magnitude lower than the channelized aquifer within the bed and banks to demonstrate essentially impermeable conditions. If the hydraulic characteristics of the "bed and banks" are not extremely low, as directly determined from well tests or as indirectly indicated by well yields, then the confined channel that would contain a subterranean stream is not present.

Water Quality - Surface and groundwater quality constituents can be complementary parameters to those listed above in describing the physical occurrence of ground water, particularly when considering direct connection to a surface stream or highly channelized subterranean stream flow. However, despite relatively recent advances in analytical and interpretive techniques, water quality by itself is not uniquely indicative of the physical occurrence of ground water. Historically available water quality data are likely to be sporadic in time and far less complete than the types of surface and groundwater quality sampling and analyses that might be obtained today. Nonetheless, even limited historical groundwater quality data can be useful in analyzing the physical occurrence of ground water, particularly when recognizing the slow rate at which groundwater quality typically changes.

In the case of stream underflow, there should be some strong similarities between the quality of the surface water and that of its underflow. Whether considering conventional dissolved mineral constituents or less common chemistry such as stable isotopes, the quality of immediate underflow should be essentially identical to that of the surface stream. True underflow has not had sufficient contact time in the porous media beneath the surface water to substantially change its chemistry.

In the case of subterranean streams in known and definite channels, groundwater quality needs to be uniquely and consistently indicative of highly channelized conditions, i.e., constant in a downgradient direction and not randomly responding (changing) to a range of varying inputs (recharge, subsurface inflow, etc.). The latter are indicative of percolating basin conditions, and not indicative of rare, or unique, highly channelized subterranean streams.

Interpretation Based on Post-Development Conditions -- Post-development conditions (how ground water responds to pumping, to natural and/or artificial recharge, etc.) should be the focus of the assessment process. Consideration of theoretical state-of-nature conditions would bias any interpretation because, absent pumping stresses, many aquifer systems were probably in a state of greater saturation than at present and so the use of theoretical state-of-nature conditions overstates the hydraulic connection between surface and groundwater.

Inclusion of the "Common Sense Parameter" -- If there is one necessary component to the interpretation of the various technical parameters listed above, it is that common sense needs to be a major factor.

Site-Specific Technical Analysis is Required to Rebut the Presumption that Groundwater is Percolating -- Technical descriptions of the occurrence of ground water should be held to high and rigorous standards that are site specific. If specific details about certain parameters are not known at a given site, they should not be assumed; legal classification should not be based on what is probably or likely the case. The presumption is that ground water is percolating water unless it is specifically shown to be otherwise. This presumption should be maintained. Technical parameters cannot satisfy opposing criteria, e.g. at the same time permeable enough to permit recharge but sufficiently impermeable to establish bed and banks.

Appendix B

As noted above, ACWA believes that the legal test for the State Board's jurisdiction over groundwater should continue to be whether the water is a subterranean stream flowing in a known and definite channel. This is the test mandated by the Legislature and the State Board has generally been able to administer the standard successfully and practically since 1913. Various parties, however, have questioned whether the subterranean stream standard reflects the modern state of knowledge about groundwater hydrology or whether it is irretrievably rooted in nineteenth century concepts. ACWA believes that modern analytic techniques and knowledge are consistent with and can successfully be used to implement the subterranean stream standard. The following paper, which was authored by Dr. Steven Bachman, a member of Professor Sax's Technical Advisory Committee, describes the many factors that can play appropriate roles in determining whether or not a given set of circumstances is indicative of a subterranean stream flowing in a known and definite channel.

Factors in Determining Whether Subsurface Water is Flowing in Subterranean Streams with Known and Definite Channels

Steven Bachman, PhD

The geologic occurrence of the subflow of streams moving within subterranean channels that have known and definite bed and banks is relatively restricted within California. The primary occurrence is within narrow stream canyons, where the stream has cut a channel into the surrounding bedrock. In this case, the channel is commonly filled with a bed of porous sand and gravel, and the channel has distinct banks made up of the incised bedrock. As the stream moves out of the canyon into an adjacent basin, the classic bed and banks commonly give way to a more complex geological structure.

At this point, the stream flows across sediments within the basin that may be little different from the stream channel deposits in their composition; in many cases the sediments in the basin were deposited by the ancestral stream itself. The subterranean channel is no longer a definite geologic entity and the channel can no longer be located using the high standard of "known and definite". Subflow of the stream may move into the groundwater of the basin or groundwater may flow into the stream – there is no distinct boundary (bank) that prevents this movement. Where it is not possible to locate a subterranean stream channel with currently available science, a "known and definite" channel does not exist.

Several factors can be examined to determine whether a subterranean stream flows within a known and definite channel. These factors distinguish percolating groundwater from water that is flowing in a subterranean channel beneath a surface stream. Many of these factors are exclusionary – if a certain relationship exists, then the subsurface water in question cannot be flowing in a known and definite channel. Where such an exclusionary relationship is not present, a combination of these factors can be used to determine whether there is a subterranean stream contained within a known and definite channel.

Geologic Factor

A range of modern tools may allow the direct detection of a subterranean channel by defining the elements of the channel – a distinct channel bed restricted in extent by banks that confine the subsurface flow to the channel. In areas where a stream is contained within a narrow bedrock canyon or valley, the banks of the buried portion of the stream alluvium are most likely to be the bedrock edges of the stream channel. The bedrock banks will have a hydraulic conductivity (permeability) several orders of magnitude lower than the sediments that fill the channel. Water flowing in the alluvium within the banks of the channel would therefore be jurisdictional, whereas subsurface water within the surrounding bedrock would be percolating groundwater. It should be noted that scale is important here, and that the width of these bedrock canyons or valleys is on the order of hundreds of feet, rather than miles.

Outside of these bedrock canyons, the occurrence of known and definite subterranean channels with distinct bed and banks is rare. Alluvial basins, in contrast, have a significantly different geologic structure. The most common geologic setting in these basins is that the bed of the stream is similar in hydraulic properties to the sediments that fill the basin, and subsurface water can move freely either from the underflow of the stream into the groundwater of the basin or groundwater can move freely into the stream. In this case, there is no known and definite subterranean channel with bed and banks.

The possibility of having subterranean channels within the alluvial basin is limited to the case where the stream has incised a channel into low permeability sediments within the basin. The same reasoning can be used as with bedrock canyons and valleys – the banks formed by the lower permeability sediments must be several orders of magnitude lower in hydraulic conductivity than the sediments that fill the channel. This contrast between the material in the channel and in the banks of the channel would have to be shown by subsurface well and log data, by differences in hydraulic properties indicated from pumped well testing, or other scientific data. A further explanation of these techniques is provided in Appendix A. If this scientific evidence does not conclusively indicate the presence of bed and banks, then logic requires that there is not a "known and definite" subterranean channel. In contrast, if evidence indicates the presence of a subterranean channel, only subsurface water flowing within the subterranean channel is jurisdictional; all surrounding subsurface water would be percolating groundwater.

Hydraulic Continuity Factor

As the stream flows across a groundwater basin within an alluvial valley, subsurface water below and adjacent to the stream can only be underflow to the stream if there is hydraulic continuity between the stream and the subsurface water. Groundwater levels need to be connected to the surface watercourse demonstrably and continuously.

Two indicators of the lack of hydraulic continuity between the surface water and the subsurface water are: 1) an unsaturated zone separates the surface water from the subsurface water; or 2) there is a confining layer that separates the surface water from the subsurface water. In either case, there is not a hydraulic connection between the surface water and the subsurface water, and the subsurface water must be considered percolating groundwater.

Evidence for an unsaturated zone comes from water level readings from wells or piezometers that demonstrate unsaturated conditions between the surface stream and underlying groundwater. Evidence for the confining layer must be lithologic, reinforced by hydrologic data. The lithologic evidence must indicate that low conductivity sediments overlie the aquifer in question, as determined by drillers' logs and/or geophysical logs. These low conductivity sediments must be present in sufficient areal extent to hydraulically separate the aquifer from the surface stream. Corroborating evidence of a confining layer is indicated by hydrologic data from wells and aquifer tests.

If water levels in wells perforated beneath the confining layer are at a higher elevation than the top of the aquifer, this is further evidence that the subsurface water is confined and not in hydraulic continuity with the stream.

Gradient and Flow Direction Factor

Subterranean streams flowing in known and definite channels will have a hydraulic gradient and flow direction that are consistent with the direction and gradient of the channel. The gradient and flow direction in the subterranean channel should not be influenced by gradients and flow directions of groundwater adjacent to the subterranean channel because the banks of the subterranean channel would keep the subterranean flow fully confined within the channel and separated from the surrounding groundwater because of the lower permeability of the banks. If the subsurface water in question has gradients and flow directions that reflect those of the regional groundwater setting rather than flow in definable channels, the subsurface water is percolating groundwater.

Chemistry and Age Factor

There should be strong similarities between the quality of surface water and that of its underflow. Therefore, the chemistry of subsurface water flowing in known and definite channels must not differ substantially from the overlying surface water. True underflow has not had sufficient contact time in the porous media beneath the surface water to substantially change its chemistry from that of the surface waters. A combination of the common general mineral analyses and the less common isotopic analyses can be used in the comparison.

Likewise, there are also techniques to determine the "age" of water (the length of time the water has been in the subsurface, not in contact with the atmosphere). Water flowing in known and definite subterranean channels is likely to be of significantly different age than adjacent groundwater because the two waters would have had a significantly different history of recharge and subsequent movement.

Pumped Well Test

A pumped well test (commonly called an aquifer test) involves monitoring water levels in the pumping well over a specified number of hours, as well as monitoring water levels in adjacent monitoring points. Standard analyses of the water level drawdown in the well and monitoring points can determine hydraulic properties of the materials penetrated by the well and can detect certain features in the aquifer such as the presence of nearby, less permeable material. If a subterranean channel with bed and banks is present, aquifer properties should vary substantially depending upon the location of the well. When a well drilled in the subterranean channel is tested, the test should indicate transmissive hydraulic conditions. In contrast, a well that penetrated the banks of the channel should indicate poorly transmissive conditions, several orders of magnitude lower than the channel itself. Well yields would also be high in the channelized material and low in the material of the banks.

A well test can also be used to indicate the presence of less permeable material laterally away from the well. Water levels in the pumped well may show unexpectedly rapid drawdown after some period during the test, indicating a boundary effect when the cone of depression reaches impermeable material such as the bank of the channel. Tests conducted on wells drilled near the bank of the channel, but within the channel, should display this boundary effect. In addition, water levels in wells on the opposite side of a channel bank from the pumping well should not be affected by the pumping – if water levels in the well outside the channel bank are reduced by the pumping, then the "bank" is not impermeable and a subterranean channel is not present.

Appendix C

TECHNICAL COMMENTS ON THE CRITERIA PROPOSED IN THE REPORT

Elsewhere in this overall paper are discussions of the legal aspects of Professor Sax's conclusions; this Appendix C discusses the technical aspects of the criteria proposed in Professor Sax's report ("Report") (pages 11-14) to determine whether any given well is subject to the permitting authority of the State Board (SWRCB), in effect the Report's answer to **SWRCB Question 6 - Can quantifiable criteria be established to implement the legal test? What are the quantifiable criteria?** For all practical purposes, only the first of the criteria in the Report is what is proposed to determine SWRCB permitting authority, since it specifies what wells will presumptively be within the Board's jurisdiction; all the other criteria deal with rebutting whatever presumption is reached via application of the first criteria. (Strictly speaking, the sixth item is more of a global exception than a rebuttal standard; it appears to be an unnecessary afterthought, since hydrological connection is an embedded requirement for proper application of all the technical analysis and testing proposed in the Report).

Instead of addressing when a well should be treated as essentially a subterranean component of a surface stream and therefore subject to SWRCB permitting jurisdiction, the Report asks which wells are appreciably and directly (both in place and time) impacting the surface stream. The Report concludes that this latter question is not a question that technical experts can answer. This is not correct. Experts can answer that question on a well by well basis. In fact, the Report inherently disagrees with its own statement in that the criteria that are proposed require a technical answer to whether or not a well derives some of its flow from the so-called stream recharge area, or produces some stream depletion, or creates measurable drawdown at the edge of the so-called stream recharge area. While it may be a legal and policy question to decide whether any appreciable, direct effect is "substantial", and what authority the SWRCB has to address the matter, it will always take a technical analysis to determine how much flow, or stream depletion, or drawdown occurs in order to then decide whether it's "substantial". The Report's test and its related technical discussion vary from the definition of what is a "subterranean stream flowing through a known and definite channel". But the "record" needs to be "set straight".

Definitions (or lack thereof)

The Report notes that the proposed criteria are not entirely quantitative, with an appropriate note that experience or further technical assistance may permit the concept of "substantiality" to be quantified in at least some settings. Many of the technical and quasi-technical terms used in the Report take us further away than ever from clarification of "subterranean stream" concepts:

"Designated Stream Recharge Area"- In the context of the Report's analysis, there is essentially no such thing. One could logically interpret the term to refer to an entire

watershed, since that is what "recharges" a stream; but that is certainly not what the Report appeared to intend. On the other hand, one could interpret the term to mean the area local to a stream where it is recharging ground water (for example, there is discussion in the Report's Appendix E of the "mound" beneath a stream). However, if ground water being recharged by a stream (whether "mounded" or not) is the target of permitting authority, then essentially all ground water in alluvial valleys would be jurisdictional (natural recharge from streams does occur; it's a major reason why ground water is a renewable resource). However, again, this is not what the Report appears to have intended.

Perhaps the word "designated" is the key. Since the Report offers no definition, a review of the technical excerpts included in Appendix E suggests that the term refers to ("designates") all of the area between lines drawn tangent to the outermost meanders of a stream. One can take issue technically with the idea that any drawdown inside such an area produces a direct stream impact. In fact, the very method that the Report mentions (the Jenkins method) utilizes distance between a well and a stream channel, which is consistent with all hydraulic theory that describes stream-aquifer-well interaction, and never mentions anything like a so-called "designated stream recharge area". Further, the Jenkins method computes flow contributions from a stream, not from something called a "stream recharge area". If any of the Report's technical criteria are to be adopted, they should be consistent with proper hydraulic theory and thus relate to distance from an actual stream, and not introduce some fictitious area unrelated to stream-aquifer-well interaction.

"Thickness" and "Substantial" - The Report acknowledges that these terms lack quantitative definition; and he goes on to note that, with more technical knowledge and experience in some places, a more quantitative test of presumptive jurisdiction might be achieved. Until then, and in all other cases, words like "substantial" are left to "protect permitting authority over surface stream waters from subversion". It seems that there is likely to be "substantial" debate, on a case by case basis, over what constitutes a "substantial" percentage of a well's annual flow or what is "substantial" stream depletion. Similarly, the thickness and lateral extent of a clay layer that would "indicate lack of hydraulic influence from a stream" are potentially very debatable (and very expensive to fully investigate and define for each individual well in question).

"Reasonable Duration and Intensity" - It is key to note here that sufficiently extended well testing, at sufficiently high capacity, can produce stream impacts that would not occur under different (smaller) durations and intensities of pumping. "Reasonable" should somehow be tied to actual well operations (pumping capacity and duration). Testing should not be conducted in such a way to try to force a "substantial" impact by extending pumping cycles and/or increasing pumping capacity, when such an impact would never occur under actual well operations. There is far too much potential to "create" an impact via extended and/or high capacity pumping, and to then claim jurisdiction, when such an impact is illegitimate for the actual well conditions in question. The same is also true for any calculated "impact", e.g. via the Jenkins or other

reproducible method.

"Period of the Most Critical Flows of a Stream System" - Since this period is critical for assessment of whether stream depletion is "substantial" or not, it needs to be defined.

"Long-Standing Hydrological Disconnection" - The entire concept of stream depletion or stream contribution to wells, as proposed in the Report, is contingent on hydraulic connection between the stream and the aquifer system. Without hydraulic connection throughout any pumping period in question, there is no stream contribution to the well, nor is there any stream depletion (see, for example, Jenkins' report where he specifically notes that the methods presented in his report are not applicable under such conditions). If Jenkins' methods are not applicable over as short a period as a pumping cycle, there is a definite need to specify what constitutes "long-standing hydrological disconnection". Fundamentally, regardless of what conditions may have historically been, or what they might be at other times, if there is disconnection at the time of pumping, there is no stream impact and no stream contribution to a well's discharge. If the latter two are to be the primary criteria for presumption, as suggested in the Report, they should be judged under prevailing conditions when pumping occurs.

The 1,000 Foot Distance

The Report's first proposed criteria is that any well within 1,000 feet of a "designated stream recharge area" is presumptively within the Board's jurisdiction, if either of two subsequent criteria is met. Before addressing the subsequent criteria, several comments on the 1,000 foot number are appropriate. In footnote 31, the Report notes that technical experts had told him that, in "water table situations", experience with aquifer tests showed that drawdown is near zero at that distance, "an experience that has been confirmed by modeling". At an absolute minimum, it should be noted that modeling has never confirmed (and never will confirm) any such thing; models are simulations and, as such, require confirmation by actual field conditions, not the other way around. There is no substantiation of the 1,000 foot number, or any other number, on the basis that it has been or could be "confirmed by modeling".

With regard to the 1,000 foot number itself, the distance from a pumped well at which drawdown is "near zero" is dictated by a combination of aquifer transmissivity, aquifer storage coefficient, and time of pumping (and nothing else); the distance is **not** a function of pumping capacity. There is an almost limitless combination of aquifer characteristics and pumping time that will produce a distance at which drawdown is zero. For water table (unconfined aquifer) conditions, a reasonable range would be from a few hundred feet to a few thousand feet; there is absolutely nothing unique about 1,000 feet. Since there is an extremely large range of aquifer characteristics and pumping times for wells throughout the state, the 1,000 foot number might be correct for some locations, but can be challenged (very defensibly) in many areas as unreasonable for real conditions in those areas. Given the very expensive onus placed on the well owner to rebut the presumption (the Report's Criteria 3), there would have to be a solid technical basis for

any number. Values for aquifer transmissivity, storage coefficient, and assumed pumping cycles should be considered before any particular distance is chosen as being reasonably applicable for all wells completed in water table conditions throughout California. Ultimately, there simply is no "magic number" that appropriately includes or excludes wells based on distance alone. Rather, proper scientific consideration would have to be given to the variables that dictate whether a well can impact a stream or derive flow from a stream. No single number can be applicable to the essentially limitless combinations of those variables that can and do exist throughout the state.

Other Technical Issues

The Report's footnote 31 notes that drawdown, or changes in the water table adjacent to the stream recharge area, is an indicator of hydraulic influence of a well's pumping. As discussed above, that is not technically correct, at least in the context described in the Report (direct pumping impacts on a surface water body). Direct stream impacts are dictated in part by distance from the stream itself, and in part by hydraulic continuity with the stream. Absent such explicit requirements, the statement that drawdown in some larger area is an indicator of hydraulic influence of a well's pumping on a stream is technically flawed and indefensible. As a specific example, where drawdown does not reach the stream itself, there is no direct effect on the stream. Similarly, where the water table is hydraulically disconnected from the surface stream, drawdown of the water table at any location has no effect on the surface stream (no stream depletion); and there is no direct contribution of surface water to the well's discharge under such conditions. Other forms of groundwater recharge may be occurring, as a result of groundwater pumping in general; but those are part of the larger basin-wide yield of an aquifer system. Subjecting that form of groundwater recharge to SWRCB permitting authority would be equivalent to expanding such authority to all ground water that is recharged from a stream.

With regard to the general subject of stream-aquifer connection, much of the Report's discussion (notably on pgs. 65-67, at the end of Part III) describes all ground water in a stream-aquifer setting, not just that which is directly influencing stream flow. Absent pumping from an aquifer system overlain by a surface stream, there is no stress that would ever lower the groundwater level. Thus, absent pumping, ground water and the stream would connect. Historically, man's development of ground water has created conditions whereby recharge from the surface, including streams, can and does occur. Several of the Report's statements ("ignoring changes in water movement brought about by pumping's cones of depression"; "hydrological connectivity... would be restored if pumping were substantially constrained"; "if that pumping were to cease or cut back, eventually the water table would rise and contribute significantly to surface stream flows") give rise to concern that Sax would have us conclude that direct streamflow impacts should somehow be evaluated in conditions as they existed in a state of nature before groundwater pumping. If analyses of stream impacts were to be done under such hypothetical conditions, permitting authority would extend to all ground water that is recharged from surface waters, i.e., essentially all ground water.

The Jenkins Method

Since the Jenkins method gains a significantly heightened identity as a result of its citation in the Report, a few comments about it are appropriate. First, it is a graphical and tabular technique developed in the 1960's to simplify mathematically challenging analysis of stream depletion by pumping that was originally developed around 1940. Today, the graphical and tabular approach is outdated by modern computers which can quickly solve the mathematically challenging analysis. Ultimately, however, regardless of how the analysis is conducted, the result is a calculation of theoretical stream depletion, and not the depletion of a so-called "designated stream recharge area". The Jenkins method is based on a set of assumed idealized conditions, acknowledged by Jenkins to be never fully met under real field conditions. Jenkins further acknowledges that his methods are not applicable if the water table is disconnected from the streambed, even if by the pumping in question. There is a fair amount of discussion in the recent literature that documents the Jenkins method as being overly conservative (over predicts) in computing stream depletion when compared to actual observations. Ultimately (i.e., with sufficient time), with real or assumed hydraulic connection, the Jenkins method will calculate all pumped water to come from the stream, hence pre-ordaining the conclusion about permitting authority.

Permitting

In addition to the technical and related problems associated with the criteria proposed in the Report, the concept of implementing a resultant permit requirement would be very challenging. The criteria proposed in the Report, if adopted, even if some of the issues herein are addressed, would provide some sense of an amount of water being directly induced from a surface stream by a particular pumping well. That technical result would then apparently be judged against some significance standard(s) yet to be determined. Assuming that a permit were then deemed to be required, a collection of questions about that permit would follow: 1) What would be permitted? a pumping capacity? a duration of pumping? a volume of water over some specified time period? 2) How would the "permitted" pumping integrate with the yield of the groundwater basin? Would the directly induced part of groundwater recharge then be somehow separately treated in terms of correlative or other shares of groundwater basin yield? 3) Where would the permitting of any given well (or, probably more challenging, the determination that a well should not be permitted) leave other pre-existing wells in the same aquifer system? Does the investigation of any given well precipitate the need to investigate all other wells in a given stream-aquifer system in order to treat them all equally? If so, over what area? A groundwater basin? A stream reach? If not, does a permitted well gain some priority of right over a non-permitted well? Conversely, does a well that cannot obtain a permit lose access to the groundwater basin while other pre-existing wells continue to pump because they were not specifically investigated?

Under the existing system, permitted wells pumping "underflow" or from a "subterranean stream flowing in a known and definite channel" are considered to pump 100 percent of

their discharge from ground water that is jurisdictional (river underflow or subterranean stream). The proposed Report criteria, if adopted, would end up with fractionated flow, some from the aquifer system and some from a surface stream, all dynamically changing as a function of pumping capacity and pumping time that can change each time a pump is started. One can only wonder how any form of organized, consistent, fair permitting could ever be applied to such a dynamically changing target as the discharge from a well. Such wondering is only exceeded by wondering how some form of organized, consistent, accurate, and technically defensible analysis and testing of stream-aquifer interaction could ever be applied on a well-by-well basis throughout the state.

KINGS RIVER WATER ASSOCIATION
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April 8, 2002

VIA FAX

Mr. Arthur Baggett
Chairman
State Water Resources Control Board
P. O. Box 100
Sacramento, CA 95812-0100

Re: Sax Report on Subterranean Waters

Dear Chairman Baggett:

As you are aware, the Kings River Water Association is an unincorporated association comprised of 28 public and private agencies which collectively hold the water rights to the Kings River at Pine Flat Dam. Our members provide critically needed water supplies to approximately one million acres of the world's most productive farmland located in Fresno, Tulare and Kings Counties. Kings River water also supplies a significant portion of the water needs of a number of municipalities within our Service Area, including the City of Fresno.

As you also know, the Kings River Conservation District serves the Kings River Service Area and adjacent lands. It provides resource management, flood control and related services to its landowners, and has taken an active role in developing groundwater recharge projects in the region.

Unfortunately, the water demands within the Kings River Service Area cannot be satisfied by Kings River water alone. As a result, both agricultural and urban water users throughout the Service Area rely on the conjunctive use of groundwater and Kings River water to meet their water needs. For that reason, the KRWA, the KRCD and those they serve are vitally interested in issues affecting both surface water and subterranean water.

We therefore reviewed with great interest and significant concern the report recently provided to the Board by Professor Joseph Sax relative to subterranean waters. Simply put, we

believe that the Sax report is flawed in both its methodology and conclusions. Moreover, if implemented, we believe the recommendations of the Sax report could lead to enormous uncertainty as well as unnecessary regulatory burdens. As a result, on behalf of the tens of thousands of farmers and other water users within the Kings River Service Area, we ask that the Board decline to adopt the proposals contained in the Sax report.

We are familiar with the comments filed with respect to the Sax report by the San Joaquin River Group and by Joel Moskowitz. Those comments include all our concerns with the Sax report. **So as not to burden the Board or staff with repetitious comments, we will simply endorse and adopt those comments rather than repeating or rearguing them here.**

Of course, if you would like additional information on the position of the KRWA and KRCD relative to the Sax report, we would be pleased to provide it.

Very truly yours,

Tim O'Halloran
Watermaster/Secretary
Kings River Water Association

David L. Orth
General Manager/Secretary
Kings River Conservation District

TFO/DLO:pl

cc: San Joaquin River Group
KRWA Executive Committee
KRCD Board of Directors
Gary W. Sawyers, Esq.
Jack Gualco

April 1, 2002

Paul Murphey
Division of Water Rights
State Water Resources Control Board
P.O Box 2000
Sacramento, CA 95812-2000

Dear Paul Murphey:

It is with grave concern that Fresno and Madera County Farm Bureaus submit the following comments on the "Review of the Laws Establishing The SWRCB's Permitting Authority Over Appropriation Of Groundwater Classified As Subterranean Streams And The SWRCB's Implementation Of Those Laws." authored by Professor Joseph L. Sax.

Professor Sax's sets out to address six questions as proposed by SWRCB.

1. What is the scope of the State Water Resources Control Board ("SWRCB") water right permitting authority over groundwater?

2. What is the current legal test for determining whether groundwater is subject to the SWRCB's permitting authority?

3. Under this legal test, what physical characteristics should the SWRCB's evaluate in distinguishing subsurface waters subject to the SWRCB's permitting authority from subsurface water that are percolating groundwater?

4. What factors has the SWRCB considered in its past decisions regarding groundwater classification?

5. Should the legal test for determining what subsurface waters are subject to the SWRCB's permitting authority be changed? If so, what legal test would be appropriate?

6. Can Quantifiable criteria be established to implement the legal test? What are the quantifiable criteria?

In an attempt to address the first question of the SWRCB's scope of authority Professor Sax looks at the history of the Water Commission Act of 1913 and the legal interpretation of *Los Angeles v. Pomeroy* to derive the legislative intent of the act. He first reviews the Act to answer the question of intent of the authors to integrate both surface and groundwater management and permitting authority. Unfortunately Sax was unable to gain access to legislative hearing records therefore he bases the majority of his conclusion on records obtained from hearings held in 1912 by the State Conservation Commission tasked with drafting the originating legislation. The original legislation put forward to the legislature in 1913 did integrate both surface and groundwater, however that in it's self is not legislative intent, though Sax attempts to use those transcripts from 1912 for the basis of his conclusions. Legislative intent is established by the legislature as a piece of legislation works its way through the legislative process. Therefore, when the amendment to separate groundwater from surface waters was adopted it can be clearly concluded that though the legislators had a full understanding of the interrelationship between groundwater and surface water they chose to govern them separately allowing permitting authority for surface waters only. The legislators also used language directly from *Los Angeles v. Pomeroy* when defining subterranean streams, again indicating their intent to uphold the parameters established by the courts in the Pomeroy case which clearly separated groundwater from surface water. In addition, Sax neglects to acknowledge the establishment of legislative intent to not integrate the groundwater and surface waters by means of the inability to pass a bill which would integrate the two. Sax himself recognizes the many attempts and failures of the legislature to integrate

the surface and groundwater codes, and in fact recommends to not seek legislative relief due to the high improbability of such a bill successfully passing through the legislature. We believe the inability to pass such a bill is clear legislative intent to **not allow** for the expansion of the SWRCB's regulatory authority over groundwater.

Sax also attempts to redefine legislative intent as follows:

> "My conclusion is that the legislation was designed to create an impact test (impact of pumping on surface stream flows), rather than seeking to identify a physical entity with a specific shape, despite the conventional "subterranean stream" language the law picked up from the old treatises. I conclude that a test designed to identify appreciable and direct impact of groundwater diversion on a surface streams represents a more faithful implementation of the legislative purpose than any catalog of physical characteristics."

Yet the legislature specifically uses language directly from *Los Angeles v. Pomeroy* when defining "subterranean streams", which uses a physically prescriptive standard based on proximity as a definition, not a qualitative definition based on impairment as Professor Sax propose to be used. Again, we must recognize that our forefathers understood the complexities of integrating groundwater with surface water and purposely chose to use a much more definitive set of standards in an effort to avoid as much subjectivity and interpretation by the permitting authority as possible.

The report also reviews legislative and legal history, which has allowed SWRCB to regulate groundwater ONLY to the extent that the use is impacting the Board's authority to regulate surface waters. It is clear that though there has been no substantive challenges to the Board's authority under the limited auspices of *Los Angeles v. Pomeroy* the Board has been somewhat inconsistent with its determinations in some cases that were before them. This occasional lack of consistency is one of the likely justifications why the legislature has not felt compelled to broaden their authority.

It is Professor Sax's three concluding recommendations that cause the greatest amount of consternation for the agriculture community. More specifically it is the use of those recommendations in order to circumvent the legislative process that is absolutely unacceptable.

> "(1) Adoption ...of clear criteria ...taking jurisdiction henceforth over groundwater uses that diminish appreciably and directly the flow of a surface stream; and
> (2) Proactive use ...of its ...to implement the constitutional prohibitions on waste, unreasonable use, and unreasonable methods of use; to protect the public trust; and to safeguard established rights in surface stream flows; and
> (3) ... comprehensive basin management (as with the most successful adjudicated/managed Southern California basins) is the most promising tool to achieve genuine integration of surface water and groundwater administration in California. ... Unlike proposals for expanding regulatory jurisdiction, basin management offers the possibility of employing the full range of needed management tools, such as professional administration, pumping assessments, importation of new supplies, replenishment programs, achievement of sustainable use, allocation of groundwater storage capacity, quality control, and conjunctive use."

How does the Board propose to enact these recommendations without harming current and future groundwater users? As it has been virtually impossible to build additional surface storage facilities many private interests have began to pursue other groundwater storage opportunities, such as water banks and groundwater recharge areas which could be used to mitigate water supply in dry years. However, if the Board chooses to adopt the proposed recommendations of Professor Sax many of those entities will be forced to reassess the risks of those projects due to the additional regulatory implications. Thus halting the few opportunities California now has to address the water shortage it now faces with a continually growing population.

We understand the complexities of groundwater and surface water and how they interrelate, as have the legislators of California over the past century. That is why we must insist that Board reject the conclusions of this report. We recommend the Board continue to fulfill their duties and responsibilities as they have been so clearly defined by the California Legislature. And, that the Board continues to use the physical characteristic of a subterranean stream as the guidance of their regulatory permitting authority.

It is imperative that historical private property rights be respected. Groundwater has historically been, and continues to be, one of those rights for the reasonable, beneficial use of the overlying landowner. The legislature has clearly identified this right and it has been codified in Water Code sec. 2500.

> 2500. As used in this chapter, "stream system" includes stream, lake, or other body of water, and tributaries and contributory sources, **but does not include an underground water supply** other than a subterranean stream flowing through known and definite channels.

Any expansion of the Board's jurisdiction, which Professor Sax proposes, would be considered erosion of those private property rights.

Respectfully Submitted,

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April 8, 2002

Mr. Arthur G. Baggett, Jr., Chairman
State Water Resources Control Board
1001 I Street, 25th Floor
Sacramento, California 95814

Re: "Review of the Laws Establishing the SWRCB's Permitting Authority Over Appropriations of Groundwater Classified as Subterranean Streams and the SWRCB's Implementation of Those Laws," by Professor Joseph L. Sax (Jan. 19, 2002)

Dear Mr. Baggett:

This letter is being submitted for the State Water Board's April 10, 2002 workshop on the above report.

At the outset, we would like to thank the State Water Board for organizing a public process where all members of the public have had opportunities to comment on the important issues regarding the legal classification of groundwater in California. We also would like to thank Professor Sax for his very substantial effort to assemble and summarize many of the relevant California court decisions, the various proceedings that led to the 1913 Water Commission Act and the decisions of the State Water Board and its predecessors on groundwater-classification issues. Professor Sax's report represents the first comprehensive compilation of many of the relevant materials on this important topic.

As is discussed in detail in this letter, Professor Sax's proposed "impact test" for Water Code section 1200, which appears in his report at pages 12-14, is not supported by the applicable rules of law, and therefore should not be adopted by the State Water Board. Instead, the State Water Board should confirm that it will follow the statutory language of Water Code section 1200, the applicable California court decisions on legal classifications of groundwater and the past State Water Board decisions that are consistent with these court decisions when it rules on groundwater-classification issues.

DISCUSSION

1. Professor Sax's Proposed "Impact Test" Interpretation Of Water Code Section 1200 Is Not Supported By Standard Rules Of Statutory Construction

The most fundamental rule of statutory construction is:

> When looking to the words of the statute, a court gives the language its usual, ordinary meaning. . . . If there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs.

(*People v. Snook* (1997) 16 Cal.4th 1210, 1215.) Under this rule, the courts may not ignore the statute's language, even if they believe that the Legislature intended something besides the actual statutory language:

> We could not, of course, ignore the actual words of the statute in an attempt to vindicate our perception of the Legislature's purpose in enacting the law. "'This court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed.'"

(*Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 993.)

> "In the construction of a statute . . . the office of the judge is simply to ascertain and declare what is in terms or substance contained therein, not to insert what has been omitted or omit what has been inserted . . . . " . . . We may not, under the guise of construction, rewrite the law or give the words an effect different from the plain and direct import of the terms used.

(*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349.)

> . . . courts "'must follow the language used and give to it its plain meaning, whatever may be thought of the wisdom, expediency, or policy of the act, even if it appears probable that a different object was in the mind of the legislature.'"

(*People v. Weidert* (1985) 39 Cal.3d 836, 843.)

While these rules are stated in terms of what courts must do when they are implementing statutes, they apply equally to the State Water Board's implementation of statutes.

Professor Sax's proposed "impact test" does not follow these rules. Specifically, as is discussed in detail on pages 37-39 of his report, Professor Sax determined what he believes that the

drafters of section 42 of the 1913 Water Commission Act intended regarding the State Water Board's permitting authority over groundwater appropriations. Professor Sax then developed his proposed "impact test" based on his opinion of the drafters' intent, rather than on the actual language in Water Code section 1200. (See Report, pp. 7, 11-14.) This statutory language refers very clearly to "subterranean streams flowing through known and definite channels," and not to impacts of groundwater pumping on surface water. It would not be appropriate for the State Water Board to follow the proposed "impacts test," which is based on the possible intent of the drafters of the legislation, and not on the actual statutory language.

Professor Sax's report concedes that the proposed "impact test" is not consistent with the actual language of Water Code section 1200, but then states that the "literal terms" of a statute do not need to be followed if they do not describe legislative intent, citing the United States Supreme Court's decision in *Andrus v. Charlestone Stone Products Co.* (1978) 436 U.S. 604. (See Report, p. 11, fn. 26.)

There are two fundamental defects with this statement.

First, because Water Code section 1200 is a California statute, decisions of the California Supreme Court, like those discussed above, and not decisions of the United States Supreme Court, determine the proper construction of the statute.

Second, the *Andrus* decision is readily distinguishable from the present matter. *Andrus* concerned the question of whether or not the term "mineral" in an 1872 mining law included groundwater. The court first recognized that the term "mineral" was ambiguous, and thus that the court had to consider information besides the language of the statute. (436 U.S., at pp. 575-576.) Next, the court concluded that Congress did not intend for federal mining law to include regulation of groundwater because Congress already had passed three statutes (in 1866, 1870 and 1872) providing that "private water rights on federal lands were to be governed by state and local law and custom." (*Id.*, at p. 578.) The court therefore did not simply ignore statutory language to carry out its view of Congressional intent. Instead, it first determined that one statutory term was ambiguous, and then looked to other statutory language to determine how to interpret the ambiguous term.

The United States Supreme Court's recent decision in *Barnhart v. Sigmon Coal Co.* (2002) 122 S. Ct. 941, confirms that the United States Supreme Court does not actually follow Professor Sax's proposed approach to interpreting Water Code section 1200. In *Barnhart*, the court held:

> As in all statutory construction cases, we begin with the language of the statute. The first step "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." . . . The inquiry ceases "if the statutory language is unambiguous and the 'the statutory scheme is coherent and consistent.'"

(*Id.*, at p. 950.) In rejecting the argument that a different statutory construction was appropriate because of some statements some Senators made during debates on the bill that ultimately was adopted as the statute, the court stated:

> Floor statements from two Senators cannot amend the clear and unambiguous language of a statute. We see no reason to give greater weight to the views of two Senators than to the collective votes of both Houses, which are memorialized in the unambiguous statutory text.

(*Id.*, at p. 954.)

Accordingly, even under United States Supreme Court decisions, specific statutory language may not be rejected in favor of possible drafters' intents, as Professor Sax proposes with his "impacts test."

2. Professor Sax's Reliance On The Transcript Of A 1912 Conservation Commission Meeting Is Incorrect

The second defect in Professor Sax's proposed "impact test" is that is relies on the transcript of a 1912 Conservation Commission meeting, even though the groundwater-classification language that later was adopted as section 42 of the 1913 Water Commission Act never was discussed during those proceedings and was not included in the Commission's proposed bill. As Professor Sax's report concedes:

> . . . the subterranean stream language appeared for the first time at a late stage in the evolution of the law. It never came up in the Commission's report, in its original bill, in any of three Commission hearing sessions on the bill, or in the bill as first introduced in the Assembly, . . .

(Report, p. 37.) It is not appropriate to rely on the Conservation Commission proceedings to interpret Water Code section 1200, when the Commission's proceedings never even addressed the language that ultimately became Water Code section 1200. While reports of commissions on proposed statutes that are subsequently adopted are entitled to substantial weight in construing the statutes (*Brigante v. Huang* (1993) 20 Cal.App.4th 1569, 1581), this rule does not apply to proceedings of commissions that propose statutes that are not adopted.

Professor Sax's statement that "no doubt those who participated in the Commission's hearings also participated in the development of the bill as it moved through the legislature" (Report, p. 33) appears to be unsupported speculation. Moreover, even if some Commission members actually did participate in drafting the bill, and even if Professor Sax has correctly determined their motives and understandings regarding the groundwater-classification issue, their motives or

understandings are not relevant to interpreting Water Code section 1200. Even the motives and understandings of members of the Legislature who draft subsequently adopted statutes, and thus are much closer to the Legislative process than the Conservation Commission members were, are irrelevant:

> . . . in construing legislation "we do not consider the motives or understandings of an individual legislator even if he or she authored the statute."

(*Grupe Development Co. v. Superior Court* (1993) 4 Cal.4th 911, 922.)

Stated simply, Professor Sax's attempts to use the 1912 statements of Conservation Commission members to interpret section 42 of the 1913 Water Commission Act, and thus to create his proposed "impacts test," are based on too much speculation, and are contrary to standard rules of statutory construction. The State Water Board therefore should not adopt Professor Sax's proposed "impacts test."

3. Professor Sax's Report Has Other Problems That The State Water Board Must Address Before Relying On The Report In Any Future Board Actions

In addition to the problems regarding the "impacts test" that are discussed above, Professor Sax's report has some other problems, which are discussed here. The State Water Board must address these problems before relying on the Sax report in any future Board actions.

First, Professor Sax proposes that, in certain cases, the party asserting that the relevant groundwater is percolating groundwater shall have the burden of proof. (See Report, p. 13.) This is contrary to two California Supreme Court decisions, each of which held that the party asserting that the relevant groundwater is flowing in a subterranean stream shall have the burden of proof. (See *Arroyo Ditch and Water Co.* v. *Baldwin* (1909) 155 Cal. 280, 284; *City of Los Angeles* v. *Pomeroy* (1899) 124 Cal. 597, 628.) The State Water Board needs to apply the correct burden of proof in its future proceedings that involve groundwater-classification issues.

Second, Professor Sax construed the State Water Board's Question 2 ("What is the current legal test for determining whether groundwater is subject to the SWRCB's permitting authority?") to concern just recent State Water Board decisions, and not applicable court decisions. Professor Sax's report therefore does not discuss the effects of several California court decisions on legal classifications of groundwater (except for a brief reference to some of them in a footnote, see Report, p. 53, fn. 162). These decisions, which are discussed in detail in my August 20, 2001 letter to Professor Sax, include *Katz v. Walkinshaw* (1903) 141 Cal. 116; *Hudson v. Daily* (1909) 156 Cal. 617; *San Bernardino v. Riverside* (1921) 186 Cal. 7; *Eckel v. Springfield Tunnel etc. Co.* (1927) 87 Cal.App. 617; and *O'Leary v. Herbert* (1936) 5 Cal.2d 416. The State Water Board needs to consider these court decisions in its future proceedings that concern groundwater classifications.

Third, Professor Sax's report makes various statements regarding the application of Water Code section 275 and the public trust doctrine to groundwater resources. (See Report, pp. 11, 81-87.) Because those issues were not included in the State Water Board's questions to Professor Sax, interested parties did not address them in prior workshops or in their comments to Professor Sax. The State Water Board therefore should treat these as unresolved issues, and not rely on Professor Sax's statements on these issues in its future proceedings unless and until interested parties have had opportunities to address them.

Thank you for the opportunity to provide these comments.

Very truly yours,

Alan B. Lilly

ALAN B. LILLY

ABL:abl
cc: Paul Murphey (10 copies) ✓

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April 8, 2002

VIA HAND DELIVERY

Mr. Paul Murphey
State Water Resources Control Board
Division of Water Rights
1001 I Street
Sacramento, CA 95814

Re: Glenn-Colusa Irrigation District's Comments Regarding the SWRCB's April 10, 2002 Public Workshop Regarding Professor Joseph Sax's Final Report On the Legal Classification of Groundwater

Dear Mr. Murphey:

These comments are submitted on behalf of Glenn-Colusa Irrigation District ("GCID") for the State Water Resources Control Board's ("SWRCB") April 10, 2002 public workshop regarding Professor Joseph Sax's final report on the legal classification of groundwater. In this regard, GCID concurs with and adopts the detailed comments submitted for this workshop by the Association of California Water Agencies ("ACWA"). In particular, GCID agrees with ACWA's recommendations that the SWRCB should, at most, simply acknowledge its receipt of Professor Sax's report, but take no action to implement the report's recommendations.

GCID also agrees the SWRCB should direct that its staff and legal counsel shall not cite to or otherwise specifically rely on Professor Sax's report in any administrative or judicial proceedings. As noted in ACWA's comments, the SWRCB's legal counsel has already cited to and submitted a copy of Professor Sax's report in the *North Gualala Water Company v. SWRCB* action currently pending in Mendocino County Superior Court (Case No. SCUKCVG 0186109). In that case, the SWRCB's legal counsel filed a status conference statement on March 1, 2002,[1] which discusses, in part, the requirement for North Gualala Water Company to implement a Surface Flow Measurement Plan. In discussing that plan, the SWRCB's status conference statement states as follows:

> . . . the data obtained as a result of implementing the Surface Flow Measurement Plan is relevant in applying Professor Sax's recommendation regarding the legal classification of the groundwater pumped

1 A copy of this status conference statement is attached hereto.

> from the North Gualala wells. Flow measurements help determine the relationship between pumping from the wells and streamflow. This relationship is a key consideration in Professor Sax's recommendations that are summarized on page 13 of the enclosed report. (Status Conference Statement, at 3, lines 21-26.)

This use of Professor Sax's report, which has not even been formally approved by the SWRCB, constitutes an underground regulation forbidden by California law. Cal. Gov't Code § 11340.5. As such, GCID believes it is necessary for the SWRCB to issue specific direction to its staff and legal counsel to refrain from relying on Professor Sax's report.

Finally, GCID agrees that when the SWRCB is making its case-by-case determinations as to whether it has jurisdiction over underground water, the SWRCB should continue implementing Water Code section 1200 in the same manner that it has for nearly a century, using the factors enumerated in Appendix B of ACWA's comments. GCID appreciates the SWRCB's review and consideration of these comments.

Respectfully submitted,

Andrew M. Hitchings

Attachment
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O.L. "Van" Tenney
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Attorneys for State Water Resources Control Board

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF MENDOCINO

NORTH GUALALA WATER COMPANY, Plaintiff and Petitioner, v. STATE WATER RESOURCES CONTROL BOARD, Defendant and Respondent.	Case No.: SCUKCVG '0186109 **RESPONDENT STATE WATER RESOURCES CONTROL BOARD'S STATUS CONFERENCE STATEMENT** Date: March 8, 2002 Time: 1:30 p.m. Dept.: The Honorable Richard L. Freeborn

INTRODUCTION

In this case, the petitioner, North Gualala Water Company, has a water right permit that covers its diversion of water from two wells adjacent to the North Gualala River in Mendocino County. Petitioner obtained the permit in 1965.[1/] In 1999, at the petitioner's request, the SWRCB added the points of diversion for the two wells to the permit and deleted the only

[1] Additionally, petitioner has three other water right permits that cover diversions of water from the surface of streams in the area of the town of Gualala.

surface diversion point under the permit. This litigation challenges State Water Resources Control Board's (SWRCB) Order WR 2001-14, which affirms a decision of the SWRCB's Chief of the Division of Water Rights to deny approval of two plans the petitioner prepared that are required under the water right permit. The two disapproved plans are a Water Supply Contingency Plan and a Surface Flow Measurement Plan. Although the litigation challenges Order WR 2001-14, the petitioner's concern is more fundamental: the petitioner does not believe that a water right permit is required for its diversion of water from the two wells.

PROCEDURAL HISTORY

On December 14, 2001, this Court held a conference with the attorneys in this litigation in connection with a scheduled hearing on a motion by the petitioner for a stay of Order WR 2001-14. After the conference, this Court imposed a temporary stay on both the litigation and the implementation of Order WR 2001-14 until March 8, 2002. The temporary stay was granted to give the petitioner an opportunity to file with the SWRCB a request for a hearing on the classification of the groundwater pumped from the wells. The length of the stay was based in part on the desirability of allowing time to review a report to the SWRCB by Professor Joseph L. Sax on the issue of groundwater regulation due on February 1, 2002. The report, entitled "Review of the Laws Establishing the SWRCB's Permitting Authority over Appropriations of Groundwater Classified as Subterranean Streams and the SWRCB's Implementation of Those Laws", was released to the public in early February 2002. A copy is attached as Exhibit A. The Introduction at pages 1-14 provides a general overview of the report.

By letter dated January 11, 2002, the petitioner requested that the SWRCB hold a hearing to decide the issue of the legal classification of the groundwater pumped by North Gualala's wells 4 and 5. The petitioner also requested that the SWRCB address in the hearing and decision the issue of the legal classification of the groundwater that would be pumped by any other wells that North Gualala might develop in the future on its property in the Elk Prairie, as depicted on a map attached to the letter.

In response to the petitioner's request, the SWRCB has prepared a hearing notice. It is expected that the hearing notice will be mailed to the interested parties on March 1, 2002. The

notice states that the SWRCB will conduct a field orientation tour of the area in which the wells are located on April 9, 2002, and will hold the hearing on June 4, 2002 and, if necessary, on June 5, 2002.

CASE MANAGEMENT

1. State Board's Position on the Stay.

By filing the request for a groundwater classification hearing, petitioner has begun the process of exhausting its administrative remedy on this issue. While the SWRCB still believes its demurrer to the First Cause of Action in the Petition is well taken, as a practical matter the request submitted by petitioner essentially renders as moot the First Cause of Action for declaratory relief. The gravamen of the remaining claims in the petition is a dispute over the interpretation of Term 9 of the permit regarding the surface flows, and the related rejection of petitioner's proposed Water Supply Contingency Plan. (See North Gualala's Petition, Second Cause of Action.)

Despite the public policy at issue in the disputed claims and in consideration of the impending water right hearing, the SWRCB is willing to stipulate to a continuing stay of the litigation and of the requirement in Order WR 2001-14 to prepare and implement a Water Supply Contingency Plan satisfactory to the SWRCB. This is acceptable to the SWRCB on the condition that North Gualala Water Company agree to comply with the permit term requiring an acceptable Surface Flow Measurement Plan as directed by the Chief of the Division of Water Rights in his letter dated January 7, 2000. (See Schueller Letter, Exhibit B.) This is necessary because the data obtained as a result of implementing the Surface Flow Measurement Plan is relevant in applying Professor Sax's recommendations regarding the classification of the groundwater pumped from the North Gualala wells. Flow measurements help determine the relationship between pumping from the wells and streamflow. This relationship is a key consideration in Professor Sax's recommendations that are summarized on page 13 of the enclosed report.

Further, as stated above, the petitioner's concerns with Order WR 2001-14 are not directed to the requirement to prepare the Surface Flow Measurement Plan, but rather to the

interpretation of Term 9 of the water right permit and the preparation of a Water Supply Contingency Plan.

In a telephone conversation with counsel for North Gualala Water Company on February 28, 2002, Mr. Lilly indicated that his client would likely be willing to stipulate to compliance with the Surface Flow Measurement requirement. Following receipt of the SWRCB's status conference statement, Mr. Lilly stated that he would attempt to fashion an acceptable stipulation prior to the status conference.

In the event the parties are unable to reach a stipulation, and assuming the Court is inclined to grant a continuation of the stay, the SWRCB requests that the Court modify the stay, lifting any stay of the requirement of the Surface Flow Measurement Plan.

2. **Future Hearing Dates.**

Assuming the Court orders a continuation of the stay, the SWRCB requests that the Court take off calendar the hearing currently set for March 22, 2002. Given the expected groundwater classification hearing in early June 2002, if the Court is inclined to order a further status conference, the SWRCB suggests that such conference be held in August or September 2002.

3. **Telephone Appearance.**

Counsel for the SWRCB intends to appear by telephone at the Status Conference on March 8, 2002 at 1:30 p.m.

DATED: March 1, 2002

Respectfully Submitted,

BILL LOCKYER, Attorney General
Of the State of California
MARY HACKENBRACHT
Senior Assistant Attorney General
MARK W. POOLE
Deputy Attorney General

By _____
MARK W. POOLE
Deputy Attorney General

Attorneys for State Water Resources Control Board, Respondent and Defendant

O'Laughlin & Paris LLP

Attorneys at Law

April 8, 2002

Paul Murphey
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000

Re: Comments of the San Joaquin River Group Authority to the Sax Report

Dear Mr. Murphey:

Enclosed please find an original and 10 copies of the Comments of the San Joaquin River Group Authority Regarding Professor Joseph Sax's Report on the Legal Classification of Groundwater for the Public Workshop of April 10, 2002.

Very truly yours,

O'Laughlin & Paris LLP

By: Tim O'Laughlin /
Tim O'Laughlin

TO/jd
Enclosure

870 Manzanita Court, Ste. B
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Comments of the San Joaquin River Group Authority

Regarding Professor Joseph Sax's Report on the

Legal Classification of Groundwater

April 10, 2002

I. INTRODUCTION

The historical novel is a popular literary genre. In such a novel, the author takes documented historical fact concerning a person or event, and supplements it with explicit detail regarding the customs, lore, architecture and day-to-day bustle of the period in question, as well as with thoughts, conversations and emotions of the characters. When done properly, the historical novel provides a seamless blend of fact and fiction that is hard for even the most discerning reader to separate. Both the reader and the author of historical fiction are always aware, of course, that the novel is a fictional account; one that, even though rich in detail and research, is only a figment of the author's imagination. After all, such novels, no matter how convincing, are clearly identified as works of fiction.

The "*Review of the Laws Establishing the SWRCB's Permitting Authority Over Appropriations of Groundwater Classified as Subterranean Streams and the SWRCB's Implementation of Those Laws*" (hereinafter "the Sax Report") prepared by Joseph L. Sax, a professor of law at the University of California at Berkeley, is a riveting account which contains many of the attributes of the best historical novels. Utilizing research that is impressive for both its quality and quantity, Professor Sax purports to take the reader into the mind of long-dead water law experts, Supreme Court Justices and legislative

draftsmen,[1] and claims to illuminate and provide answers to thorny questions of law and politics.[2] Unlike historical novels, however, neither the author nor the reader is sure where the facts end and the fiction begins. Indeed, the Sax Report differs from the historical novel in that it is offered as an accurate account of actual events, and not as a possible sequence of events that cannot be conclusively proven with the known historic record.

As a result of this flaw, the Sax Report, while certainly a compelling piece of fact based fiction, has little value as a legal-based effort to shed light on the scope and extent of the SWRCB's permitting authority over subterranean streams. That effort must be based not upon the supposition of the persuasiveness of arguments made nearly 100 years ago by men long dead, but instead upon the application of dry, boring and mundane legal tenets which form the backbone of statutory interpretation in California jurisprudence.

II. THE SAX REPORT

The SWRCB engaged Professor Sax to respond to six specific questions. Five of the questions focused on the nature and extent of the SWRCB's permitting authority over subsurface water. The remaining question asked whether or not the existing legal test for determining whether or not the SWRCB's permitting authority applied should be changed, and if so, in what way. (Sax Report, p. 4).

Professor Sax concludes that the scope and extent of the SWRCB's permitting authority over subsurface water is dependent upon the construction of Water Code

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[1] *See* page 16, fn. 42, where Professor Sax discusses what was in the mind of author Clesson S. Kinney; *see also* pages 21-22 discussing the purpose and intent of the Supreme Court, based upon the later writings of only one of its members; page 29, where the identity of two members of the Conservation Commission are "probably" identified; page 30 discussing the understanding of geology of the men on the Conservation Commission.

section 1200. (Sax Report, p. 3, 6-7). Based upon an exhaustive and detailed review of a portion of the legislative history regarding the passage of Water Code section 1200, Professor Sax concludes that the legislature intended the SWRCB to have permitting authority over surface waters, and any subsurface waters whose extraction would have an impact on surface waters. (Sax Report, p. 4, 7, 11, 12, 30 and 39).

Once the legislative purpose has been divined, Professor Sax utilizes that purpose, "despite the conventional 'subterranean stream' language" actually used in Water Code section 1200 (Sax Report, p. 7) to concoct an impact test that would somehow manage to both "enlarge Board jurisdiction somewhat" and "implement the legislative will." (Sax Report, p. 7, fn. 10; p. 12). Under the test developed by Professor Sax, any well located within 1000 feet of a designated surface water recharge area and either (a) extracts water from the recharge area, or (b) results in substantial stream depletion during critical periods is presumptively subject to the permitting authority of the SWRC under Water Code section 1200, and the well owner has the burden of rebutting that presumption. (Sax Report, p. 13).

III. THE SAX REPORT DOES NOT CONTAIN SOUND LEGAL ANALYSIS WHICH CAN BE RELIED UPON BY THE SWRCB

Professor Sax indicates that the only way to evaluate Water Code section 1200 is to determine Legislature's intent. (Sax Report, p. 3, 6-8). While this desire to determine legislative intent is appropriate, the method by which Professor Sax goes about it is deeply flawed and improper. By immediately jumping to a review of (1) the law on the books at the time that the Legislature passed the Water Commission Act and (2) excerpts

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[2] *See, e.g.*, page 33, where Professor Sax indicates the "most likely reason" that an amendment to a bill was not controversial. *see also* page 38, where Professor Sax discusses "the likeliest explanation" the Legislature's draftsmen used the language referring to subterranean streams.

from the original bill, transcripts of commission meetings, letters, newspaper articles and other aspects of the legislative history, Professor Sax ignores the well established principles of statutory construction. As such, Professor Sax's conclusions as to the intent of the Legislature in passing Water Code section 1200, and the tests he provides based upon such conclusions, are unreliable, unsupportable and must be rejected.

A. Interpretation of Statute Starts With Its Language.

The interpretation of a statute is a question of law, not fact. (Heavenly Valley v. El Dorado County Bd. Of Equalization (2000) 84 Cal.App.4th 1323, 1334). The test for interpreting a statute in California is clear, concise and indisputable. As the California Supreme Court has stated

> "As with any statutory construction inquiry, we must look first to the language of the statute. 'To determine legislative intent, a court begins with the words of the statute, because they generally provide the most reliable indicator of legislative intent.' [citation] If it is clear and unambiguous our inquiry ends. There is no need for judicial construction and a court may not indulge in it. [citation] 'If there is no ambiguity in the language, we presume the legislature meant what it said and the plain meaning of the statute governs.' [citations]." (Diamond Multimedia Systems, Inc. v. Superior Court (1999) 19 Cal.4th 1036, 1047; *see* Lungren v. Deukmejian (1988) 45 Cal.3d 727, 735; California Teachers Assn. V. Governing Bd. Of Rialto Unified School Dist. (1997) 14 Cal.4th 627, 632-633; California Fed. Savings & Loan Assn. V. City of Los Angeles (1995) 11 Cal.4th 342, 349).

Thus, the *only* time that a review of the legislative history and other extrinsic sources is permissible is when the language of the statute is ambiguous. (People v. Snook (1997) 16 Cal.4th 1210, 1215).

There are two types of ambiguity that, if present, will justify the examination of sources extrinsic to the language of the statute itself – facial ambiguity and latent

ambiguity. (County of Santa Clara v. Perry (1998) 18 Cal.4th 435, 442; Stanton v. Panish (1980) 28 Cal.3d 107, 115). A facial ambiguity exists when the words of a statute are susceptible to more than one reasonable interpretation. (People v. Jefferson (1999) 21 Cal.4th 86, 94). Thus, for example, the provisions of Code of Civil Procedure section 2033(m) dealing with the withdrawal or amendment of admissions was found to be facially ambiguous, since the term "admissions" could reasonably be found to apply to those willfully made, as well as those which are "deemed" as a result of a failure to respond to a request for admissions. (Wilcox v. Birthwhistle (1999) 21 Cal.4th 973, 977-979). Similarly, the use of the term "convicted" in Penal Code section 1732.5 was found to be facially ambiguous, since the term could mean reasonably mean either a current conviction or a prior conviction. (People v. Woodhead (1987) 43 Cal.3d 1002, 1007-1008).

A latent ambiguity is defined as "where the language employed is clear and intelligible and suggests a single meaning, but some extrinsic evidence creates a necessity for interpretation or a choice among two or more possible meanings." (Mosk v. Superior Court (1979) 25 Cal.3d 474, 495, fn. 18). A latent ambiguity is often found to exist when two otherwise unambiguous statutes regarding the same subject matter conflict. Thus, in Hale v. Southern California IPA Med. Group (2001) 86 Cal.App.4th 919, the court found that section 800 of the Corporations Code contained a latent ambiguity since subsection (d) of that section did not provide a monetary cap on the amount of a bond, while subsection (e) of that section did provide such a cap. (Id. at 922-924). Although not dealing specifically with the language of a statute, another prominent example of a latent ambiguity occurs in the context of interpreting the will of a person where the will clearly

refers to the deceased's children, yet extrinsic evidence indicates that a child has been adopted into or out of the deceased's family, raising doubts as to whether or not that child is covered by the will. (*See, e.g.*, Newman v. Wells Fargo Bank (1996) 14 Cal.4th 126, 134-137).

B. Professor Sax Fails To Comply With the Accepted Test For Determining Legislative Intent.

Professor Sax acknowledges that he was asked to provide "an analysis of the meaning of the subterranean stream provision of Water Code § 1200." (Sax Report, p. 6). Amazingly, Professor Sax never discusses the principles of statutory construction, never conducts a review of the language of Water Code section 1200, and never analyzes the language to determine if a facial or latent ambiguity exists which would justify a review of the legislative history and other materials extrinsic to the language of Water Code section 1200 itself. In an inexcusable break with the well-established authority laid down on dozens of occasions by the California Supreme Court, Professor Sax jumps, without comment or explanation, to a review of the materials extrinsic to the statutory language.

There is no legal analysis in either Part I, where Professor Sax provides a review of the relevant legal precedents at the time the Water Commission Act of 1913 was promulgated and passed, or in Part II, where Professor Sax discusses the Water Commission Act of 1913 itself. As a result of Professor Sax's failure to conduct a review of Water Code section 1200 in accordance with the law, all of the conclusions he reaches as to the Legislature's intent in passing Water Code section 1200, as well as all of the policy recommendations he makes in an effort to best implement such intent, are faulty. Absent a finding of a facial or latent ambiguity, there is simply no justification for

conducting a review of any material extrinsic to the language of Water Code section 1200 itself.

C. Water Code Section 1200 Is Not Ambiguous.

Giving the words used in Water Code section 1200 their plain, ordinary, everyday meaning, it is obvious that this statute is anything but ambiguous, as none of the relevant terms are susceptible to more than one reasonable interpretation. The pertinent portion of Water Code section 1200 can be divided into three components. The first component is that the SWRCB has permitting authority over "surface water." This component, of course, refers to water that is found on the surface of the earth.

The second component is that the SWRCB has permitting authority over something that is "subterranean." The term "subterranean" clearly refers to something beneath the surface of the earth. (*See* Webster's New World Dict. (3d College Ed. 1991) p. 1336). This is not ambiguous.

The third component is that whatever is subterranean must be a "stream[s] flowing through…channels" which are "known and definite." A stream is defined as "a current or *flow* of water…" (*Id.*, p. 1325)(emphasis added). The verb "flowing" is a derivative of "flow," which is defined as "to move as a liquid does; move in a *stream*, like water." (*Id.*, p. 519)(emphasis added). A channel is "the bed of a *running stream*, river, etc." (*Id.*, p. 234)(emphasis added). To be "known" is to be "within one's knowledge" and "understanding," (Id., p. 748) while to be "definite" is to "have exact limits." (*Id.*, p. 362). These terms are not only clear and unambiguous, but also redundant and mutually supporting. Indeed, there simply cannot be a stream that does not have

either a channel or flow; while flow does not depend upon the existence of a stream, a crowd can flow, for example, there cannot be a stream without flow. Moreover, there can be a flow of water without a channel, but a channel cannot exist without known and definite dimensions. Similarly, while a channel can exist without a stream or flow, such as a dry channel, a stream cannot exist without a channel.

The use of these three terms together demonstrates, unambiguously, that the SWRCB has permitting authority over two separate and unrelated categories of water: water found on the surface of the earth, including lakes and streams, and water which flows in an underground stream. None of the terms used individually can be construed any other way, and the use of such redundant and mutually supporting terms amply demonstrates that the plain meaning of the latter portion of Water Code section 1200 applies only to an underground stream, and not to any water found underground. As noted above, while it is appropriate to examine materials extrinsic to the specific language used in a statute when such language is susceptible to more than one reasonable interpretation, its is not appropriate to do so "when the language of a statute is unambiguous." (Williams v. Superior Court (2001) 92 Cal.App.4th 612, 621). Since the language of Water Code section 1200 is clear and unambiguous, Professor Sax was not justified in extending his review to include the legislative history and other extrinsic materials.

IV. PROFESSOR SAX'S REVIEW OF THE LEGISLATIVE HISTORY IS FAULTY

Even assuming that a review of the legislative history were appropriate in determining the legislative intent behind Water Code section 1200, the account provided

by Professor Sax is both erroneous and inadequate. In fact, Professor Sax's own words illustrate the lack of foundation for his conclusions as to the intent of the Legislature.

Professor Sax begins his review of the legislative history by examining the original legislative draft of a bill prepared by the Conservation Commission in 1912, including a detailed examination of the transcript of a hearing held on that bill on May 28, 1912. (Sax Report, p. 27-31). According to Professor Sax, this original bill gave the SWRCB the authority "to protect those with surface stream rights against off-tract underground pumpers 'where it is claimed that such development and carrying away of water is diminishing the supply of water of such riparian owner or appropriator of water from the streams or water or underground water.'" (Sax Report, p. 27). This quote is essentially equivalent to the legislative purpose that Professor Sax claims was behind the adoption of Water Code section 1200. Professor Sax states "My analysis reveals that the legislative purpose was to protect the integrity of the permitting agency's jurisdiction over surface stream appropriations by preventing unpermitted taking of groundwater that appreciably and directly affects surface stream flows." (Sax Report, p. 7).

The cited language of the original bill seems to be compelling evidence in support of Professor Sax's analysis – except for the simple fact that the original bill *was not passed.* As Professor Sax admits, the language which of what is now Water Code section 1200 was added by an amendment on April 30, 1913, almost 12 full months after the hearing on the original bill which Professor Sax labors over. Thus, the excruciating detail that Professor Sax provides regarding the language of the original bill, as well as his discussion of the Conservation Commission's "cast of characters" (Sax Report, p. 29, fn.

88) such as Sam Weil, "the leading water law authority of his day," (Id., p. 30) and George C. Pardee, a "progressive Republican," (Id., p. 26), is completely irrelevant.

To determine whether or not the legislative history supports Professor Sax's conclusions as to the legislature's intent behind Water Code section 1200, the only relevant history is that regarding the bill that actually passed, including the amendment accepted on April 30, 1913. Unfortunately, as Professor Sax acknowledges, ***there is no relevant legislative history on this***. Professor Sax states

> "Strikingly, the subterranean stream language appeared for the first time at a late stage in the evolution of the law. It never came up in the Commission's report, in its original bill, in any of three Commission hearing sessions on the bill, or in the bill as first introduced in the Assembly, even though, as we have seen above, efforts to distinguish surface water and underground water engaged the bill's drafters at some length in the May 28th hearings the previous year. None of the suggested phrasing put forward in that hearing, such as "surface water and sub-stream flow" or "surface water and subsurface water within the banks of streams" or surface water and underground stream flow" appeared in the final bill as enacted."
>
> "Why did the bill's draftsmen use the *Pomeroy*/Kinney language, rather than one of the formulations that had been suggested in the previous year's hearings? **No documentation has been found to answer this question**, or to explain the reasoning for any of the other amendments made…" (Sax Report, p. 37-38)(emphasis added).

Since there is no specific legislative history that supports Professor Sax's conclusion that the intent of the legislature was to devise a permitting system where surface waters would be protected from impacts caused by the extraction of groundwater, Professor Sax resorts to supposition that is only loosely based upon fact. Rather than point to any direct evidence, such as a committee report, a hearing transcript, or other language in the amendment or bill, Professor Sax regales the reader with the "significant

tale" of Mr. Frank Short, "an influential representative of Central Valley agricultural interests" who "most likely" persuaded the Legislature that there would be constitutional problems associated with giving the SWRCB permitting authority over groundwater and surface water. (Sax Report, p. 34-39). According to Professor Sax, "Most likely, once they [the Legislature] were persuaded that there were constitutional problems...they simply...sought to make sure that they had prevented the most egregious opportunities for people to subvert the surface water permitting system" and the language regarding subterranean streams was "the only established legal tool for doing so, as it clearly covered what had been described in the hearings as 'sub-surface flow' of surface streams, or what Wiel had earlier described as a line that would protect streams against pumping that 'directly effects a surface flow.'" (Sax Report, p. 38-39).

Thus, according to Professor Sax, the amendment to the original bill was not really an amendment at all, but just a different way of stating the original intent. This is nonsense. Did Mr. Short actually persuade the Legislature that the original bill was unconstitutional? How vast was his influence? Did the Legislature really believe that the language finally adopted "clearly" stood for the proposition that Professor Sax claims? These are questions that can indeed be speculated upon, and Professor Sax certainly provides *possible* answers based upon snippets of evidence found in transcripts, old letters and newspaper articles. However, the plain fact of the matter is that there is no legislative history that supports Professor Sax's conclusions.

Even if, however, Professor Sax's suppositions were plausible, they are not the only explanation. Another explanation, which is equally plausible and suffers from the same lack of evidentiary support due to the missing legislative history as does Professor

Sax's suppositions, is that the Legislature knew what the original bill intended, and consciously changed the language so that the SWRCB would not have permitting authority over the extraction of subterranean water that would impact surface water. It is, after all, hornbook law that the removal of a provision contained in an original bill supports the conclusion that the bill actually passed should not be construed to include the omitted provision. (Hess v. Ford Motor Co. (2002) 27 Cal.4th 516, 117 Cal.Rprt.2d 220, 233; *see also* Code of Civ. Proc. § 1858). In that case, where the legislative history is not conclusive, and "gives rise to conflicting inferences regarding the legislation's purposes or intended consequences, a departure from the clear language of the statute is unjustified." (Lewis v. County of Sacramento (2002) 93 Cal.App.4th 107, 123). Reliance on the plain language in such an instance is required "even if it is probable that a different objective was in the mind of the Legislature." (Id., p. 123-124).

Thus, even if Professor Sax's rendition of what really happened is accurate, it is not sufficient to justify his conclusions as to the intent of the Legislature in passing Water Code section 1200. Had the original bill passed, it might be harder to question Professor Sax's findings; but since it did not pass, and was significantly changed to include language which, on its face does not lead to the conclusion that the Legislature intended to create a system where the extraction of groundwater which affects surface water streams was subject to the permitting authority of the SWRCB, Professor Sax's conclusions must be accepted as nothing more than mere speculation.

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V. LONG-STANDING CONSTRUCTION OF WATER CODE SECTION 1200 BY THE SWRCB IS FURTHER EVIDENCE THAT PROFESSOR SAX'S CONCLUSIONS ARE INCORRECT AND UNRELIABLE

Even if the language of Water Code section 1200 was ambiguous, and the legislative history was simply not clear, additional extrinsic evidence can be examined. In determining the intent of the Legislature in drafting an ambiguous statute, administrative construction is highly instructive.

> "Consistent administrative construction of a statute over many years, particularly when it originated with those charged with putting the statutory machinery into effect, is entitled to great weight..." (DiGorrgio Fruit Corp. v. Dept. of Employment (1961) 56 Cal.2d 54, 61-62).

Administrative construction of a statute is given even greater weight when the Legislature and other interested parties have long acquiesced in the interpretation, particularly since the Legislature is presumed to be aware of a long-standing administrative construction. (Thornton v. Carlson (1992) 4 Cal.App.4th 1249, 1257; Horn v. Swoap (1974) 41 Cal.App.3d 375, 382). Where there is a long-standing administrative construction of a statute, such construction will be upheld unless it is clearly erroneous or unauthorized. (Nipper v. California Auto. Assigned Risk Plan (1977) 19 Cal. 3d 35, 45).

Professor Sax admits that the SWRCB has interpreted Water Code section 1200 as only providing it permitting authority over subterranean streams flowing through known and definite channels. (Sax Report, p. 5, 44-47).[3] Evidence of this interpretation is found in the SWRCB's January 2000 guidance document ("[u]nderground water not

[3] This is obvious from the fact that the third question posed to Professor Sax asked for an evaluation of the physical factors the SWRCB should evaluate when trying to determine if subsurface water was subject to its permitting authority under Water Code section 1200. Had the SWRCB felt, as does Professor Sax, that such permitting authority would depend upon the impact the extraction would have on a surface stream, it would not have asked about physical factors.

flowing in a subterranean stream…is not subject to the SWRCB's jurisdiction. Applications to appropriate such water, regardless of use, should not be submitted."), and in actual SWRCB decisions dating back to 1926. (Sax Report, p. 45, fn. 42; pp. 47-67).

In his review, Professor Sax tries to scrutinize and characterize each SWRCB decision in an effort to cast doubt on those aspects which do not support his conclusions, and to emphasize those portions that do. For example, while the decision in the *Garrapata Creek* case is the most recent SWRCB decision, and clearly demonstrates that the SWRCB construes Water Code section 1200 as only providing it permitting authority over subterranean streams flowing through known and definite channels, Professor Sax remarks that the case is "not a very good test case" because "it is the type of case which engenders the least controversy about the meaning and application of Water Code § 1200." (Sax Report, p. 50). The reason, of course, he feels the case is not a good test case is that the subsurface water in question was found to flow in a subterranean stream with a known and definite channel.

In other cases, even where the SWRCB finds that a subsurface water qualifies as a subterranean stream flowing through a channel with a known and definite channel, Professor Sax dismisses this finding as insignificant, and focuses instead on specific statements suggesting that "impact of pumping on a stream seems to be present (and important) in most cases where the Board takes jurisdiction. (Sax Report, p. 59-60). For example, although Professor Sax states that the SWRCB found that the physical setting of subsurface water near Stony Creek "comfortably fits the legal understanding of a California subterranean stream," he nonetheless finds that the decision "***could be read*** as

indicating that a test of whether water is jurisdictional is whether the surface stream is directly contributing to the water being pumped." (Sax Report, p. 58)(emphasis added).

Professor Sax grasps at these straws despite expressly acknowledging that the SWRCB has found permitting authority in some cases where there was no evidence that the extraction of subsurface water impacted a surface stream. Citing a staff investigation regarding Pilarcitos Creek, as well as the SWRCB's actual decision regarding Chorro and Morro Creeks, Professor Sax recognizes that the SWRCB "has taken jurisdiction despite the absence of hydrological connection" (Sax Report, p. 60) and "[i]mpact alone, however, is not understood to be sufficient, where there is nothing that can be characterized as a channel." (Sax Report, p. 58, fn. 178).

Clearly, the construction of Water Code section 1200 by the SWRCB, since 1926, has been in accordance with the express language of the statute. Permitting authority has been found only when there has been a subterranean stream flowing in a known and definite channel. While in some of these situations there was also evidence of an impact of the extraction of such water on a surface stream, that alone has never been sufficient grounds upon which to find SWRCB permitting authority. Since the SWRCB is charged with the implementation of Water Code section 1200, and the Legislature has acquiesced in its consistent application of that statute since at least 1926, such construction should be upheld as indicative of the legislative intent.

VI. CONCLUSION

The Sax Report is a well-written, painstakingly researched, and remarkably thorough work. It combines many bits and pieces of fact from several sources to generate a variety of compelling, thought provoking conclusions. Despite this, the Sax Report

must be rejected as it does not present a reliable, legally based analysis of the nature and extent of its permitting authority under Water Code section 1200. Any attempt to rely upon the conclusions contained in the Sax Report will be met with derision and will not withstand judicial scrutiny. To the extent that the SWRCB is still interested in a legal analysis regarding the nature and extent of its permitting authority under Water Code section 1200, it will need to commission an entirely new effort that must utilize the well-established principles of statutory construction.

Dated: April 1, 2002

O'LAUGHLIN & PARIS LLP

By _____
Tim O'Laughlin
Attorneys for San Joaquin River Group Authority

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April 3, 2002

VIA HAND DELIVERY

Mr. Paul Murphey
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000

RE: WRITTEN COMMENTS ON PROFESSOR SAX'S REPORT ON THE LEGAL CLASSIFICATION OF GROUNDWATER

Dear Mr. Murphey:

Pursuant to the State Water Resources Control Board's (SWRCB) March 7, 2002 Workshop Notice, the Department of Fish and Game (DFG) submits these written comments regarding Professor Joseph Sax's Report on the Legal Classification of Groundwater. At the outset, DFG would like to commend SWRCB for securing the expertise and experience of Professor Sax in dealing with this important statewide water issue. The report is an encouraging first step and DFG hopes this work will continue in an iterative process towards an ultimate solution.

Insofar as Professor Sax's recommended criteria, as a whole, establish an impact-based test for SWRCB jurisdiction, DFG wishes to express its support. Our agency has long advocated a jurisdictional test based on impacts to aquatic ecosystems. While the quantitative test suggested by Professor Sax is somewhat artificial, our agency accepts these recommendations as a tremendous step forward in the development of a sensible and administratively-workable impact test that is more closely aligned with the dynamics of hydrologic systems.

The following initial comments speak to Professor Sax's six recommended criteria for the use of presumptions in determining SWRCB jurisdiction, which are described on page 13 of Professor Sax's report:

- In Criterion #1, the word "substantial" is used twice – in relation to both the percentage of annual flow extracted from the stream recharge area and the amount of stream depletion during the critical flow period. It would help interested parties if this term was defined in some manner. Doing so would provide better notice and offer a level of predictability in administration. One suggestion is to incorporate impacts on biota into such a definition. Another would be to perhaps model the term after the definition of "significant effect on the environment" in the

CEQA guidelines.

- The term "critical flows" is also used within Criterion #1. DFG's understanding is that this term refers to the interaction of stream flow and water-dependent aquatic resources. This is not spelled out, however. Again, it may be helpful to provide some standard(s) in determining what constitutes "critical flows."

- Criterion #2 describes two situations in which a limited hydraulic connection between surface and groundwater will rebut a presumption of jurisdiction. The first of these situations involves the presence of a clay layer. As stated by Professor Sax, the pumping well must be screened below a clay layer that has a thickness and lateral extent adequate to restrict vertical movement of water, thereby reducing the hydraulic connection. There are no specific criteria for the minimum thickness or lateral extent. Presumably, these would be quantified by first determining what stream depletion is considered "substantial." DFG recommends that before this criterion may be used to rebut a presumption of jurisdiction, the well must be constructed so as to seal off groundwater above the clay layer. This is important as many wells have gravel outside of the casing that extends nearly up to the surface of the ground. This gravel pack allows shallower water to flow across the clay layer. Thus, it may be possible to rebut a presumption of jurisdiction on the basis of a clay layer even if hydraulic influence exists and a well has actual impacts on a stream.

- Criterion #2 also requires no measurable drawdown at the edge of the stream recharge area. The point of measurement is presumed to be at the point of maximum possible drawdown, but this is not specifically stated. If SWRCB plans to adopt this test, DFG suggests that some qualifying language be included to communicate that the purpose of the test is to demonstrate that the stream recharge area is sufficiently outside the pumping influence of the well, such that no substantial surface waters are diverted.

- Under virtually all of the criteria, the use of pump tests may be necessary. It would serve all interested parties if SWRCB provided standards for the performance of such tests – especially in relation to duration and method – in order to ensure an acceptable level of accuracy, uniformity, and predictability and to prevent repeated tests and their associated expenses.

- Criterion # 6 is apparently included because in some parts of California – particularly Southern California – groundwater is separated from surface water by a zone of partially saturated soils, otherwise known as the vadose zone. When the thickness of this zone is sufficient, variations in the elevation of the groundwater table does not influence surface water flows or infiltration rates. The logic behind this exemption from the presumption of jurisdiction is that pumping of groundwater in this situation does not influence or impact surface flows. This is partially correct. However, there are exceptions that can be important. DFG suggests that SWRCB modify the language of the criterion to cover the following:

    - Whenever the volume or rate of pumping is sufficient to cause expansion of the vadose zone beneath the surface stream

recharge zone the jurisdictional presumptions shall apply;

- Whenever the thickness of the vadose zone varies seasonally such that a high groundwater table is necessary to maintain surface water flows or habitats, the jurisdictional presumptions shall apply.

Such provisions would prevent a "rush to pump" to keep or develop a vadose zone that will remove SWRCB jurisdiction. The exemption as now stated does not prevent such an expansion of impacts.

DFG suggests the adoption of formal regulations to flesh out the aforementioned terms and offers any technical assistance it can provide in their development.

On a policy note, the recommended criteria and the associated changes to the administration of Water Code Section 275 raise the difficult issue of the "grandfathering" of wells. In particular, DFG is curious as to whether pre-existing wells will be exempt from the new criteria and instead be subject to the current "bed and banks" test. While DFG does not have any ready solutions to the potential legal and practical problems this issue presents, our agency hopes to be involved in any process designed to address this important matter.

Finally, DFG is concerned about the issue of securing property access in order to perform any necessary pump tests and related information gathering. Clearly, the success of the administration of Professor Sax's recommended criteria depends on such access. DFG looks forward to working out a process whereby interested parties may cooperatively secure permission to enter property for purposes of gathering necessary information. As Professor Sax points out in his report, it may be advisable to secure legislative authority for entry for the limited purpose of information-gathering. DFG seeks involvement in any such process, as any solution that SWRCB develops may ultimately have effects on interested parties, including our agency.

DFG again expresses its support for the criteria suggested by Professor Sax as a positive first step and offers its thanks to all involved for their hard work. Again, our agency hopes that this process will continue to be pursued actively towards an ultimate solution. Thank you for the opportunity to present these comments.

Sincerely,

Harllee Branch
Office of the General Counsel

HB/hb

cc:

Department of Fish and Game
Ms. Diana Jacobs, Science Advisor

Mr. Michael R. Valentine, General Counsel
Ms. Nancee Murray, Senior Staff Counsel

Department of Conservation, Division of Mines and Geology
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March 28. 2002

State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-0100

Re: SWRCB Jurisdiction Over Subterranean Streams
Flowing Through Known and Definite Channels; Joe Sax Report

Dear Board Members:

I am writing you on behalf of the Board of Supervisors of the County of Butte, in an effort to persuade you not to expand your regulation of groundwater beyond the type of subterranean streams generally described in Los Angeles v. Pomeroy (1899) 124 Cal 597. Please accept this letter as testimony provided for the April 10, 2002 Workshop regarding the above referenced subject.

Professor Sax's report advocates a risky course of action. Professor Sax, for example, acknowledges that the Legislature has declined for almost 100 years (since the enactment of Water Code Section 1200 in 1914) to expand SWRCB's jurisdiction and is unlikely to do so now. He nonetheless recommends that the Board boldly seize the "end run" opportunities he sets forth in order to do so itself. As others have pointed out, the existing legislative policy set forth in the report, far from being a signal to the Board to depart from legislative policy, ought to be a signal for the Board to remain within it.

Professor Sax's recommendation concerning existing legislative policy (Water Code Section 1200) is fraught with danger. Professor Sax's conclusion that the policy of Water Code Section 1200 was and is to prevent the Board's "permitting authority over surface waters from subversion by identifying groundwater diversions that in some 'substantial' way undermine that authority" (Report, pp. 12-13), appears to be correct. However, his recommendation that the Board should "implement existing statutory authority by taking jurisdiction over groundwater uses that diminish appreciably and directly the flow of a surface stream" (Report, p. 92) necessarily entails that the Board ignore the substantial body of California case law concerning water rights which has continued to develop since Water Code Section 1200 was enacted.

It is apparent that adopting Professor Sax's recommendations and attempting to expand the Board's jurisdiction would constitute an unwarranted embarkation down a very slippery slope, at the risk of effectively "transforming" large portions of groundwater basins into surface water, which would turn established water rights law on its head Why do so when it is possible for the Board to continue to implement legislative policy, while also continuing to respect established water rights law?

Because Professor Sax advocates expanding SWRCB's jurisdiction, the Board of Supervisors of the County of Butte requests that the State Water Resources Control Board reject the recommendations contained in Professor Sax's recent report on the State Board's jurisdiction over groundwater.

Thank you for your consideration of this letter. If you have any questions, please feel free to call me at (530) 538-7621 or correspond with me at the above address.

Very truly yours,

Bruce S. Alpert,
Butte County Counsel

By _____
Robert W. MacKenzie
Chief Deputy County Counsel

enclosure

cc: Board of Supervisors
Lawrence Odle, Interim Chief Administrative Officer
Ed Craddock, Water & Resource Conservation Director
Roger Masuda, Esq.
BBWUA
NCWA
ACWA

(g:\rob\SWRCB3)

STATEMENT OF THE CITY OF SAN BERNARDINO, MUNICIPAL WATER DEPARTMENT TO THE STATE WATER RESOURCES CONTROL BOARD CONCERNING

"REVIEW OF THE LAWS ESTABLISHING THE SWRCB'S PERMITTING AUTHORITY OVER APPROPRIATIONS OF GROUNDWATER CLASSIFIED AS SUBTERRANEAN STREAMS AND THE SWRCB'S IMPLEMENTATION OF THOSE LAWS SWRCB No. 0-076-300-0"

April 2, 2002

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(Continued)

1. Executive Summary

The City of San Bernardino Municipal Water Department urges the Board to reject any regulatory or adjudicatory action in reliance on "Review of the Laws Establishing the SWRCB's Permitting Authority over Appropriations of Groundwater Classified As Subterranean Streams and the SWRCB's Implementation of Those Laws" (the "Report").

The Report does not address the practical consequences of its analysis and recommendations. Unlike legislative changes, which can make provision for protection of existing rights, simply declaring by fiat that water once treated as groundwater is now surface water is tantamount to declaring that even senior groundwater rights now belong to junior surface water appropriators. If this Board agrees that its jurisdiction should be expanded, that recommendation should be forwarded to the Governor and the Legislature. California's population and economy depend upon the stability and seniority of groundwater rights, and significant changes in those rights are a matter for the Legislature.

The Report concludes, however, that the Legislature will reject any such changes, and so recommends, without analysis, development or explanation, that the Board circumvent that legislative policy decision through use of the Public Trust and Reasonable Use doctrines. The Board should obviously refuse to usurp by indirection, interpretation or erosion powers that the Legislature has explicitly withheld.

Even evaluated on its own terms, the Report's omissions, biases and unexplained assumptions overshadow its merits.

The Report fails to directly analyze the basic question posed by the Board: "What is the scope of the State Water Resources Control Board's (SWRCB) water right permitting authority over groundwater?[1]" The Report expends virtually no effort to explain the continuing reasons for the prohibition against the Board issuing permits for groundwater appropriations. As its title ("Review of . . . Subterranean Streams . . .") reveals, the Report instead deals with the sole *exception* to the basic rule confining the permitting jurisdiction of this Board to surface water appropriations. The Report speculates that the underlying limitation of this Board's power to surface water was based on an historic mistake of law, and urges the expansion of the *exception* for subterranean streams to partially rectify this supposed "mistake"without even similarly speculating on, let alone studying, the persistent reasons for the rule to which it is an exception. The Report thus disables itself from meaningfully answering the question this Board asked.

Although seeming to concede that groundwater rights have a legitimacy and status coequal with surface water rights, the Report proceeds throughout on the basis of an opposite, unstated premise – that groundwater rights must yield to surface water rights whenever the two are in conflict. Thus, the Board is asked to adopt an "impact" test that would have the Board forbid those exercises of groundwater rights that "impact" surface water rights – *but not vice versa* – in order to "safeguard established rights in surface stream flows[2]." If the exercise of junior rights to surface water "impacts" the exercise of senior groundwater rights,

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[1] Report, p. 4.

[2] Report, p. 92.

however, no matter how vital those latter rights are, that is not even a topic for discussion, let alone intervention.

Finally, the Report depends for its conclusions on the proposition that its key statute does not mean what it says when it confines the Board's jurisdiction over groundwater to underground "streams flowing through known and definite channels." Instead, the Report claims, in overt defiance of the statutory language, that "the legislation was designed to create an impact test (impact of pumping on surface stream flows), rather than seeking to identify a physical entity with a specific shape, ***despite the conventional 'subterranean stream' language the law picked up from the old treatises.***"[3] Because this is an age of "modern-day high-powered pumps [that] were not extant at that time,"[4] the Board is urged to jettison the musty old language in favor of the supposed underlying intent. The statute's language, which has been unaltered for 89 years, and which had a known meaning long before that from what the Report dismisses as "old treatises," is to be read out of the statute as irrelevant. The Report instead insists that "the literal terms of a statute sometimes simply do not describe legislative intent."[5]

At the point that the Report turns its back on the language of the statute in favor of a filtered, partial and at places speculative history, it lost sight of three fundamental rules of statutory interpretation: (1) legislative history cannot be consulted to create an ambiguity, only to resolve one; (2) exceptions to a general

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[3] Report, p. 7, emphasis supplied.

[4] *Ibid.*

[5] Report, p. 11, n.. 26.

rule (such as the exception conferring jurisdiction over underground streams) are to be narrowly construed, not inflated; and (3) words cannot be clipped out of a statute because they are inconvenient to a theory; the job of those who interpret a statute is to give meaning to each word in that statute.

The Board has before it a deeply flawed document, one that ignores public policy and that cannot stand as the basis of public policy.

2. The Report Ignores the Practical Consequences of its Recommendations

This Board estimates that 40 percent of the water used in California is groundwater.[6] Our society and the economy that supports it have grown up around the seniority and stability of groundwater rights. Any analysis that concludes that waters which had commonly been thought of as outside of this Board's permitting authority are, or ought to be, declared by fiat as within it is no mere academic exercise. It means that even the most senior rightsholder of what had been thought of as groundwater has no rights at all, but instead must come running to this Board for a permit, and even then will be junior to the most junior surface water appropriator.

The Report insists that its vision of a "logical" public policy is for this Board to have permitting power over appropriations of all groundwater as well as all surface water. It warns that "Water Code § 1200 is [not] suited to resolve California's 21st Century water problems."[7] But the Report warns just as

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[6] SWRCB, "Groundwater in California, " http://www.swrcb.ca.gov/general/publications/docs/ground-water.pdf, page 1.

[7] Report, p. 90.

strenuously that the Board must stay away from the Legislature to achieve any amendment to the statute. Why? The Report's candid reason is that the Legislature has, with full knowledge of the Report's arguments, steadfastly refused to grant this Board those powers since the beginning of the last century:

> Experience shows the reluctance of the legislature to provide for comprehensive regulation of groundwater, even in the context of local control, as illustrated by the limitations in recent groundwater management legislation. The prospects for comprehensive legislative reform are therefore unpromising.[8]

One would imagine that this persistent and unwaivering (if unexplained) policy decision of the governing body that created this Board would be a signal to the Board to refuse to subvert that decision.

Instead, the Report counsels the Board to expand the reach of the limited exception conferring permitting jurisdiction over underground streams "flowing through known and definite channels," and to somehow use this jurisdiction, along with the Public Trust and Reasonable Use doctrines, in undefined but aggressive ways to circumvent the uncooperative Legislature.[9]

But only the Legislature could protect existing rights while expanding this Board's powers, if it chooses to do so. Oddly, the Report turns the ability of the

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[8] Report, p. 91, footnote omitted. See page 41, where the Report calls this legislative reluctance something that long ago became "the political reality," and page 44, where the Report concludes: "This brief review makes clear that the legislature has repeatedly been made aware of the Board's limited jurisdiction over groundwater under Water Code § 1200, and has shown no inclination to expand that jurisdiction . . .."

[9] The Report recommends on its last page, without elaboration, discussion or explanation, "[p]roactive use by the Board of its authority under Water Code § 275 and any other sources of jurisdiction it has, to implement the constitutional prohibitions on waste, unreasonable use, and unreasonable methods of use; to protect the public trust; and to safeguard established rights in surface stream flows." Report, p. 92.

Legislature to protect existing uses into a drawback:

> A great deal of subsurface water has been pumped for a long time, and any comprehensive permitting system would have to address existing uses. To do so presents complex problems of fairness to those dependent on existing uses, and perplexing questions of implementation. Illustratively, would a pumper of tributary groundwater since 1980 be integrated as of that date with appropriators from the stream, or be treated as a new appropriator, as of the date of a newly required permit application? What if 1980 surface stream appropriators are subject to bypass flow limits in their permits? Would such limits be newly imposed on pumpers of tributary water? Or should there be recognition of longstanding existing uses through some form of "grandfathered rights" (an approach that presents its own fairness problems)?
>
> Numerous such questions would arise under new legislation if it extended Board jurisdiction over existing uses, such as the application of permit requirements to situations such as adjudicated groundwater rights, and to established groundwater banking programs.[10]

However, the Report's alternative – for this Board to instead declare by fiat that a right that once belonged to "A" now belongs to "B"– does not *solve* the problem of fairness; it just *evicts it* from the analysis. This is no exercise in "logic"; it is an exercise in economically and socially destructive, unauthorized, and indeed unconstitutional taking.

3. The Report Provides no Meaningful Answer to the Board's Question About the Scope of its Permitting Authority Over Groundwater

A. Lacking any Reasons for the Legislature Continuing to: (1) Divide "Surface Water" from "Groundwater," and (2) Grant This Board Jurisdiction Over Only Surface Water, The Report Lacks any Basis on Which to Respond to This Board's Question.

In a report that elevates speculating on legislative intent based on secondary sources to the point that it recommends ignoring the statutory language to the

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[10] Report, p. 91.

extent that it fails to capture the supposedly inferred intent, it is remarkable that the Report includes no discussion of what policies caused the Legislature to persist in limiting the Board's jurisdiction to surface water for the past 89 years.

The Report tells us one thing: This legislative refusal is not a product of the Legislature's ignorance of or disagreement with the Report's scientific argument that the categories are not wholly discrete. To the contrary:

> [T]hose who drafted the legislation that became the Water Commission Act were not ignorant of the interactive relationship between groundwater and surface water. They knew perfectly well that much "percolating groundwater" was on its way to or from a surface stream, and they knew that water appeared, disappeared and reappeared on the surface as streams flowed. It was, after all, 1913 and not 1319 in which they were drafting legislation.[11]

So if ignorance was not the reason, what *was* the reason?

The Report tells us one other thing. The boundary between surface water and groundwater is the boundary of the jurisdiction of this Board, and for almost a century the Legislature has repeatedly refused to enlarge the jurisdiction of this Board to include appropriations of groundwater.[12] Indeed the Report recognizes that as recently as the adoption of the area of origin statutes "the legislature added § 1221, stating 'This article shall not be construed to authorize the board to regulate groundwater in any manner.'"[13]

The Report is openly critical of this choice, speculates without much evidence that it was the product of a mistake in 1913 as to the Legislature's constitutional

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[11] Report., p. 3.

[12] Report. p. 42 ["[I]n a variety of statutory provisions as well as legislative studies, the legislature's posture toward statewide groundwater has been set down unambiguously".].

[13] *Id.*

authority,[14] and details those states that have handled matters better, from the Report's perspective[15]. But we are left to guess at why California still has not taken this path. This is an especially odd omission in a report that focuses so minutely on the history of the narrow *exception* to this rule, for underground streams.

Rather, the Report by its very silence asks us to attribute the Legislature's continuing and long refusal to centralize the permitting of all water appropriations in this Board to a lack of "logic" in the face of known facts, to an inexplicable quirk, or to a constitutional delusion – a public policy version of St. Vitus Dance.

But if the Board does not know *why* the line between surface water and groundwater is being drawn, or believes that there is no reason for it at all, how can it know *where* to draw this line?

It is not our aim to rewrite the Report in this commentary. We suggest, however, that the beginning of an answer as to why the Legislature insists on decentralization of power to allocate this resource must focus on four principles:

First, this is not at heart a debate about the science of water, and it makes no more sense to ask engineers to answer this question than it does to ask them to design bathtubs for angels. This is a question of *political* science. ***The Legislature has made a judgment about the jurisdiction of this Board, not about hydrogeology.***

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[14] "Most likely, once they were persuaded that there were constitutional problems in creating an integrated system (which is what the Commission and the Johnstone bill had originally sought), they simply reconciled themselves to a bifurcated system, and sought to make sure that they had prevented the most egregious opportunities for people to subvert the surface water permitting system." Report, p. 38.

[15] Report, pp. 68-79.

Second, and with that obvious but glossed-over point accepted, we can revisit the truism that "the waters of the state [are] of transcendent importance. Its waters are the very life blood of its existence." *Gin S. Chow v. City of Santa Barbara* (1933) 217 Cal. 673, 702. With the power to allocate water in this state comes the power to determine which cities will grow and which will wither, where our mounting population can live, which fortunes will be made and which lost. Would Californians repose that stranglehold over their destiny in one unelected board?

Third, the history of groundwater regulation in this state has been one of local control. The Legislature saw transcendent state interest in surface waters, which may traverse many localities, whereas local basins could and should be locally regulated.[16] Both state and federal programs continue to emphasize local control over watershed management rather than *ad hoc* management from afar, as it produces more informed and more supportable actions.

Fourth, under our laws, a right to appropriate groundwater has equal dignity with a right to appropriate surface water; the water rights *not* granted by this Board are as valid, and as important, and as worthy of protection as those that are.

With these principles in mind the fallacies of the Report come into focus, and its strange and failed attempt to construct a public policy based solely on the

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[16] See Report, p. 42, which cites to an Assembly Interim Committee Report that concluded: "In most areas of the State, the key to the solution of ground water problems lies in local attitudes and political feasibility....Water agencies expressed a strong desire to solve their problems themselves and to manage ground water basins locally. The committee agrees that local management is desirable and ...provides simplified solutions to many of the ground water basin management problems."

exception for underground streams is revealed as foreordained to failure.

B. Report Improperly Assumes that Surface Water Rights Must Prevail Over Groundwater Rights Wherever the Two Come Into Conflict

A central lapse of the Report is its unstated and unsupported assumption that wherever groundwater rights and surface water rights come into conflict, such that the exercise of one diminishes the other, groundwater rights must yield to surface water rights.

The Report thus assumes that the paramount policy of the state is to "safeguard established rights in surface stream flows.[17]" Groundwater rights will be suffered to exist, but only where they do not proximately impact surface water rights. In an age of "high-powered pumps," the Board's jurisdiction over groundwater must be somehow expanded.[18]

But the obverse proposition is ignored. No corresponding policy is imagined that protects groundwater appropriators from diversions of surface waters that diminish, for example, historic recharge. The Report omits mention of cases such as *City of Lodi v. East Bay Municipal Utility District* (1936) 7 Cal.2d 316, where the holder of groundwater rights obtained an order restraining the defendants from storing or diverting any water from the Mokelumne River, or from regulating the flow thereof, so that the water table in the underground strata from which the plaintiff obtains its supply is not unreasonably lowered.

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[17] Report, p. 92.

[18] Report, p. 7.

Although nevertheless not disputing that groundwater rights have a legitimacy and status coequal with surface water rights, the report proceeds throughout on the basis of an opposite, unstated premise – that groundwater rights must yield to surface water rights whenever the same water is sought by both surface water and groundwater rightsholders. Thus, the Board is asked to adopt an "impact" test that would have the Board forbid the exercise of groundwater rights that "impact" surface water rights in order to "safeguard established rights in surface stream flows[19]" – *but not vice versa.* If the exercise of junior rights to surface water "impacts" the exercise of senior groundwater rights, no matter how vital those latter rights are, that is not even a topic for discussion, let alone regulation.

The only support attempted for this central but unarticulated premise is found in a discussion of pueblo rights, where the Report presents the following, in underlined quotes:

> Because the flow of the river is dependent on the supply of water in the San Fernando Valley, it has also been held that the pueblo right includes a prior right to all of the waters in the basin.[20]

What this quote explicitly tells you is that a pueblo right is, in part, a groundwater right "to all of the waters in the basin." This principle obviously does not express or imply that all surface water rights are, in general, also groundwater rights "to all of the waters in the basin." The latter proposition is obviously not true and there is no authority for it.

The Report's unstated premise is the lens through which it looks at the

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[19] Report, p. 92.

[20] Quoting *Los Angeles v. Glendale* (1943) 23 Cal.2d 68, 73, citation omitted.

otherwise unremarkable and narrow exception of Water Code Section 1200, to which we next turn.

C. The Report Artificially Confines Itself to a Discussion of the Board's Exceptional Jurisdiction Over "Known and Definite" Underground Streams

Rather than consider the policies that are being served by the distinction between "surface water" and "groundwater," the Report seeks instead to extrude the rule from its exception, and so turns to the history of Water Code Section 1200, which carves out an exception granting the Board permit jurisdiction over "subterranean streams flowing through known and definite channels."

The Report recognizes that this *is* an exception to the general rule denying permit jurisdiction over groundwater:

> The concern was essentially to close a loophole that would have been left if any taking of water from a subsurface location would leave the permitting agency powerless in the face of wells or tunnels that were effectively underground facilities for withdrawing stream water.[21]

We accept this fully. But even perfect knowledge about "wells or tunnels that were effectively underground facilities for withdrawing stream water" tells one approximately nothing about the continuing public policies behind the underlying distinction between "stream water" and "groundwater."

Heedless of this, the Report is finally titled: "Review of the Laws Establishing the SWRCB'S Permitting Authority over Appropriations ***of Groundwater***

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[21] Report, p. 7. As the Report concludes, "In short, all the evidence we have indicates that the legislative language was designed to exclude groundwater generally, except for that which was functionally part and parcel of a surface stream – in the sense of pumping that directly affected surface flow." *Ibid.*, p. 39.

Classified as Subterranean Streams and the SWRCB'S Implementation of Those Laws." Remarkably, *none* of the six questions posed by the Board and listed on page 4 of the Report asked about the narrow subject of "subterranean streams," and nothing useful is gained by writing a report exclusively addressing such streams.

The reason for the Report's self-confinement to the exception (as far as can be gleaned) is that a broad reading of this exception (so as to make *absolutely certain* that a stream is not drained by underground facilities) might ultimately swallow the rule against jurisdiction over groundwater. Unanchored by any reason for a distinction and a policy it thinks fatuous, the Report evidently thinks this approach is plausible. It is not.

D. The Report's Attempts at a Broad Construction of the "Subterranean Streams" Exception Were Fruitless

The evident purpose of the Report's infinitely detailed but almost perfectly unrevealing history of Water Code Section 1200 is to persuade us that this exception should be broadly construed. While the effort was ultimately unsuccessful and was at the end abandoned in favor of jettisoning the language altogether and turning to undeveloped but aggressive of the Public Trust and Reasonable Use Doctrines (of which more *infra*), the Report omitted common rules of interpretation which would have led it in more fruitful and accurate directions.

1. The Narrow Language of Water Code Section 1200 Does not Allow a Broad Construction

Water Code Section 1200 provides unrelentingly redundant pleas to be *narrowly* construed, but the Report picks up on none of them.

A close look at the phrase "subterranean streams flowing through known and definite channels" reveals a remarkable four-fold redundancy:

- Could one imagine a "stream" that was not "flowing"? Were it not flowing, it could not be a stream.
- Likewise, could one picture a "stream" that "flows," but not through a "channel"?
- Is a "channel" a "channel" if it is not "definite"?
- Finally, could one declare a channel to be "definite" if it is not "known"?

Hutchins teaches us that these terms are all intrinsic to the idea of a watercourse.[22] Because these terms are intrinsic, they are patently redundant, and reflect an insistence that the phenomenon being called a "stream" is just that and not something else. The Legislature is literally saying: "And I mean it!"

To suggest a "broad construction" at the end of all of these attempts to confine the exception is more than ironic; it is defiant.

2. Once the Report Recognized Jurisdiction Over "Subterranean Streams" as an Exception, it Should Have Recognized that Exceptions Must be Narrowly Construed.

A major barrier to an expansive reading of the "subterranean streams" exception, which the report fails to mention, is that we must "narrowly construe"

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[22] "There must be a stream, usually flowing in a particular direction . . .. It must flow in a definite channel, having a bed or banks, and usually discharge itself into some other stream or body of water." Wells A. Hutchins, *The California Law of Water Rights* 21 (1956), quoting *Sanguinetti v. Pock* (1902) 136 Cal.466, 471-472.

provisions that are "exceptions to the general statutory scheme."[23]

Although the Report might hope for a multiplication of instances where the Board determines that the "walls" of a "channel" are mountain ranges, and the "bed" of the "stream" is an entire valley floor[24], this would hardly be a "narrow construction."

3. Having Failed to Identify an Ambiguity in the Phrase "Subterranean Streams Flowing Through Known and Definite Channels," Resort to Legislative History is Improper.

The Report's protracted legislative history of Water Code Section 1200[25] reflected admirable diligence, but had nothing to add to the "interpretation" of the redundantly clear language of that statute.

To any reader of that history inclined to grasp at puffs of smoke, the California Supreme Court, which knows something about statutory interpretation, instructs us as follows:

> In interpreting statutes, we follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law, ""whatever may be thought of the wisdom, expediency, or policy of the act."" [Citation.] We give the words of the statute "'their usual and ordinary meaning.'" [Citations] . . . "If there is no ambiguity in the language of the statute, 'then the Legislature is presumed to have

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[23] *Korean American Legal Advocacy Foundation v. City of Los Angeles* (1994) 23 Cal.App.4th 376, 397 citing *City of National City v. Fritz* (1949) 33 Cal.2d 635, 636; *Telefilm, Inc. v. Superior Court* (1949) 33 Cal.2d 289, 297; *San Diego Union v. City Council* (1983) 146 Cal.App.3d 947, 954; *Marrujo v. Hunt*, (1977) 71 Cal.App.3d 972, 977; *Harris v. Alcoholic Beverage Control Appeals Board* (1962) 201 Cal.App.2d 567, 571; *Corey v. Knight* (1057) 150 Cal.App.2d 671, 680.)

[24] Report, p. 51.

[25] Report, pp. 26-39.

> meant what it said and the plain meaning of the language governs.'" [Citation.] 'Where the statute is clear, "courts will not interpret away clear language in favor of an ambiguity that does not exist." [Citation.]'" [Citation.]

People v. Loeun (1997) 17 Cal.4th 1, 7.[26] If, and only if, a statute is ambiguous "we may look to the history and background of the statute to ascertain legislative intent. [Citation.]" *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 129. Otherwise:

> In a case such as this one when the language of the statute is clear on its face, we may not consider extrinsic evidence to determine the intent of the Legislature. . . . We may not speculate that the Legislature meant something other than what it said, nor may we rewrite a statute to make express an intention that did not find itself expressed in the language of that provision. [Citation.]
>
> . . .
>
> Although [something else] may well have been the intent of our Legislature, this is not what the statute says. As stated by our Supreme Court [citation], a court must follow the plain meaning of statutory language "'". . . even if it appears probable that a different object was in the mind of the legislature."'"

Wilson v. Safeway Stores, Inc. (1997) 52 Cal.App.4th 267 272.

The Report does not claim that the language of Section 1200 is ambiguous. To the contrary, it insists that the language was used precisely because it was

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[26] See also *Kobzoff v. Los Angeles Harbor/UCLA Medical Center* (1998) 19 Cal.4th 851, 861 ["The statute's plain meaning controls the court's interpretation unless its words are ambiguous. If the plain language of a statute is unambiguous, no court need, or should, go beyond that pure expression of legislative intent. [Citation.]"]; *Ventura County Deputy Sheriffs' Assn. v. Board of Retirement* (1997) 16 Cal.4th 483, 493 ["Therefore, if a statute is unambiguous, it must be applied according to its terms. Judicial construction is neither necessary nor permitted."] *People v. Lawrence* (2000) 24 Cal.4th 219, 230 ["[S]tatutory language generally provides the most reliable indication of [legislative] intent [citation]."]"; *Hartford Fire Ins. Co. v. Macri* (1992) 4 Cal.4th 318, 326.

familiar and had a well-known history.[27] Any attempt to contradict that language through resort to legislative history was therefore improper *ab initio.*

E. The Report's Decision to *Ignore* the Statutory Language in Favor of the Legislature's Unarticulated and Undemonstrated "Intent" is Contrary to Law

Having failed to find any ambiguity in the clear and well-worn phrase "streams flowing through known and definite channels," having failed to locate any rule of interpretation that would allow anything other than a narrow reading of those words, the Report simply announces that it is abandoning the language for the imagined "intent" of the Legislature.

The steps the Report takes to rid itself of the pesky statutory language are spelled out on page 7 of the Report. It begins with the unsurprising proposition that the purpose of Water Code Section 1200 was "essentially to close a loophole . . . [for] wells or tunnels that were effectively underground facilities for withdrawing stream water." Then it abstracts this specific purpose into being "to protect the integrity of the permitting agency's jurisdiction over surface stream appropriations by preventing unpermitted taking of groundwater that appreciably and directly affects surface stream flows." Then it notes that because "modern-day high-powered pumps were not extant at that time" we need to capture that threat through an "impact test (impact of pumping on surface stream flows), rather than seeking to identify a physical entity with a specific shape".

At this point, the Report remembers that it is burdened with statutory

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[27] "The subterranean stream language . . . was the only established verbal tool . . ." Report, p. 38.

language, so it simply concludes that rather than interpret away this language, it needs to go follow its derived intent "despite the conventional 'subterranean stream' language the law picked up from the old treatises." We are assured that this operation "represents a more faithful implementation of the legislative purpose than any catalog of physical characteristics." Lest there be any doubt that the Report has simply decided not to care any longer what the statute says, it spells this out on page 11 at footnote 26:

> Because I conclude that this was the legislative intent, the so-called "bed and banks" test of jurisdiction is inappropriate, nor can legislative intent be implemented by efforts to define what constitutes a "definite channel[]," or when groundwater water is "flowing" through such a channel, notwithstanding the literal language of the statute. It should be emphasized that the literal terms of a statute sometimes simply do not describe legislative intent. See *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604 (1978) (holding that groundwater is not a "valuable mineral" within the meaning of the General Mining Law of 1872, 30 U.S.C. § 22).

The Report must have been written on the supposition that its readers would not take the trouble to read *Andrus v. Charlestone Stone.* Far from holding that statutory language may be discarded if one knows the "intent," what the Supreme Court held is that the word "mineral" was ambiguous and needed interpretation:

> "The word 'mineral' is used in so many senses, dependent upon the context, that the ordinary definitions of the dictionary throw but little light upon its signification in a given case. . . .*Northern Pacific R. Co. v. Soderberg*, 188 U.S. 526, 530 (1903).

436 U.S. at 610. So the Court simply consulted the legislative history in order to *interpret* whether water should be considered a mineral because "Congress' general conception of what a 'valuable mineral' was for purposes of mining claim location is of obvious relevance in construing the 1872 law." *Ibid.* at p. 611, fn. 8. Were this

case to be relevant to the Report's preposterous postulate, the Supreme Court would have had to say that it *did not care* whether water was a mineral or not, because it wanted to implement the intent of the statute regardless of its language.

In California, such an operation is forbidden by Code of Civil Procedure Section 1858:

> In the construction of a statute . . . the office of the judge is simply to ascertain and declare what is in terms or substance contained therein, not to insert what has been omitted, *or to omit what has been inserted* . . .

(Emphasis supplied.) As the California Supreme Court said:

> This court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed. This court is limited to interpreting the statute, and such interpretation must be based on the language used.

Seaboard Acceptance Corp. v. Shay (1931) 214 Cal. 361, 365; *Khajavi v. Feather River Anasthesia Group* (2000) 84 Cal.App.4th 32, 46.

The central premise of the Report is that it has somehow gleaned, from the ashcans of the legislative process, the 1913 Legislature's unenacted "true" intent (although from exactly what scraps this intent is deduced remains vague). Then, armed with that intent, the Report proclaims that it knows how the 1913 Legislature would have rewritten the statute had the Legislators survived term limits and the limits of their natural lifespans and learned about high-powered pumps. Then the Report concludes that this Board should ignore the language of the statute in favor if the "impact" test that the Report concocts to address this threat.

If the Board accepts this Report's unique analysis, any action based on it will

have a very short life in our courts.

4. Conclusions

A. The Report's Attack on the "Illogic" of Decentralized Power is Itself Illogical

The Report's first premise is discontent at the Legislature's insistence on the artificial categories of "surface water" and "groundwater."

But the law is almost entirely composed of legislated categories that imperfectly conform to a fluid world that came to exist without these categories in mind. Law students have been taught for more than a century that "the law is a seamless web."[28] Modern physics teaches that "in principle, the flap of a butterfly's wing in one hemisphere could cause a hurricane in the other hemisphere."[29] Small wonder that actions taken in groundwater can affect surface water, and vice versa.

But as the report goes on, it is clear that this is not an essay on hydrogeology, but about power and economic control. It is an exhortation for the Board, Prometheus-like, to seize – by regulation, interpretation, enforcement, other doctrines, or whatever other means it can think of – such scraps of power it can get away with and that the Legislature has withheld.

But no principle of science, logic or political science demands that any single agency have unitary authority over the entirety of any legal category. The very fact that in our system of government three branches compete for power is acclaimed as its genius. By the measure of the Report, dictatorship is far more "logical" than

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[28] 1 Frederick Pollock & Frederic W. Maitland, *The History of English Law* 1 (2d ed. 1899).

[29] David Deutsch, *The Fabric of Reality* 201-202 (1997).

democracy.

B. The Board Should Reject the Report's Assumption that Groundwater Rights are Subservient to Surface Water Rights

The Legislature, knowing full well about the interconnections of ground water and surface water, created this Board with limited powers. Appropriative surface water rights are dispensed by this Board. Groundwater rights, like riparian rights to surface water and most other property rights, are largely overseen by the courts.

Where those rights come into conflict, the rights are of equal importance and equal legality. The Legislature has not articulated anywhere that this Board should weigh in on behalf of surface rights-holders so as to somehow "protect its permitting jurisdiction."

Holders of groundwater rights may no more access surface waters by draining underground streams than holders of surface water rights may deprive groundwater basins of their recharge. But in the case of surface water rights, the Legislature articulated the limit of this principle in the language of Water Code Section 1200, and this Board is not free to enlarge its own jurisdiction in pursuit of some more abstract principle, no matter how desirable it seems to the Board that its jurisdiction should be increased.

C. Application, Interpretation and Implementation of Water Code Section 1200 Must Narrowly Construe that Section and Adhere to, Rather than Discard, its Language

Whether the Board proceeds by regulation or on a case-by-case application or enforcement of the law, its obligation is the same: to effectuate the legislative intent and to confine any efforts to protect the efficacy of its permitting authority against

groundwater-sucking predators to those extracting from "subterranean streams flowing through known and definite channels."

The Board must apply those words in their ordinary meanings, rather than imagine an ambiguity so that it can turn instead to some abstract "policy" they are trying to express. And in construing the language, it must recall at each step that this is an exception at the border of the Board's jurisdiction that must be narrowly construed.

D. If the Board Believes that its Jurisdiction is too Narrow, it Should Make That Case to the Legislature

While the Report lists several states that have established monolithic regulatory structures, it mentioned not a single one that did so other than by legislation. The Report's exhortation that this Board should move as far as it can in that direction by stealth is simply unacceptable, not to mention illegal.

Over a century has passed since Water Code Section 1200 became law, setting in statute the rule of the "old treatises." Millions of Californians have come to rely on the existence and seniority of groundwater rights, which depends upon their not needing a permit from this Board unless they are appropriating surface water and waters from underground streams in "known and definite channels."

The Board lacks the regulatory tools to safeguard these existing rights while carving out new jurisdictional territory for itself. If it believes it needs a broader mandate, it should ask the Legislature for it.

E. Do not Attempt to Adopt or Apply the Report's "Impact" Theory in the Guise of "Interpreting" Water Code Section 1200

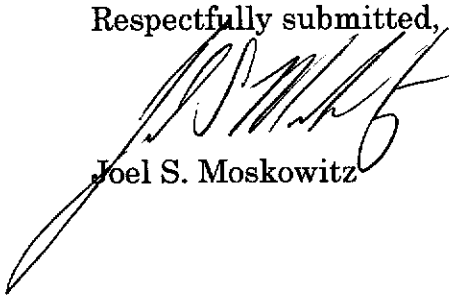
No word in Water Code Section 1200 requires a regulation in order to know

its meaning. Each word is simple, common, and unambiguous, and placed together the sentence they form is simple, common and unambiguous. Any attempt to adopt some disembodied "impact" theory cannot be based on any words of this statute and would therefore be an unlawful attempt by the Board to enlarge its own jurisdiction.

And as a parting thought, if the Board is distressed that the categories of "surface water" and "groundwater" are not wholly discrete, ponder that the notion of "impact" also constitutes a spectrum between "no impact at all" and "total destruction," and that any dividing line labeled "direct impact" or "unacceptable impact" or "impact needed to protect the permitting power" will also be an arbitrary creation not found in nature. Except that this creation will not be found in the statute either, and will therefore be thrown out by our courts.

Date: April 2, 2002

Respectfully submitted,



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Comments on the Report of Professor Joseph Sax on the Legal Classification of Groundwater

SWRCB Workshop, April 10, 2002

Mr. Short: **"...the decisions of the courts of this State have been as wide as the human mind can go in describing [subsurface] stream flow..."***

*From the transcript of the hearing of May 28, 1912, on the draft Water Commission Act, in Appendix D of the Sax Report.

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Members of the Board:

Thank you for the opportunity to comment on Professor Sax's report on the legal classification of groundwater, and thank you especially for arranging to have it prepared. Although I have some concerns about aspects of the report, which are described below, the report will certainly raise the discussion of the issue to a higher level than was evident in the hearing of April 2000.

Professor Sax has recommended an Alexandrean solution to the knotty problem of defining the bed and banks of "groundwater flowing through known and definite channels." As he points out in less direct language, in many cases that seems a fool's errand. Instead, he argues that the real concern should be with regulating pumping that has a significant effect on the flow of surface streams, and offers various suggestions about how that regulation might be effected.

This is an eminently sensible approach in concept, although there are weaknesses with some of his suggestions for implementation that would undercut the level of protection for public trust resources that he intends. These can be remedied, however, particularly given the Board's independent authority to protect public trust resources under § 275 of the Water Code.

It appears, however, that in the interests of developing the justification for a sensible solution to the problem facing the Board, Professor Sax may not have given the case of *Los Angeles v. Hunter* (156 Cal. 603 [105 P. 755] 1909)) as much emphasis as he otherwise might have done. Particularly in view of the fruits of Professor Sax's archival research, that case provides the foundation for a more conservative and less creative analysis of the Water Commission Act that also supports broad jurisdiction for the Board over groundwater, although it does so at the expense of depending upon hydrogeologically naive categories. Those who would oppose Professor Sax's recommendation on regulating pumping from wells that significantly effect surface streams might do well to consider the implications of this more conservative analysis.

As Professor Sax has pointed out, too much attention has been paid to *Los Angles v. Pomery* in the recent SWRCB workshops on underground streams, and more attention should be given to what was intended by the legislature in passing the Water Commission Act. There were important developments in water law, including development of the correlative rights doctrine and more California Supreme Court decisions regarding the subsurface flow in streams, in the dozen-plus years between *Pomery* and the passage of the Water Commission Act. There were also important advances in the understanding of the hydrogeology of the areas considered by these decisions. These bear on the critical question of what was intended by the Act. Perhaps the most plausible reading of the historical record is simply that the legislature intended to incorporate the law concerning subsurface streams as it was understood at the time, and the hearing transcript discovered by Professor Sax provides compelling evidence on that point. For example, Mr. Fred Short, who arguably dominated the discussion and was apparently a prominent figure in the development of the Water Commission Act, asserted that: **"...the decisions of the courts of this State have been as wide as the human mind can go in**

describing [subsurface] stream flow..."[1] Presumably he was thinking of the 1909 case of *Los Angeles v. Hunter*, as he had just mentioned that "(T)hey enjoined pumping way out here in the San Fernando Valley because they penetrated the gravel through which the water was flowing. They took away the percolating[2] water." For the convenience of those who have not obtained the transcript from the web, I have attached the most relevant section, with some annotation, as an appendix to these comments.

In *Los Angeles v. Hunter* the Court found that "The finding [by the trial court] that the waters developed in the wells of the appellants are part of the subsurface flow of the Los Angeles River was, as above discussed, abundantly sustained by the evidence." The finding by the trial court was summarized by the Appellants Opening Brief in that case as follows: "...all of the underground waters in all of said lands, from the surface of the ground down to bed-rock, are flowing waters, and are part of the subterranean stream of said Los Angeles River, "and ."...that **there is a subterranean river a part of the surface stream of the Los Angeles river, which subterranean stream is ten to twelve miles wide, and about six to eight miles long**,..." This makes Short's comment quite understandable, and suggests that the SWRCB has been quite restrained regarding its jurisdiction over groundwater, rather than overreaching as some have claimed.

For understanding legislative intent, it also seems appropriate to consider the views that scientists of the time held regarding underground streams. A series of Water-Supply and Irrigation Papers dealing particularly with "The Valley of Southern California" (roughly, the greater Los Angels area) published by the United States Geological Survey,[3] provide good evidence on this point:

> These three streams [the Santa Ana, San Gabriel, and Los Angeles rivers], the largest in southern California, carry to the Pacific almost all of the run-off from the southern and western faces of the San Gabriel and San Bernardino ranges, which are the most effective mountain masses in this section of the State from the point of view of their capacity to induce precipitation. ....
>
> The channel of each of these streams, in its passage seaward the mountains, crosses one or more wide valleys filled with loose sands and gravels. The waters are absorbed by this debris, and percolate slowly through it, beneath the surface, to reappear at some lower point where an obstruction to the underground passage forces them to the surface. At these points the underground waters become surface flows again, until absorbed later

[1] Transcript of the hearing of May 28, 1912, in Appendix D of the Sax Report.
[2] "Percolating" was then commonly used to describe flow through sand and gravel, and did not necessarily imply a legal category.
[3] Hamlin, H. 1905. Underflow tests in the drainage basin of Los Angeles River. USGS Water Supply Paper 0112. 55 p. Mendenhall, W.C. 1905. Development of underground waters in the eastern coastal-plain region of Southern California. USGS Water Supply Paper W 0137. 140 p. Mendenhall, W.C. 1905. Development of underground waters in the central coastal-plain region of Southern California. USGS Water Supply Paper W 0138. 162 p. Mendenhall, W.C. 1905. Development of underground waters in the western coastal-plain region of Southern California. USGS Water Supply Paper W 0139. 105 p.

> by another body of loose material. Thus the Santa Ana sinks in the wash above Redlands, rises to the surface above the Bunker Hill "dike," sinks below it, rises from Riverside to Bedrock Canyon below El Rincon, sinks in the wash above Santa Ana, and finally partly rises again in the large peat-land springs about Talbert. The San Gabriel and the Los Angeles exhibit the characteristics, but disappear and reappear less often in their much shorter courses to the sea. (Mendenhall, 1905, W 138)

> The principal eastern tributaries of [the Los Angeles River] rise on the west slopes of the San Gabriel Mountains and flow down to San Fernando Valley in deep rocky canyons which have been eroded in the granite rocks of the range. These streams are torrents during the rainy season, but dwindle to mere rivulets in the summer. When in flood they transport a vast amount of detritus, sand, gravel, and bowlders to the plain below, and have buried the old drainage lines across the east end of San Fernando Valley beneath extensive detritus cones, into which the surface streams sink except in times of extraordinarily floods. ...
>
> After flowing southerly in a broad underground channel beneath the detritus in the east end of San Fernando Valley, the water of the Los Angeles River is deflected easterly by the impervious rocks of the Santa Monica Mountains. This barrier, taken together with the contraction of the underground channel, so obstructs the free percolation below that much of the ground water rises and flows as a surface stream again. (Hosmer, 1904, W 112)

Thus, the finding of the California Supreme Court in *Los Angeles v. Hunter* was consistent with the views of scientists of the United States Geological Survey, and given the eminence of that agency, it seems reasonable to assume that the state legislature was also aware of these views.

Although the strategy recommended by Professor Sax at the conclusion of his report is eminently sensible, the criteria that he has suggested for determining the extent of the Boards jurisdiction under Water Code § 1200, which seem based largely on the discussions of the Technical Advisory Group, are problematic. There are at least four problems:

1. The proposed criteria do not account for the rate of production from wells.

The distance over which a well will have a significant effect depends strongly on the rate of pumping from the well, so a criterion based only on a distance of 1,000 feet will include some small wells that have a negligible effect on the stream while excluding high production wells that have a significant effect. Distance and production rate should be considered together.

2. The proposed criteria do not account for cumulative effects.

Wells are often not so isolated from each other that their effects on groundwater or on surface streams can be considered separately, but the proposed criteria offer no guidance on how the cumulative effects of multiple wells should be treated. As perhaps a different statement of

the same problem, no criterion is proposed for the maximum acceptable cumulative effect of wells on surface streams.

3. The proposed criteria ignore useful hydrogeological information.

Considerable information on aquifer properties and on the spatial limits of aquifers is available for many areas of the state, and can be used to estimate the effects of wells on nearby streams. The "well-by-well" approach of the suggested criteria unwisely ignores this information. Similarly, although the "bed and banks" approach is problematic for many areas, it works well in others, for example in coastal aquifers such as the Carmel Valley, and there is no reason to abandon the approach in such areas.

4. The proposed criteria ignore human motivation.

It is an unfortunate fact, well demonstrated by the April 2000 workshop, that some hydrologists confuse their role with that of lawyers. Criteria that temp a well owner to try to get a "get out of jail free" card by hiring an obliging hydrologist to conduct a pump test invite abuse.[4] In this regard, it is useful to consider a letter from Professor Hubert Morel-Seytoux to Arlen Feldman of the Hydraulic Engineering Center, commenting on three studies that used the same model and the same data to come to differing conclusions about the effects of pumping groundwater to supply a proposed development. The letter is included as an appendix to his chapter on groundwater in the recent book, *Model Validation, Perspectives in Hydrological Science*,[5] and says in part:

> "I have no doubt that the hydrologists were competent. In fact they knew *very well* what parameters to choose and what assumptions to make in order to obtain results that would meet their clients' desire. Obviously Models 1 and 3 were developed for a client that wanted the developments to proceed and model 2 was carried out for a client that did not favor the development. What *is* needed is an *independent* study, from a party that has no ax to grind..." (emphasis in original)

The Sax Report is a giant step forward in the difficult process of determining the extent of the Board's jurisdiction over groundwater. Professor Sax has wisely recommended that the Board take jurisdiction over groundwater uses that significantly diminish the flow in streams. However, the technical criteria suggested in his report are flawed, as noted above. I suggest that Board follow its own successful example for the next step, and seek the advise of an independent technical expert on surface water-groundwater interactions, much as it sought the advice of Professor Sax as an independent expert on water law. Such a person could be charged with the task of developing criteria that would both provide protection to surface streams and allow the owner of a well to be reasonably clear whether a permit is required.

---

[4] The background to WRO 95-10 provides a good example of well test abuse. The California-American Water Company had a competent hydrologist named Russell Mount who claimed, on the basis of well tests, that a confining layer separated the Carmel River from the main body of the alluvial aquifer in the lower valley, where the wells of concern at the time are located. It is now abundantly clear that no such layer exists.

[5] M.G. Anderson and P.D. Bates, eds., John Wiley & Sons, 2001.

If the Board is reluctant to pursue the approach suggested by Professor Sax, then it should ask such an expert to recommend criteria for the bed and banks of subsurface streams, based on the actual physical conditions in cases decided by the California Supreme Court before the passage of the Water Commission Act, such as *Los Angeles v. Hunter*, and the hydrogeological understanding embodied in the USGS reports cited above and other contemporary scientific works.

Thank you for your attention to these comments.

Appendix A: Discussion of Section 8 of the draft Water Commission Act

Anyone who has edited a transcript from a tape of a meeting knows that a transcript needs considerable interpretation. In meetings, most of us often leave sentences incomplete, misspeak, depend on gestures or other non-verbal means for communicating our meeting (for example, looking at someone to give meaning to an otherwise ambiguous 'you'), depend heavily on context or shared background knowledge (as by allusions to long-standing arguments that other participants know about) and often respond not to the last speaker but to some other previous speaker. As a result, the transcript of a discussion, even after some editing, may raise questions in the mind of the reader about the mental competence of the those involved, even though the discussion seemed clear and meaningful to the participants. The transcript of the hearings on the proposed water commission bill is not an exception to this pattern.

The discussion starts with Mr. Keech raising the concern that failing to distinguish underground streams from other groundwater would work against the interests of riparians -- owners of land overlying the underground streams. Mr. Pardee suggests language to make the distinction, and this topic seems to dominate the rest of the discussion. As I read it, however, except perhaps for Mr. Cuttle, the participants were not looking for words to define the limits of underground streams, but merely for words to acknowledge their existence (at least in law). Mr. Wiel, who as an advocate for a rational approach to water law generally was odd-man-out in the meeting, seemed to be needling his associates as well as making serious suggestions. What follows is the entire transcript of the discussion of Section 8 of the draft bill, with my editorial comments in brackets.

Mr. Pardee: [finishing the discussion of Sec. 7] That is provided for in the balance of the bill.

As to this section on underground water, I am in doubt somewhat myself. (Reads) "Section 8: Underground water, for the purposes of this Act, is defined as any water that occurs or is found beneath the surface of the ground".

Underground water is underground water.

Mr. Keech: You may as well define all water making streams. The sub-channel stream is deemed to be part of the stream; one minute it is in the open and another minute it is below the surface. The vested rights in a stream under the riparian law is the stream consisting of the running open water on the surface and also of the sub-surface water in the same bed. And here you attempt to put them in the same category. [The meaning of the last sentence is far from clear, but one logical reading is as a complaint that subsurface streams and "percolating" groundwater were being put in the same category; another is that riparian and appropriate rights were being not being distinguished. See his comment below.]

Mr. Baumgartner: As we have handled "Stream flow" in the Bill, does it interfere with the subsurface streams?

Mr. Keech: You have handled "streams" so far under the terms of riparian rights only, and the riparian rights include that sub-surface flow and is sustained by the courts, and sustained by constitutional provisions. Now you propose to take out and destroy it as a stream flow and put in and classify underground water with sub-surface flow.

Mr. Pardee: How would this do: "Outside limits of defined streams." ["defined" and "definite" seemed to have been used somewhat interchangeably in this context, so Pardee's suggestion is not that far from "known and definite channels."]

Mr. Keech: Just simply as to stream flow.

Mr. Cuttle. If there is any interference with underground stream flow belonging to riparian proprietors, they have a right to be heard, and if they can show that the interfered with, they will be protected in that right, because it will be presumed the Commission has the right to protect them.

Mr. Keech: After destroying rights, you assume they would be protected on a very high plane of justice. I think it would be better to be right in the bill.

Mr. Cuttle. All I seek is to determine what is underground stream and what is percolating water.

Mr. Keech. I admit it would be simpler to say it all belongs to the public and let the Commission distribute as they think just, but it would not be the wise thing to do. This

sub-surface flow is an all important matter and it [the proposed section] is so radical a departure from the law that I do not think it would stand. I think you have attempted to incorporate riparian law in accordance with the doctrine of the courts, but now you take that underground flow right out of the [riparian] rule and class it with water with which it has never been classed [percolating groundwater]; and since you provide for both kinds of water, why have you made that radical change? [The meaning of "both kinds of water" here probably means riparian and appropriative.]

Mr. Pardee: [trying again] Put right at the end of the sentence "Exterior to banks of streams".

Mr. Keech: I should say "Sub-stream flow". You have not defined stream flow, but nevertheless it is defined under the law. You have not defined stream, but that is a term known to the law. Either would be satisfactory to me.

Mr. Pardee: You want it confined to the banks of a stream.

Mr. Keech: Yes, that is all right. They mean the same thing.

Mr. Short: The definition of what constitutes stream flow within the meaning of the right of appropriation to appurtenant land would not change the right if it was conditioned from the present determination, but they have determined a great many subterranean flows where they have been connected up, in Los Angles and other places, are part of the stream flow and connected as such. If you define that as stream flow it would not change the right of vested property in percolating waters. So that the definition that would confine it to within the banks would exclude large quantities of water now subject to the law of streams. [Short seems to be speaking of the banks of surface streams here.] If it had any effect at all it would simply have a narrowing effect with respect to flowing and percolating water as distinguished from flow, and if your definition were accepted you would simply narrow the definition of flow instead of widening it. Therefore, you do not want to make it narrower than it is. You cannot legislate as to stream flow, and there is no law that I know of to appropriate the underground percolating waters of another stream flow. [another's sub-surface stream flow?] You would not want to narrow the definition of stream.

Mr. Keech: What would you say?

Mr. Short: I would say stream flow and nothing more. [as in, "Section 8: Underground water, for the purposes of this Act, is defined as any water that occurs or is found beneath the surface of the ground, except for stream flow."]

Mr. Wiel. You would say "Underground" and not say part of the stream at all. In Section 8 it says underground part of the stream.

Mr. Cuttle: It includes it in the definition of underground water.

Mr. Wiel: You do not deny that underground water is under ground?

Mr. Cuttle: No.

Mr. Wiel: This section does not deal with it at all.

Mr. Lombard. The trouble is later on it provides means for applying that water.

Mr. Baumgartner: "Underground water for the purpose of this Act".

Mr. Short. Is it not the purpose the definition to distinguish between "stream flow" and "underground water". The underground water embraces stream flow for the purposes of the law. The object of the Act is to keep all of the water of the stream and the percolating water.

Mr. Tait: I would say just "Other than stream flow". [as in, "Section 8: Underground water, for the purposes of this Act, is defined as any water that occurs or is found beneath the surface of the ground, other than stream flow."]

Mr. Cuttle: Would not this difficulty crop up of determining what is underground stream flow or percolating groundwater?

Mr. Short. You cannot get rid of that difficulty. The rights of one kind of water is of one nature, and of the other kind of water of another nature. You want to leave the stream unimpaired and call all the other kind of [ground] water underground water.

Mr. Wiel: If a man wants to make an appropriation of water by building a tunnel on the banks of a stream, he should not look to this section, but to the other, to the previous section. You do not want to include the underground stream in this part of the bill.

Mr. Keech: That is correct. It is included in the other.

Mr. Wiel: Yet every man, nine out of ten, consider when they build a tunnel to get water, they are appropriating underground water.

Mr. Keech: What they consider I do not know anything about.

Mr. Short: The courts say that any water that continues with the stream, and probably to reappear again, that would be stream flow.

Mr. Pardee: Confined or not confined?

Mr. Short: Yes sir. They enjoined pumping way out here in the San Fernando Valley because they penetrated the gravel through which the water was flowing. They took away the percolating water.

Mr. Wiel: I would suggest in section 8 "Except stream flow". You also put in the previous part of the Bill "Except underground flow". You are now going to except anything that is in the stream from the underground provisions. You want to make it clear, whether it goes in under the previous portions of the Bill?

Mr. Keech: I undersigned the previous portions of the Bill concern riparian rights which are directly connected with streams.

Mr. Pardee: Not riparian rights but appropriators.

Mr. Wiel: I suggest this Bill have two or three chapters, underground water and stream flow, - and provide that no water that directly effects a surface flow shall be affected by this chapter. [This is the only language that I can find that supports Professor Sax's reading of the legislative intent.] In another chapter, provide something corresponding so we can keep them separate. Have one chapter to apply to stream flow and another chapter to apply to underground water.

Mr.: Keech: [Sarcastically, it seems to me.] I suggest that as Mr. Wiel is the greatest authority on water and water rights, he be appointed a committee to draft the amendment.

"Mr. Short: I would suggest the object should be not to try to define [subsurface] stream flow but merely to describe it, because the decisions of the courts of this State have been as wide as the human mind can go in describing stream flow, and is wider than any definition you can give. " [Short is making a distinction between defining and describing (recognizing?) a legal concept, and I think he meant to refer to the courts 'defining' stream flow, not 'describing' it.. Short is probably referring to LA v. Hunter here, as well as above.]

Mr. Wiel: I would not make any distinction between stream flow and underground water, make no distinction whatever, but take water supply. If water supply is partially underground and partially on the surface, there is no reason why people should not enjoy it whether underground or of the stream. There should be a right in the supply regardless of whether underground or surface. [Wiel seems to be stating what he really thinks, which is far too rational for serious consideration.]

Mr. Keech: It is a departure from this Bill and is a radical construction.

Mr. Short: My suggestion would be that the Act, the general scope, should apply to all waters now unappropriated as stream flow, and to all underground waters other than stream flow. When you say that you have done the best you can.

Mr. Pardee: Then we may go to section 9?

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April 2, 2002

VIA E-MAIL AND FEDERAL EXPRESS

Paul Murphey
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000

Re: State Water Resources Control Board's Public Workshop Regarding Professor Joseph Sax's Report on the Legal Classification of Groundwater on April 10-11, 2002

Dear Mr. Murphey:

We represent the San Luis Rey Municipal Water District "(District"), a public agency organized pursuant to the Municipal Water District Act of 1911.

All of the District's customers are pumpers, and rely entirely on groundwater for municipal and industrial use, and for agricultural use. Some of the pumpers in the District extract water from the Pala Basin. The District has adopted a groundwater management plan pursuant to AB 3030. Pumping has been ongoing since before 1900. The following comments are submitted on behalf of the District and pumpers in the District regarding the January 19, 2002, Final Report by Professor Joseph L. Sax to the State Water Resources Control Board ("SWRCB") entitled, Review of the Laws Establishing the SWRCB's Permitting Authority Over Appropriations of Groundwater Classified as Subterranean Streams and the SWRCB's Implementation of Those Laws.

First, the 1,000 foot distance proposed by Professor Sax as the outside boundary of the SWRCB's permitting jurisdiction is arbitrarily chosen and too expansive to be workable on the San Luis Rey River, and many of the stream systems in Southern California. A more flexible standard would be more suitable. According to Professor Sax's report, the 1,000-foot distance was chosen because "in water table situations when setting observation wells in pump tests, drawdown is near zero at that distance." Final Report, at 13 n.31. The legislative purpose behind Cal. Water Code §1200, according to Professor Sax, is to protect the SWRCB's permitting authority over surface streams "from subversion." Final Report, at 12. To achieve that goal, the SWRCB's authority over subterranean streams is limited to those groundwater diversions that would have an "appreciable and direct impact" on surface stream flows. Final Report, at 7. Professor Sax's use of a distance (1,000 feet) at which drawdown would generally

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equal zero for a jurisdictional limit, would often be inconsistent with the application of a more objective standard, such as the "appreciable and direct impact" standard. In many instances, a shorter distance would accord more closely with the test's purpose.

Additionally, while in some areas of the state, 1,000 feet may be a reasonable measure of the distance at which drawdown approaches zero, the technical opinions included in Appendix E suggest, and it is true, that California has a widely diverse geology giving rise to such a multitude of hydrological conditions that it is impossible to fix a single distance state-wide. In fact, Professor Sax himself acknowledges this when he notes that "No magic number can do that job" of setting the limits of subterranean streams. Final Report, at 13.

While it is true that Professor Sax's recommended test includes requirements other than the 1,000-foot distance for a particular groundwater diversion to fall within the SWRCB's permitting jurisdiction, the use in those requirements of such difficult-to-determine concepts as "substantial percentage" and "substantial stream depletion" would mean that the bright-line distance test would likely become the only real requirement, and for such a purpose, 1,000 feet is too expansive. As a generally applicable standard, the 1,000 foot test is arbitrary, and conflicts with Cal. Water Code §1200. Any arbitrary or fixed standard would be inappropriate.

Second, any significant change in the legal dividing line between subterranean streams and percolating groundwater will cause great problems for groundwater users throughout the state. It has been over 150 years since California became a state, and during that time people have populated all reaches of its territory. Wherever there has been development, whether rural agricultural or dense urbanization, water resources have been developed. Entire economies have been based upon the availability of groundwater, with reliance on the rules governing its use. To submit long-standing diversions and uses of groundwater to a new set of rules now would cause great uncertainty and confusion over water rights, and not serve a substantial number of groundwater producers in the state.

Third, Professor Sax's recommendation places too great a financial burden on small groundwater pumpers such as the pumpers in the San Luis Rey Municipal Water District. Small agricultural and domestic pumpers collectively provide great benefits to California's economy and culture. The District asks that the SWRCB avoid damaging this economy and culture merely for the sake of expanding or clarifying its regulatory power. Individual pumpers are not always able to meet the technical and financially costly burdens associated with conducting pump tests and hydrogeological studies. Placing any burden of production or proof on those pumpers will negatively impact the District, its pumpers, the San Diego County economy and state.

Fourth, existing pumpers who have relied on the existing rules and practices, and commonly understood hydrogeologic designations should be protected if a change in classification occurs.

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Thank you for the opportunity to provide comments on this issue which is highly important to the District.

Sincerely,

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A Professional Corporation

Susan M. Trager

SMT:ch

MID Modesto Irrigation District
Water and Power

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(209)526-7373

March 25, 2002

Honorable Arthur Baggett
Chairman
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000

Re: Professor Sax's Report on the State Board's Groundwater Jurisdiction

Dear Mr.Chairman:

Modesto Irrigation District requests that the State Water Resources Control Board reject the recommendations contained in Professor Sax's recent report on the State Board's jurisdiction over groundwater.

The Board will be receiving our detailed comments on the report through the San Joaquin River Group. This letter addresses separately the overriding concern that the report seeks expansion of the Board's water rights jurisdiction over groundwater, whether through regulations, interpretations, adjudications or aggressive use of the Public Trust and Reasonable Use doctrines – all without legislative oversight. While the report concludes that "Water Code § 1200 is [not] suited to resolve California's 21st Century water problems," the only justification for bypassing the legislative process to enact this view is that the Legislature has been withholding this jurisdiction from the State Board for almost a century and the report concludes that it will not grant such authority today. (Report, pp. 44, 91.)

We believe that such legislative refusal, far from being a signal to the Board to evade that policy judgment, ought to be a signal for the State Board to refrain as well.

As the State Board has recognized, 40 percent of all water used in this state is groundwater. Our economic and social systems depend today on the stability of groundwater rights. Any changes that render waters that are today considered groundwater into surface water immediately transfer the rights of the most senior groundwater appropriators into rights of the most junior surface water appropriators. Only the Legislature can protect existing groundwater rights and the uses that depend upon them from being eroded or eliminated in this process.

Action by the State Board to overtly or subtly alter, evade or interpret away a long-established and legislatively prescribed water allocation system would be dangerous and ill-advised.

Sincerely yours,

Allen Short

Allen Short
General Manager
Modesto Irrigation District

cc: The Honorable Gray Davis
The Honorable Winston Hickox
The Honorable William J. Lyons
The Honorable Thomas Hannigan
The Honorable Jim Costa
The Honorable Dick Monteith
The Honorable Dave Cogdill
The Honorable Dennis Cardoza
The Honorable Joe Canciamilla
The Honorable Dick Dickerson
Ms. Susan Kenndedy
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5090.44
Water
April 2, 2002

Paul Murphey
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000

Via E-mail: WrHearing@waterrights.swrcb.ca.gov

Dear Mr. Murphey:

We appreciate the opportunity to provide comments on the January 19, 2002, Final Report of Professor Joseph L. Sax, Review of the Laws Establishing the SWRCB's Permitting Authority over Appropriations of Groundwater Classified as Subterranean Streams and the SWRCB's Implementation of Those Laws.

Our comments are limited to Professor Sax's assertion on pages 13-14 that the presumptions contained in his recommended test for subterranean streams should "not apply in cases of long-standing hydrological disconnection." *See also* Final Report at 67, 92. We find particularly troublesome the reference that Professor Sax made to physical conditions in the Santa Margarita River basin, since the Marine Corps' only amphibious training base on the West Coast, Camp Pendleton, relies almost exclusively on the Santa Margarita River to meet its military and domestic water supply needs. Any degradation of the base's water rights would cause harm to the base and the Marine Corps' national defense mission.

First, Professor Sax is incorrect in using the Santa Margarita River basin and the Temecula-Murrieta groundwater area as an example of a reverse gradient caused by groundwater pumping. *See* Final Report, at 67 n.211. As explained in the enclosure from Stetson Engineers, Inc., there has in fact not been a reversal of gradient in the groundwater aquifer in that area. Therefore, even if Professor Sax's recommended test were adopted, it would not be appropriately applied to the Santa Margarita River as he suggests.

The fact that Professor Sax's only legal citation in support of his proposed test is to a case where the physical situation that he believes justifies that test does not currently exist should cause significant doubt about the wisdom of adopting that test at all. While there may be a physical setting somewhere within the State of California to which his proposed rule would apply, identification of such a location would be difficult. Additionally, any reversal of gradient as a result of excessive groundwater pumping, and the resulting reduction in surface stream flows caused by increased percolation, should be able to be corrected through legal processes, including action by the State Board through its permitting jurisdiction over subterranean streams.

Second, as a question of law, it is inappropriate for the State Board to relinquish its jurisdiction over groundwater contained in subterranean streams simply because of overpumping for a period of time. The State Board is required in its administration of the surface stream permitting system to protect all prior water rights, including riparian, federal reserved and public trust water rights. Those rights are not based on continuous appropriation of water for a beneficial use as are appropriative water rights, and they cannot be forfeited despite the fact that the holder or trustee of those rights does not jealously guard them, even if a "long-standing hydrological disconnection" has intervened. Any appropriator, either of surface water or groundwater, should know that he cannot divert and use water to the detriment of prior water rights, and cannot obtain any property right to the same unless he meets the requirements for prescription.[1]

The permit system administrated by the State Board provides a relatively fast, inexpensive and simple way for riparian, federal reserved and public trust water rights holders to protect their interests. Simply because an individual or group of groundwater pumpers has created a situation of hydrological disconnection in derogation of prior water rights should not mean that those same or later pumpers should benefit from their activities.

Sincerely,

C.W. STRICKLAND
Captain, U.S. Marine Corps (Reserve)
Special Counsel, Water Law

Enclosure

[1] It should be noted that an appropriator cannot obtain prescriptive rights against the United States or the public trust.

MEMORANDUM

STETSON ENGINEERS INC.

2171 E. Francisco Blvd., Suite K • San Rafael, California • 94901
TEL: (415) 457-0701 FAX: (415) 457-1638 e-mail: stever@stetsonengineers.com

TO: Captain Wes Strickland DATE: April 1, 2002

FROM: Stephen B. Reich JOB NO.: 1671-14

RE: Temecula-Murrieta Hydrogeology

Stetson Engineers has vast experience studying the hydrogeology that controls the surface and ground water flow in the Temecula-Murrieta ground water basins. Stetson Engineers participated in the development of a MODFLOW ground-water model, including the surface water package, used to describe the interaction between ground-water pumping and surface flow of the Temecula and Murrieta Creeks. Furthermore, Stetson Engineers provides technical expertise to the United States Marine Corps Base Camp Pendleton for the purpose of settling the *United States v. Fallbrook PUD* litigation.

Stetson Engineers has completed a preliminary review of the SWRCB's Review of the Laws Establishing the SWRCB's Permitting Authority Over Appropriations of Groundwater Classified as Subterranean Streams and the SWRCB's Implementation of Those Laws (Joseph L. Sax, January 19, 2002). The document suggests that the gradient that controls the movement of ground water in the Murrieta basin has reversed direction due to pumping. As described in this memorandum, the historical ground-water level and streamflow data indicate the gradient is in the same direction today as it was prior to development.

The SWRCB's document cites the *United States v. Fallbrook PUD* case on pages 48, 49, 53, and 67. The citation found on page 67 is in reference to the statement:

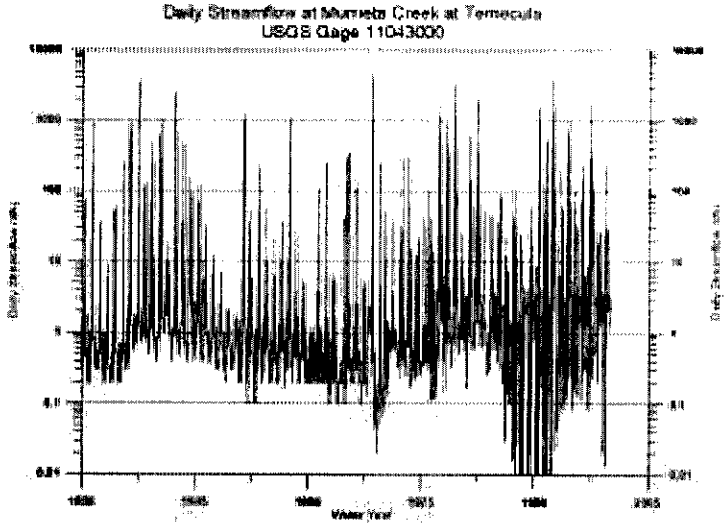
> "There are a number of places in California where widespread pumping over the years has lowered the water table and reversed the gradient that existed before pumping began.[211]"

Citation 211 references the *United States v. Fallbrook Public Utility Dist.* 193 F.Supp. 342, 353 (S.D. Cal. 1961), rev'd in part on other grounds, 347 F.2d 48 (9 Cir. 1965). Page 353 of F.Supp. 342 (1961) states:

> "In fact, the United States' principal expert witness, Fred Kunkel, testified that such uses in Murrieta Valley (one of the two major ground water basins upstream of the military reservation) have lowered the ground water table to such an extent that there has been a reverse gradient in the ground water movement and that ground water which formerly moved southerly and westerly toward Camp Pendleton at certain

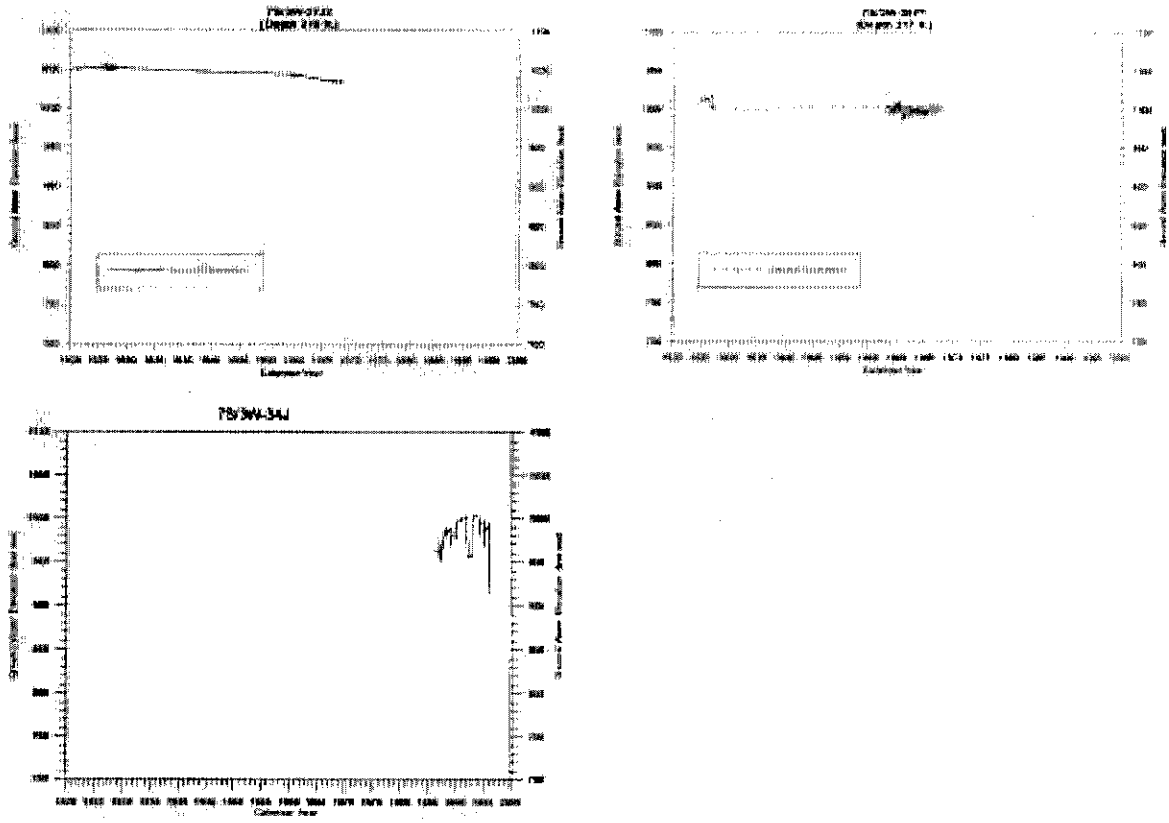
times now moves in essentially an opposite direction. While this witness did testify that this was probably a temporary result and that upon recharge of the ground waters in the Murrieta Basin the reverse gradient would be corrected,..."

It is possible that Mr. Kunkel's reference to a reverse gradient may have been restricted to a local event in Murrieta Basin. Although it is common to reverse the ground-water gradient near pumping wells, it is much less likely to reverse the flow of the ground-water throughout the entire aquifer. Review of the historical data suggests that a reverse gradient in the Murrieta basin did not occur in the 1960s at the time of his testimony. The figure shown above depicts the daily



streamflow at the Murrieta Creek at Temecula streamflow gage. Following the 1937 to 1941 wet period, baseflow steadily declined until the late 1960s before it began to recover to the levels that exist today. The baseflow is supported by rising ground water fed by three different aquifers in the Murrieta basin. If the ground-water gradient had been reversed in the Murrieta basin, ground water would not have supported the live stream status of the creek as shown in this figure. The hydrograph shows that baseflows are affected by climatic conditions, ground water development, and urbanization. Although a reverse gradient may have existed at a particular well location, in the Murrieta basin, it was likely localized and did not affect the ground water/surface water relationship in Murrieta Creek.

Ground-water level data for the Murrieta basin shows fluctuations in the water level over time. The figures below show the water levels in two wells located in Murrieta Basin, 7S/3W-27J2 located south east of Murrieta and 7S/3W-35P1 located in Temecula. Both wells show ground-water levels have been supported from the 1920s to the 1970s. A more recent 7S/3W-34J monitoring well in the Murrieta basin also shows the water levels have been supported over the last twelve years. Although the data is sparse in the first two graphs, it shows that water levels remain elevated and continue to support baseflow as shown in the Murrieta Creek hydrograph. All three graphs show water levels at approximately 1,000 feet msl, approximately 30 feet higher than the gage elevation of 970 feet.



Conclusion

The surface and ground water level data does not suggest that underflow in Murrieta Creek has been permanently disconnected from surface flow. The cumulative effect of ground-water development, urbanization, and climatic conditions that exist today do not prevent ground water from supporting streamflow in Murrieta Creek. In fact, contrary to the SWRCB's citation, Murrieta Creek is not "one of a number of places in California where widespread pumping over the years has lowered the water table and reversed the gradient that existed before pumping began."

Although it is difficult to distinguish between the impacts of ground-water pumping, climatic changes, and urbanization on the flow of a stream without the use of a numerical model, rising ground water in the Murrieta Basin continues to support streamflow in Murrieta Creek. An additional factor that may affect the flow of Murrieta Creek includes wastewater discharge that began in December 1995 and continues today. Studies are currently being conducted to determine the total impact on streamflow due to these releases.

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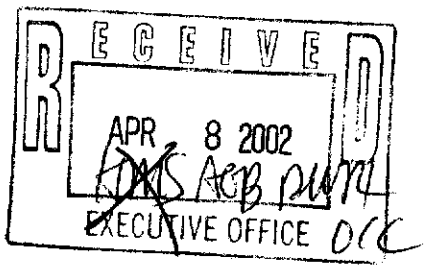

April 2, 2002

Mr. Arthur G. Baggett, Jr, Chair;
Ms. Erin Mahaney, Staff Counsel; and
Mr. Paul Murphey, Associate Engineering Geologist
State Water Quality Control Board
P.O. Box 0100
Sacramento, California 95812-0100 fax: 916-341-5621

RE: Comments on the *Report on the Legal Classification of Groundwater*, SWRCB No. 0-076-300-0.

Dear Sirs:

On behalf of many friends and neighbors I wish to express *strong opposition* to the above captioned report by Prof. Joseph L. Sax and *strong opposition* to any intentions of the SWQCB to implement the recommendation therein that existing State Law on groundwater ownership be set aside by use of regulatory edicts. This would clearly be a circumvention of our constitutional system of checks and balances and would represent an illegal *"per se taking"* of property as well as rights that by law now accompany property ownership.

I further object to the use of Prof. Sax, widely known as *The Father of Environmental Law,* as the ONLY source of legal opinion on what role the SWQCB should, or can play, in groundwater management. As a citizen and owner of my homestead (my only real estate interest), I respectfully demand the SWQCB solicit at the same expenditure at least one (consider more) opinions from highly recognized legal authorities who are not obviously biased as Professor Sax,s history clearly indicates he is.

I hardly need state that the historical record of all governmental attempts to control or otherwise allocate any natural resource or bulk commodity has met with abject failure; especially so in California where the track record in electricity is a national disgrace. Previous attempts by California, occasionally in concert with the Federal Government and powerful interests, in allocating water are likewise abysmal and certainly the cause of many our current distributional problems. There is absolutely no reason to assume that the SWQRB could perform any better than, for example, the misdirected machinations of the Air Quality Control Board with MTBE's (poisons groundwater), or Fish and Game on the Spotted Owl debacles based on incomplete and/or deliberately skewed, and thus dishonest, "scientific" investigation. As other commodities such as oil, multi-tier pricing will only lead to further chaos, and schemes to allocate or price selectively will fail. I respectively submit it is clearly impossible for one small group of bureaucrats to effectively control the complexity of California water today.

Water--an occasional, and sometime perennially scarce commodity in California--is best left to locals and market forces to work out in amenable negotiation unencumbered with yet more restrictive, confusing, unnecessary and ill-designed regulation-often prompted by outside California environmental interests from as far away as Eastern United States. This Great State does not need the added difficulty of more regulation. Such ill-considered action, legislative or regulatory, invariably lead to serious and costly, unintended consequences. If we the people think the State should further interfere water matters, then the constitutional legislative process should, as usual, be used to consider and effect change.

As a scientist who has spent 41 years as a Geologist involved with natural resources at all levels of consideration from basic research to exploration and management and as a consultant, I need not suggest to your technical staff that the matter of our groundwater is not a simplistic model of infiltration as implied throughout Prof. Sax's report; but is in fact compounded by many hydrogeologic factors like age of the water (some may be in fact Late Pleistocene), migratory paths, distance traveled, and residency time to name but a few. These other factors place severe local constraints that deserve attention because they may affect the ability of local owners to live at their homestead--on their property.

The "one size fits all" conclusions and regulations so often characteristic of a politicized bureaucracy such as yours does not well-serve the people of this Great State, but serves rather those who prevail either because of financial clout or circumvent political influence.

I ask the SWQCB to act responsibly, to seek alternative opinion to that of Sax not only legal, but technical, and historic prior to any effort to change the current legal designation of groundwater ownership and control.

I further request these comments to be made an official part of the record of considerations of Prof. Sax's report and any pending action on groundwater ownership and control at the SWQCB, and also a part of the record of commentary on SWQCB Report No. 0-076-300-0.

I would like to state that the late date of this comment is due to the lack of wide distribution in a timely manner, by SWQCB of these matters and relevant time schedules regarding associated action.

I tender these comments as an individual; however, all of my friends and neighbors with whom I spoken about these matters, are in total agreement with the thoughts expressed above. Thus you may be assured you are effectively hearing from more than one individual.

Respectively submitted,

Claude C Rust

Claude C. Rust, Ph. D., Geology

Madera County Water Oversight Committee, Member,
Adjunct Professor, Geology, California State University, Fresno

N.B: This letter is submitted by e-mail. A signed copy will be placed In the U.S. Mail on this date.

c: Messrs: Gary Gilbert, Madera County Supervisor, District 5 (Eastern Madera County.)
Tony Ward, Land Commissioner, District 5, Madera County
Denis Prosperi, Chairman, Madera County Water Oversight Committee
Gray Davis, Governor, State of California
Richard Monteith, 12th District, California State Senate
George House, 25th District, California State Assembly
George Radanovich, 19th District, United States House of Representativrs

MADERA IRRIGATION DISTRICT

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T D P/PGM

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MICHAEL CAMPOS
Legal Counsel

April 2, 2002

Mr. Paul Murphey
Division of Water Rights
State Water Resources Control Board
Post Office Box 2000
Sacramento, California 95812-2000

Re: Assessment of Joseph L. Sax Final Report on Review of the Laws Establishing the SWRCB's Permitting Authority Over Appropriations of Groundwater Classified as Subterranean Streams and the SWRCB's Implementation of Those Laws

Dear Mr. Murphey:

The Madera Irrigation District ("District") appreciates this opportunity to comment on the Final Report of Professor Joseph Sax on the Legal Classification of Groundwater. The District is located in Southeast Madera County and is comprised of 130,000 acres, most of which is in agricultural production. The District provides a supplemental surface water supply from the Friant Division and the Hidden Unit of the Federal Central Valley Project to agricultural users. Because of wide variance in available supplies from Friant, most of our water users rely primarily on groundwater supplies.

California Water Code § 1200 defines the scope of the State Water Resources Control Board's ("SWRCB") authority for those provisions in Part 2, Appropriation of Water, of the California Water Code that require SWRCB approval of diversions of a stream, lake or other body of water. California Water Code § 1200 provides:

> Whenever the terms stream, lake or other body of water, or water occurs in relation to applications to appropriate water or permits or licenses issued pursuant to such applications, such term refers only to surface water and to subterranean streams flowing through known and definite channels.

The Final Report ("Report") of Professor Joseph Sax lists the current legal test as set forth in the SWRCB's 1999 decision on the Garrapata Creek decision (D. 1639). Under this legal test, in order for groundwater to be classified as a subterranean stream flowing through a known and definite channel, it must satisfy the following criteria:

1. A subsurface channel must be present;

2. The channel must have relatively impermeable bed and banks;

3. The course of the channel must be known or capable of being determined by reasonable inference; and

4. Groundwater must be flowing in the channel.

As indicated in Joseph Sax's analysis, these criteria have not been consistently applied by the SWRCB or the courts. Mr. Sax correctly indicates that the legislative intent behind § 1200 was to protect the integrity of the SWRCB's jurisdiction over surface stream appropriations by preventing unpermitted taking of groundwater that appreciably and directly affects surface stream flows. However, this legislation was not intended to create permitting jurisdiction for the SWRCB over all groundwater. Mr. Sax concludes that a test designed to identify appreciable and direct impacts of groundwater diversions on a surface stream would be a more direct implementation of the legislative intent than any set of criteria to define subterranean streams. Mr. Sax further concludes that hydraulically connected groundwater and surface water should be managed in a single integrated system. As acknowledged in the Report, California has a long and deep history of opposition to such integration and any proposed legislation to accomplish such purpose would likely fail. In view of this, Mr. Sax suggests a non-legislative approach for addressing this issue. Under this approach, Mr. Sax sets forth three proposed actions:

1. Improvement of the existing method for implementing Water Code § 1200 along the lines proposed in his Report;

2. Active use by the Board of its jurisdiction under Water Code § 275 to deal with waste, unreasonable use, unreasonable method of use, and implementation of the public trust doctrine, which offers considerable authority to protect surface resources from groundwater diversions; and

3. Additional attention to basin-wide management, using as a model the managed Southern California basins.

It is clear from the legislative history that the Legislature has limited the authority of the SWRCB to regulate groundwater only to the extent that use of groundwater is impacting or subverting the Board's authority on the regulation of surface waters. The legislative history makes it clear that there is no intent to empower the SWRCB to regulate percolating groundwater. This fact was recognized by the Governor's Commission to Review California Water Rights Laws in its Final Report (December 1978) which noted that California's experience with groundwater management differs from that of other western states, and that local management offers the best opportunity for workable and effective controls. The California legislative approach, since the enactment of the Water

Commission Act of 1913, has been to limit the Board's authority over groundwater to subterranean streams where they impact the use of surface water, and to recognize local control for management of groundwater basins. In fact, the Legislature took pains under § 1221 of the Water Code to clearly state its intent that "This Article shall not be construed to authorize the board to regulate groundwater in any manner." The Legislature has clearly indicated its view that its preferred method for dealing with groundwater is through local basin-specific management.

The Report also highlights a case where the SWRCB appears to be departing from the legal criteria developed by it and court decisions relative to exercising jurisdiction over groundwater. A draft decision issued by the SWRCB in 1999 (which has not yet been finalized) indicates a substantial departure from its own criteria. This involves the Pauma and Pala Basins in the upper reach of the San Luis Rey River in San Diego County. This case involves protests on applications filed by several mutual water companies to appropriate water from a purported subterranean stream in the upper reach of the San Luis Rey River. Protestants contended that these appropriators were pumping percolating groundwater and that the water the applicants sought to pump was percolating water as well. Under the view expressed in the draft SWRCB decision, a confined aquifer in the vicinity of a surface stream, otherwise meeting the subterranean stream standards, but the pumping of which has no direct impact on the stream itself, would come within the Board's permitting jurisdiction. The position in the Pauma and Pala draft decision embraces a far more inclusive view of subterranean streams than the SWRCB has heretofore utilized.

The concern with the Pauma and Pala draft decision is that the SWRCB is administratively expanding its jurisdiction toward regulating groundwater pumping quite broadly. As indicated in Joseph Sax's Report, the significance of the position taken in this draft decision is that a subterranean stream need not be in connection with a surface stream, need not be flowing in the same direction as a surface stream, and need not be within a space reasonably well-defined. This clearly would be an expansion of the SWRCB's long-standing approach to Water Code § 1200 and a departure of the legislative authority granted to the SWRCB.

The Report, in considering the limitations on the SWRCB's jurisdiction imposed by Water Code § 1200, sets forth two observations. The first of these is that even if the definition of a subterranean stream were very expansively interpreted, the SWRCB's permitting jurisdiction would not embrace uses of that water on overlying land. The second observation is that there are other potentially available sources of SWRCB authority over the use of subsurface water, outside of Water Code § 1200 permitting jurisdiction. Relative to these other sources of SWRCB authority over groundwater, the Report cites SWRCB's authority to control water uses where they either (1) violate the prohibition of the Constitution and the Water Code on waste and unreasonable use and method of use, or (2) violate the public trust.

Three cases are cited in the Report, *Imperial Irrigation District v. SWRCB,* 225 Cal.App.3d 548, *Environmental Defense Fund v. East Bay MUD,* 20 Cal.3d 327, and the *Racanelli* decision, to support the State Board's authority to assert jurisdiction over percolating groundwater pumping to adjudicate and remedy claims that come within the scope of waste and unreasonable use covered by California Water Code § 275. The question is also raised whether pumping of tributary groundwater that effects public trust values in navigable waters would be treated like tributary surface waters under the *National Audubon Society v. Superior Court*, 33 Cal.3d 419. The argument is made that assuming that a substantive violation exists, there is no question the SWRCB could institute litigation to control groundwater use that violates public trust.

While the Report does not recommend legislation expanding the SWRCB's permitting jurisdiction over subsurface waters, it does propose legislation improving the SWRCB's information-gathering authority so that it can effectively fulfill responsibilities it already has under Article X, Section 2 of the California Constitution and Water Code § 275. The Report closes with a recommendation that in lieu of proposing legislative groundwater reform, that instead the State implement a three-point plan to address the problem of groundwater/surface water management in California. The Report recommends the following:

1. Adoption by the Board of clear criteria to implement the existing statutory purpose, by taking jurisdiction henceforth over groundwater use that diminishes appreciably and directly the flow of the surface stream; and

2. Proactive use by the Board of its authority under Water Code § 275 and any other sources of jurisdiction it has, to implement the constitutional prohibition on waste, unreasonable use, and unreasonable method of use; to protect the public trust; and to safeguard established rights in surface stream flows; and

3. Where serious basin-wide problems are presented, comprehensive basin management is the most promising tool to achieve genuine integration of surface water and groundwater administration in California.

Joseph Sax's proposal would take management of groundwater basins out of the hands of local agencies and shift this responsibility to state control by empowering the SWRCB to exercise a greater role in the management of groundwater basins, along with its views of what constitutes waste and unreasonable use, coupled with proposed legislation to support its gathering information on groundwater basins. This proposed role is clearly contrary to the role envisioned for the SWRCB by the Legislature which has unambiguously limited the SWRCB's jurisdiction to surface waters and subterranean streams.

It is clear from this Report that Professor Sax views conjunctive use and groundwater banking as the next frontier for addressing the State's expanding water supply crisis.

The critical question not addressed or even mentioned in the Report is should we depart from the current state/local framework, which allocates control of the State's surface water to state and federal agencies, leaving to local agencies the management of groundwater basins. The responsibilities and obligations of these federal, state and local agencies are clearly different. Federal and state agencies are required to ensure an adequate and shared supply among all users throughout the State, whereas the primary responsibility of local agencies is to ensure that local needs are first satisfied before permitting the use of local water resources such as its groundwater basins for out-of-basin uses.

The SWRCB has scheduled workshops to consider the proposals set forth in the Professor Joseph Sax Final Report. The issue for these workshops as phrased in the Report is that there is a problem of waste and unreasonable use of underlying groundwater resources, that is directly impacting surface water supplies. The Report then sets forth two alternative solutions: one legislative and the other using existing authority to expand the SWRCB's role. There is, however, an array of several other options by which such problems on the use of percolating groundwater can be resolved by local and regional agencies. Since local control of groundwater basins is clearly consistent with current legislative authorities, efforts by the authorities of local agencies to address many of the issues set forth in the Report should be supported.

The Madera Irrigation District, therefore, recommends that the Board reject the conclusion of Professor Sax that efforts should be made to administratively expand the role of SWRCB into areas that have already been rejected by the California Legislature.

Sincerely yours,

Stephen Ottemoeller
General Manager

Cc Madera County Board of Supervisors
Chowchilla Water District
Madera County Farm Bureau
Root Creek Water District
Friant Water Users Authority
Michael A Campos, Esq.

GRAVELLY FORD WATER DISTRICT

1836 West 5th Street
Madera, CA 93637

April 2, 2002

Mr. Paul Murphey
Division of Water Rights
State Water Resources Control Board
Post Office Box 2000
Sacramento, California 95812-2000

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Sincerely yours,

Tim Da Silva
President

Cc Madera County Board of Supervisors
Chowchilla Water District
Madera Irrigation District
Madera County Farm Bureau

CALIFORNIA FARM BUREAU FEDERATION

GOVERNMENTAL AFFAIRS DIVISION

1127-11TH STREET, SUITE 626, SACRAMENTO, CA 95814 · PHONE (916) 446-4647

April 2, 2002

Mr. Paul Murphey
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, California 95812-2000

Dear Mr. Murphey:

The California Farm Bureau Federation has made a preliminary review of the Professor Joseph Sax's Report on the Legal Classification of Groundwater. We must express our grave concerns with the Report and the recommendations made by Professor Sax. The Farm Bureau intends to submit extensive comments into the record at the April 10, 2002 hearing. In the meantime, our overall primary concerns are highlighted below.

Briefly, the report encourages the State Water Resources Control Board (Board) to expand its regulatory authority over groundwater by reinterpreting the meaning of subsurface flows. It recommends that the Board change its test for determining what is a subsurface flow versus percolating groundwater by using an impact test instead of looking at physical characteristics. Such a dramatic change in law should not occur outside of the legislative arena.

Additionally, the six quantifiable criteria proposed by Professor Sax dramatically shift the burden of defending one's use of groundwater onto the property owner. This burden shift would be costly and detrimental to overlying landowners who are legally entitled to use the groundwater beneath their property.

The recommendations within this report greatly change the regulation of groundwater within the State of California. The changes suggested within the report can only be accomplished through the wholesale change of law by the Legislature. The should resist any effort to implement these recommendations through regulation and precedential decisions.

Sincerely,

Tess Dunham

Tess Dunham
Director, Water Resources

cc: The Honorable Art Baggett
CFBF Board of Directors

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March 27, 2002

Paul Murphey
Division of Water Rights
State Water Resources Control Board
Post Office Box 2000
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Re: Comments to Professor Joseph Sax's: "Review of the Laws Establishing the SWRCB's **Permitting Authority** over Appropriations of Groundwater Classified as Subterranean Streams and the SWRCB's Implementation of those Laws" dated January 19, 2002: The Sax Approach to Expand SWRCB Control Over California Groundwater!

Gentlemen:

The foregoing comments are submitted on behalf of:

Biggs-West Gridley Water District
Butte Basin Water Users Association
Butte Water District
Byron-Bethany Irrigation District
Central California Irrigation District
Chowchilla Water District
Columbia Canal Company
Cordua Irrigation District
Delano-Earlimart Irrigation District
Exeter Irrigation District
Firebaugh Canal Water District
Garden Hwy. Mutual Water Company
Ivanhoe Irrigation District
Joint Water Districts Board
Lindmore Irrigation District
Lindsay-Strathmore Irrigation District
Los Molinos Mutual Water Company
Nevada Irrigation District
Orange Cove Irrigation District
Orland Unit Water Users' Association
Oroville-Wyandotte Irrigation District
Plumas Mutual Water Company
Reclamation District 1004
Richvale Irrigation District
San Joaquin River Exchange Contractors Water Authority
Solano Irrigation District
Sutter Extension Water District
Terra Bella Irrigation District
Tudor Mutual Water Company
Western Canal Water District

Professor Sax's report to the SWRCB of January 19, 2002 supports the expansion of SWRCB control of groundwater in California. It appears that Professor Sax settled upon the goal at the outset of his report, and he then developed the narrative to support his goal.

1.
NEITHER LEGISLATIVE HISTORY NOR BOARD PRECEDENT SUPPORT PROFESSOR SAX'S POSITION

Professor Sax spends much of his report tracing judicial, legislative, and Board precedent in search of a solid foundation for his theory that a hydraulic connection between surface and groundwater will justify the expansion of the Board's permitting authority.

He fails to find the support he needs, but, undeterred, he does find isolated language. Throughout his report, Sax continues to be critical of not only current statutory law (Water Code § 1200) but also of *Pomeroy;* which separates unregulated groundwater from surface water in California. In his drive to connect the two, he opines, at Page 10:

> "In theory, there is no doubt that hydraulically connected groundwater and surface water ought to be managed in a single integrated system, and that this has been the general direction in which many states have moved."

His criticism of current law notwithstanding, he also recognizes that California, at judicial administrative and legislative levels, has historically resisted groundwater/surface water integration. Therefore he rejects legislation to enlarge the SWRCB's regulatory/permitting jurisdiction over percolating groundwater. Instead, he suggests three other methods that the SWRCB should consider:

1. Improve the existing method implementing Water Code §1200 such as adopting well criteria "distance" from surface streams;
2. Aggressive use by the SWRCB of its existing jurisdiction under Article X Section 2 of the California Constitution, Water Code § 275 (prevention of waste, unreasonable use, unreasonable methods of use) and implementation of the Public Trust, which Professor Sax opines offers considerable authority to protect surface water resources from the impacts of groundwater pumping; and
3. Look closer to basin-wide management, using the Southern California basins as successful models.

As a manner of implementing methods of use of Water Code § 1200, Professor Sax tries to guide the SWRCB into making a decision to regulate/permit groundwater extraction by using a numerical (distance from streams) value of wells from surface streams; i.e., a well 1,000 feet from the stream could be within SWRCB jurisdiction given certain criteria. Obviously, if a well is within a certain number of feet from a surface stream and thereby is presumptively within the SWRCB jurisdiction, the burden switches to the well owner to prove lack of hydraulic connection with the surface stream and that burden could be (and most times is) economically prohibitive.

Regardless of his goals, however, Professor Sax's analysis is glaring in its failure to find a solid legal foundation, and his advocacy of using the law applicable to uses of water to expand the Board's permitting authority must be rejected.

2.
1999 *PAUMA & PALA* DRAFT DECISIONS ON THE *SAN LUIS REY RIVER* DO NOT SUPPORT PROFESSOR SAX

Professor Sax's analysis of the *Pomeroy* Decision and its progeny must also be rejected. He determines that the decision can be read "broadly and/or narrowly," that it is ambiguous; that it is basically an eminent domain case; and in a final obituary of *Pomeroy,* states that:

> " . . . while the outcome in *Pomeroy,* in favor of Los Angeles, made good sense, the decision's legal effort to define a part of the groundwater continuum as a "subterranean stream" was both a hydrogeological and a public policy fiasco." See Sax Report at Page 18.

Sax suggests that the 1903 Decision of *Katz v. Walkinshaw*, 141 Cal. at 121 decided that absolute ownership of percolating groundwater was not the law in California.

Professor Sax's analysis seems driven by his preoccupation with ensuring that groundwater is not an attribute of real property, and, contrary to Professor Sax's opinion, *Katz* did not opine that the doctrine of ownership of groundwater was not the law in California. His view of *Katz* is truncated. *Katz* does state at Page 132 that the doctrine of absolute ownership was not well established in this state, but further states the following:

> "In controversies between an appropriator for use on distant land and those who own land overlying the water bearing strata, there may be two classes of such landowners: those who have used the water on

> their land before the attempt to appropriate, and those who have not previously used it, but who claim the right afterwards to do so. Under the decision in this case, the rights of the first class of landowners are paramount to that of one who takes the water to distant lands; but the landowners right extends only to the quantity of water that is necessary for use on his land, and the appropriator may take the surplus. As to those landowners who begin the use after the appropriation, and who, in order to obtain the water, must restrict or restrain the diversion to distant lands or places, it is perhaps best not to state a positive rule until a case arises. Such rights are limited at most to the quantity necessary for use, and the disputes will not be so serious as those between rival appropriators." See *Katz, supra,* at Pages 135-136.

The *Katz* case, while acknowledging restrictions on absolute ownership reflecting reasonable and beneficial use, left intact the concept of "property" when applied to groundwater.

The Correlative Rights Doctrine (established by *Katz* in 1903 following the 1899 *Pomeroy* Decision) did not change the law in California that ownership of groundwater is the overlying rule; it simply states that extraction of groundwater from one's land must be reasonable and must be correlative with other uses such that injury to adjoining landowners is avoided. (Indeed, such rules are not dissimilar to rules governing use of the overlying land). Regardless, Professor Sax "blurs" the distinctions between ownership and "absolute" ownership, and percolating groundwater and subterranean stream water flowing in a known and definite channel as he attempts to expand regulatory/permitting authority over groundwater at the SWRCB.

Fortunately, Professor Sax recognizes, as he must, that the Water Commission Act of 1913, together with current law, do not regulate riparian uses of surface water or the extraction of underground water for use on overlying land.

Conceding that long-established legislative history has continued to distinguish surface and groundwater, Professor Sax acknowledges that Water Code § 1200 remains virtually unchanged from when it was in 1914 but he doesn't give up. He notes that the subterranean stream language in Water Code § 1200 has never been interpreted by the California Supreme Court since the legislature's adoption of the Water Commission Act in December of 1914. Professor Sax also acknowledges that the SWRCB's interpretation of the subterranean stream language in Water Code § 1200 follows the 1899 *Pomeroy* Decision and the "four-pronged test" from *Garrapata Creek* for determining a subterranean stream giving regulatory jurisdiction to the SWRCB.

Sax finds that the second element of the *Garrapata Creek* test; i.e., ". . . relatively impermeable bed and banks," provides an opportunity to greatly expand SWRCB jurisdiction. He uses the decision as an indication of a present groundwater case in which the SWRCB determines whether a subterranean stream is present by using the four-prong test. Sax says that the second prong; i.e., whether the channel has relatively impermeable bed and banks, is derivative of Water Code § 1200, as opposed to being expressly and statutorily set forth.

For instance, a channel could be quite broad, and if determined to have "relatively impermeable bed and banks," could encompass, for instance, an entire valley. This is what happened in the 1999 *Pauma & Pala* draft Decisions of the *San Luis Rey River* where the SWRCB broadly interpreted "groundwater flow" through a known and definite channel (and was the reason for our enclosed April 18, 2000 letter).

The Sax report does review older SWRCB decisions regarding Water Code § 1200 commencing with the 1926 *Sheep Creek* case in San Bernadino County through to the *Stony Creek* Decision in June of 1980 and others. Suffice it to say, he opines that the various historical (1926 through 1999) SWRCB decisions raised groundwater complexities that make it difficult for the SWRCB to establish "quantifiable criteria" to implement the subterranean stream test in Water Code § 1200. Regardless, Sax argues it was the Legislature's goal in preparing Water Code § 1200 to determine that a groundwater well should be treated as a subterranean component of a surface stream, when wells are appreciably, indirectly (both in place and time), impacting the surface stream.

Sax would rather change Water Code § 1200, legislatively, to explicitly expand the SWRCB's permitting jurisdiction over groundwater. However, he sees potential problems with this process (given its historical lack of legislative support) so he recommends that the SWRCB look to other means to limit "over-pumping" through comprehensive basin management. He opines that such efforts will be hindered by the California Supreme Court's recent Year 2000 Decision in *City of Barstow v. Mojave River Agency* at 23 Cal. 4th 1224 particularly where our Supreme Court determined that "overlying water rights" are still the law in California:

> "Courts typically classify water rights in an underground basin as overlying, appropriative or prescriptive. [citation omitted]. An overlying right, "analogous to that of the riparian owner in a surface stream, is the owner's right to take water from the ground underneath for use on his land within the basin or watershed; it is based on the ownership of the land and is appurtenant thereto." [citation omitted]. "One with overlying rights has rights superior to that of other persons who lack legal priority, but is nonetheless restricted to a reasonable

beneficial use. Thus, after first considering this priority, Courts may limit it to present and prospective reasonable beneficial uses consonant with Article 10 Section 2 of the California Constitution. (*Jordan v. City of Santa Barbara)* (1996) 46 Cal.App. 4th1245, 1268)." See *Barstow, supra,* at Page 1240.

3.
SHOULD THE CURRENT APPLICATION OF GROUNDWATER LAW IN CALIFORNIA BE CHANGED

Professor Sax reviews groundwater law in 15 western states inclusive of California and categorizes groundwater in these other western states as falling into one of four categories:

1. The separation of surface and groundwater with no integration
2. Fully-integrated surface and groundwater systems recognizing the priority rights system without regard to the difference between groundwater and surface water.
3. Integration of groundwater and surface water based upon *impact* by the user of groundwater upon the user of surface water and vice-versa.
4. Separate groundwater and surface water that limits groundwater permitting authority.

Professor Sax, acknowledging that history doesn't favor legislative tinkering with Water Code § 1200, and knowing that the SWRCB's adoption of criteria to determine those factual situations in which permitting authority could be extended to ". . . subterranean streams flowing through known and definite channels" would be complicated and very difficult to apply and implement, looks for other ways in which to reach his goal of a fully-integrated surface and groundwater regulatory system. Sax thinks that the best method of expanding SWRCB authority over groundwater is the aggressive use of Water Code § 275, and § 100, the Public Trust Doctrine, and Article X Section 2 of the California Constitution.

But, using the tools suggested by Professor Sax does not require a landowner to obtain a permit for a well. Instead, it requires that the SWRCB hold an evidentiary hearing and determine that a violation (i.e., wasteful use; impact on Public Trust) exists which requires more SWRCB staff to support such an expansion of SWRCB control of groundwater. Since, the SWRCB still would not have original permitting jurisdiction over groundwater, Sax opines that legislation should be pursued to give additional powers (and presumably money) to the SWRCB to improve the SWRCB's "information – gathering capacity" to require diverters to report and monitor extractions of groundwater in order to justify future SWRCB actions for violations of Water Code §§ 100 and/or 275 for waste and unreasonable use or unreasonable method of use, Public Trust, and Article X Section 2 violations. (See Sax Report at Page 91).

4.
CONCLUSION

Professor Sax sees no substitute for state regulation of all water resources, a view he has long espoused. He believes that comprehensive basin-wide management is the most promising tool to achieving integration of surface and groundwater in California. Giving water rights the status of private property impairs this type of comprehensive management but that status is the law of California. Sax's vision is contrary to the recent Supreme Court decision in the *Mojave* case, and therefore he dismisses it as an impediment to his goal. One must give Professor Sax credit for his steadfast consistency in urging more overarching regulation of all water resources – surface and groundwater. However, if the long-established doctrine of groundwater rights as property rights is to be honored, his "vision" must be rejected by the SWRCB.

Respectfully submitted,

MINASIAN, SPRUANCE, BABER,
MEITH, SOARES & SEXTON, LLP

By: _____
WILLIAM H. BABER III

WHB/kc
Enclosure
cc: Butte Basin Water Users Association

Steven Hall, Executive Director
Association of California Water Agencies

David Guy, Executive Director
Northern California Water Association

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April 18, 2000

State Water Resources Control Board
Paul R. Bonderson Building
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Re: Subterranean Streams Flowing Through Known and Definite Channels: Workshop Commencing on April 24, 2000: Comments

Ladies and Gentlemen:

Our offices represent a number of public water agency and landowner clients currently holding pre-1914 water rights. They are listed below.[1] We are submitting these comments on behalf of those clients in response to the March 15, 2000 Notice of Public Workshop which requests informal comments. The issues suggested for comment in the State Board Notice are three and we will discuss them in the order presented in the Notice.

ISSUE 1

What legal test should the SWRCB apply in determining whether subsurface waters should be classified as part of a subterranean stream or percolating groundwater?

ANSWER:

The Pomeroy decision (1899) 124 C 598: The Pomeroy decision sets forth California case law on

[1] Biggs-West Gridley Water District; Butte Water District; Byron-Bethany Irrigation District; Cordua Irrigation District; Garden Highway Mutual Water Company; Joint Water Districts Board; Los Molinos Mutual Water Company; Nevada Irrigation District; Orland Unit Water Users' Association; Oroville-Wyandotte Irrigation District; Plumas Mutual Water Company; Reclamation District 1004; Richvale Irrigation District; San Joaquin River Exchange Contractors Water Authority; Solano Irrigation District; Sutter Extension Water District; Tudor Mutual Water Company; and Western Canal Water District.

the subject of when the SWRCB can exercise jurisdiction over groundwater pursuant to Water Code § 1200; *i.e.*, the SWRCB has no jurisdiction over groundwater as opposed to surface water unless groundwater flows in "subterranean streams" through known and definite channels. The Pomeroy decision gives the test which distinguishes between a subterranean stream and percolating groundwater. Instruction No. XII given the jury by the Pomeroy trial court states in part:

> "XII. In addition to these rights and benefits arising from the flow of the river through this land, the defendants are the absolute owners of all such water as may be present in the soil of this land and which does not constitute a part of the water of the river. This is usually called percolating water. There is, however, no magic in the word 'percolating', and the fact that any witness may apply that word or refuse to apply it to any particular class of waters of which he may speak is not conclusive of the question whether or not such water does or does not form part of the river. That question is to be determined by you from a consideration of the facts proven. The right and ownership of the defendants in this class of waters is distinct from and much greater than their right to the waters of the stream. As to the waters of the stream, they have a right only to the use of it on this land and they do not own its *corpus*, or its body, or the very water itself, and they have no right to take it away from the land and use it on other lands, or to sell or dispose of it for use on other lands or at other places. But as to this other water, if any there be in this land, not a part of the stream, they are the absolute owners of it, to the same extent and as fully as they own the soil, or the rocks or timber on the land. . . . " See Pomeroy at page 622.

As demonstrated by the Supreme Court's apparent affirmation of the above jury instruction given in 1898-1899, the critical issue of whether subsurface waters are subject to SWRCB jurisdiction is a factual question to be determined by either a local trial court or jury or the SWRCB. The legal test, however, remains the same as expressed in Water Code § 1200 and Pomeroy, supra:

> "Whenever the term stream, lake or other body of water, or water occurs in relation to applications to appropriate water or permits or licenses issued pursuant to such applications, such term refers only to surface water, and to subterranean streams flowing through known and definite channels." See Water Code § 1200.

Certainly the San Luis Rey decision of the SWRCB should be strictly limited by the facts presented. It should not be liberally interpreted or expanded beyond existing statutory and case law which limits the SWRCB jurisdiction to groundwater flowing through subterranean streams in known and definite channels. See also Arroyo D & W Co. v. Baldwin (1909) 155 Cal App. 280 at page 284.

ISSUE 2

What information should the SWRCB consider when determining whether subsurface waters are part of a subterranean stream or are percolating groundwater?

ANSWER:

Our thoughts on this particular issue are rather simple; *i.e.,* we encourage the SWRCB to use a conservative application of the Pomeroy legal standard in determining the facts of each individual case presented to you to determine your jurisdiction. Whether the existence of subsurface bed and banks are impermeable with flowing groundwater is a factual issue that must be constrained and limited to the Pala and Pauma Basins. The decision should not be treated as precedent for future SWRCB determinations of whether or not subsurface waters constitute a subterranean stream or are percolating ground waters not subject to SWRCB jurisdiction.

ISSUE 3

Should the SWRCB propose rules or guidance for the classification of which subsurface waters are subject to the water right permitting and licensing system administered by the SWRCB? If so, should the SWRCB propose or establish those rules or guidance through administrative rule making, as a proposal for legislation, in a precedent decision, or through other means?

ANSWER:

We suggest that the SWRCB should not propose guidance for how to factually classify "subsurface waters" as either being part of a subterranean stream or percolating groundwater. We make this comment because, the extraction and use of groundwater in California is increasingly subject to local control. For example, in the Butte Basin area in northern California within the Sacramento Valley, groundwater is subject to local control by the County of Butte (as well as other counties within the Sacramento Valley, *i.e.,* Glenn County) and local water and irrigation districts through the adoption of AB 3030 Plans resulting from the Costa Bill adopted by the state legislature in 1992. See Water Code §§ 10750 et seq. Many local water districts and water agencies have adopted and are implementing 3030 Plans exercising local control over the use of groundwater supplies within the boundaries of their respective districts. Likewise, Baldwin v. County of Tehama decision (1994) 31 CA 4th 166 allows the use of the "police power" to the 58 counties in the State of California to monitor and control the extraction and distribution of groundwater through the adoption of local county ordinances. In fact, the County of Butte electorate in 1996 adopted what is referred to as "Measure G." Measure G requires that a county permit be obtained from Butte County prior to extraction of groundwater which leaves county boundaries as well as groundwater substitute pumping to replace surface water which leaves county boundaries.

Local public and private agencies formed the Butte Basin Water Users' Association (including the County of Butte as well as local water and irrigation districts) in 1992 and developed a hydrologic groundwater model currently used to monitor the health of the Butte Basin groundwater acquifer.

We urge the SWRCB to limit any assertion of jurisdiction over groundwater to those limited factual circumstances that make SWRCB jurisdiction appropriate. The San Luis Rey decision should make clear that the decision is limited to those particular facts and is not precedent for future SWRCB action.

We appreciate the opportunity to submit comments to you in this workshop as to how you treat future application of not only the San Luis Rey decision but existing case law established by Pomeroy, supra and the statutory law set forth in Water Code § 1200.

Respectfully submitted,

MINASIAN, SPRUANCE, BABER,
MEITH, SOARES & SEXTON, LLP

By: _____
WILLIAM H. BABER III, Attorneys for

Biggs-West Gridley Water District
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March 25, 2002

Mr. Arthur Baggett
Chairman
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000

Re: Professor Sax's Report on the State Board's Groundwater Jurisdiction

Dear Mr. Baggett:

Chowchilla Water District requests that the State Water Resources Control Board reject the recommendations contained in Professor Sax's recent report on the State Board's jurisdiction over groundwater.

The Board will be receiving detailed comments on the report from our law firm. This letter addresses separately the overriding concern that the report seeks expansion of the Board's water rights jurisdiction over groundwater, whether through regulations, interpretations, adjudications or aggressive use of the Public Trust and Reasonable Use doctrines – all without legislative oversight. While the report concludes that "Water Code § 1200 is [not] suited to resolve California's 21st Century water problems," the only justification for bypassing the legislative process to enact this view is that the Legislature has been withholding this jurisdiction from the State Board for almost a century and the report concludes that it will not grant such authority today. (Report, pp. 44, 91.)

We believe that such legislative refusal, far from being a signal to the Board to evade that policy judgment, ought to be a signal for the Board to refrain as well.

As the Board has recognized, 40 percent of all water used in this state is groundwater. Our economic and social systems depend today on the stability of groundwater rights. Any changes that render waters that are today considered groundwater into surface water immediately transfer the rights of the most senior groundwater appropriators into rights of the most junior surface water appropriators. Only the Legislature can protect existing groundwater rights and the uses that depend upon them from being eroded or eliminated in this process.

Action by the Board to overtly or subtly alter, evade or interpret away a long-established and legislatively prescribed water allocation system would be dangerous and ill-advised.

Sincerely yours,

Doug Welch
General Manager

cc: 10 copies to:

Paul Murphey
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April 2, 2002

Paul Murphy
Division of Water Rights
State Water Resources Control Board
P. O. Box 2000
Sacramento, CA 95812-2000

VIA EMAIL

Re: Comments on Professor Joseph Sax's Report on the Legal Classification of Groundwater

Dear Sir:

I am submitting these comments on behalf of Siskiyou County. I understood that the deadline had been changed to April 18, 2002; however, I heard today that you have gone back to the original schedule. These comments are submitted in haste because of this confusion; therefore I request an extension of the comment deadline.

I would like to make the following comments:

1. In Professor Sax's recommendations and three-point strategy:

   A. In (1), what do "appreciably and directly" mean?

   B. How are existing water rights, that have not had to be permitted, affected by this strategy if implemented?

2. An addition to the Report should be prepared by Professor Sax describing how he recommends his strategy be practically implemented.

Siskiyou County would appreciate any consideration you can give to extending the comment deadline.

Sincerely,

Siskiyou County Planning Department
Richard D. Barnum, Planning Director

James W. De Pree
Natural Resource Specialist

JWD:mv
Comments.SAX.reportSWRCB.4.02.02.word

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cc: Board of Supervisors
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April 9, 2002

Paul Murphey
Division of Water Rights
State Water Resources Control Board
P. O. Box 2000
Sacramento, CA 95812-2000

Re: Subterranean Streams and the Legal Classification of Groundwater

Honorable Board Members:

Please accept this letter as testimony for the April 10, 2002, public workshop regarding the above referenced subject. Del Norte County is an extremely rural County of the State of California. We receive an average rainfall of approximately 80 inches along our coastal plain where the bulk of our residents live. Del Norte County is approximately 75% owned by State and Federal agencies. Our mountainous interior where the bulk of this public ownership exists receives over 120 inches of rainfall each year. Water is not in short supply in Del Norte County. Our residents rely upon groundwater as our potable water supply. This groundwater is used for agricultural purposes and for domestic use.

Our review of Professor Sax's report generates far more questions than it provides answers. We are also concerned about the frequent use of terms such as "my assumption", "I suggest for the use of presumptions", "in theory", "presumptively", and other vague terms which lead to the cavalier recommendations on page 92. These recommendations lead to the potential for a complicated and inconclusive permit process that will fall to the property owner to disprove impacts assumed in this report. The costs of such process will potentially be onerous to small property owners, many on fixed incomes, and will also be a substantial cost to the state to enforce.

The logistics of enforcement have not been addressed. Our nearest Water Resources office is in Red Bluff, which is a six-hour drive from Del Norte County. We are also concerned that any punitive permit process may result in persons drilling wells without the proper local health permits or any permit of any kind. The health implications of such illegal wells are obvious and should be as important to the state as the implied issue in Professor Sax's report.

Prior to consideration of any new implementing regulation by the Water Resources Control Board, the County of Del Norte requests that it, as well as all other rural counties, be specifically informed of any proposed regulation, rule making, or any imposition by the Water Resources Board of any implementation of assumed jurisdiction regarding the legal classification of groundwater. At a minimum, consideration must be given to providing an exemption for existing wells and their replacements if any new regulatory guidelines are considered. We also request consideration for an exemption for individual domestic wells and individual agricultural wells. These exemptions are necessary to prevent a disruption of domestic water and agricultural water for rural residential property owners and small farm operations currently in place pursuant to existing water rights procedures of the State of California.

Sincerely,

Ernest Perry
Director of Community Development

EWP/wm

cc: Members of the Board of Supervisors
Robert Black, County Counsel

April 2, 2002

Paul Murphey
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P.O. Box 2000
Sacramento, California 95812-2000

Dear Mr. Murphey and Members of the Board:

On behalf of our 107,000 members in California, Defenders of Wildlife provides the following comments on the "Review of the Laws Establishing the SWRCB's Permitting Authority over Appropriations of Groundwater Classified as Subterranean Streams and the SWRCB's Implementation of Those Laws" (hereinafter "the Report"), prepared for the Board by Professor Joseph L. Sax.

We would like to begin by thanking the Board for providing this opportunity to comment on the Report and for retaining Professor Sax to prepare it. It is not often that a public agency invests time and resources in a thorough examination of the scope of its authority, and still less often that an agency provides the public with a process for participating in such an examination. We urge the Board, having embarked on this valuable process, to follow it through to its logical conclusion. We recommend that the Board use the Report and its recommendations as a basis for establishing formal criteria for determining when groundwater belongs to "subterranean streams flowing through known and definite channels," in the words of Water Code section 1200, and is subject to the Board's permitting jurisdiction.

We strongly endorse the Report's central conclusion, that the legislation that became Water Code section 1200 was designed to create an "impact test" under which the Board would have jurisdiction over groundwater pumping that has a direct and appreciable impact on surface water resources. This conclusion has ample support in the legislative history of the Water Commission Act, the case law that informed debate over the Act, and case law and Board decisions subsequent to the Act. The impact test also has important practical advantages, as it relies on measurable characteristics that are in accord with contemporary understanding of the relationship between groundwater and surface water. This test would provide the Board with the ability to protect surface water users from groundwater pumping and enhance its ability to protect public trust resources such as fish, wildlife, and riparian habitat that may be adversely affected by groundwater pumping.

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We also strongly endorse the Report's recommendation that the Board adopt clear criteria to implement the statutory purpose by taking jurisdiction over groundwater uses that directly and appreciably diminish the surface water resources.

While strongly supporting both the Report's conclusions and its recommendations, we do wish to note that the direct impact test is not the most expansive interpretation that could be given Water Code § 1200 in light of the state of the law on the relationship between surface water and groundwater at the time of the Water Commission Act. The language of section 1200, of course, is drawn directly from *City of Los Angeles v. Pomeroy* (1899) 124 Cal. 597, but as the Report acknowledges, "[t]here is nothing to suggest that the draftsmen intended to codify the *Pomeroy* case, or any particular reading of it." (*Id.*) Instead, they "sought to make sure that they had prevented the most egregious opportunities for people to subvert the surface water permitting system," and "[t]he subterranean stream language of *Pomeroy* was the only established verbal tool for doing so, . . ." (*Id.*) The Report states that "[t]he likeliest explanation [for why the drafters used language from *Pomeroy*] is that rather than seeking to devise their own language to identify the subsurface water that should be included within the surface water system . . . , they simply plugged in familiar language that was already a part of water law terminology, "subterranean stream [etc.]." (Report, p. 38.)

However, it is also plausible that the drafters intended the provision that became section 1200 to codify existing law for determining when groundwater is part of a surface stream, and employed *Pomeroy's* language as the most convenient handle for doing so. If so, it would make sense that the test they sought to incorporate in Water Code section 1200 would be drawn from the Supreme Court's most recent major groundwater decision, *Los Angeles v. Hunter* (1909) 156 Cal. 603, decided in 1909, ten years after *Pomeroy* and only four years before the Water Commission Act.

In *Hunter,* which like *Pomeroy* involved the City of Los Angeles' rights to the waters of the Los Angeles River, the Supreme Court found that groundwater withdrawals that diminish the flow of the Los Angeles River effect a diversion from the river:

> The finding that the waters developed in the wells of the appellants are part of the subterranean flow of the Los Angeles River was, as above discussed, abundantly sustained by the evidence. . . . The wells indisputably drew from this underground supply, with the effect of appreciably diminishing the surface flow.

(*Los Angeles v. Hunter,* 156 Cal. at 609.)

In essence, the Court found that all underground water tributary to the Los Angeles River was part of its underground supply, as a practical matter indistinguishable from the River itself. As the Report indicates, subsequent cases interpreting this finding have "focused on whether the groundwater was known to be contributing to a surface stream, as the line of demarcation, . . ." (Report, p. 25.) In *Los Angeles v. Glendale,* 23 Cal. 2d 68, 73 (1943), the Supreme Court held

that Los Angeles' right in the Los Angeles River extended to all the waters in the basin that supply the River, irrespective of whether they are above ground on subterranean. The Court reaffirmed this holding in *Los Angeles v. San Fernando,* 14 Cal.3d 199 (1975). If the drafters of the Water Commission Act intended the subterranean stream language to reflect existing law regarding surface water and groundwater interactions, then arguably the Board has permitting jurisdiction over the "underground supply," to use *Hunter's* terminology, of surface water streams, i.e. all groundwater tributary to a surface water supply.

For present purposes, however, we agree with Professor Sax that an impact test is a reasonable way of capturing the Legislature's intent in drafting section 1200. Whether or not the drafters intended to include all groundwater tributary to surface water streams within the scope of the Board's permitting jurisdiction, unquestionably they intended to protect surface water uses from groundwater pumping, and the Report is rightly focused on the issue of impacts.

After consulting with members of a Technical Advisory Committee, Professor Sax developed a recommended set of criteria for use in determining impact, and thus under the proposed impact test, jurisdiction. These criteria include physical considerations for presumptively establishing jurisdiction, procedures for parties contesting an initial jurisdictional determination, and procedures for allocating the costs in determining jurisdiction.

We recommend that the Board take these criteria as a starting point and establish a process for developing clear policy and technical criteria as the next step in its review of its jurisdiction. The Board should develop these criteria with a view to protecting all surface water uses, including fish, wildlife, and other public trust values. As we emphasized in our comments submitted for the August 2001 workshop on the Report, unregulated groundwater pumping can irreversibly alter delicate riparian ecosystems, eliminate refugia for rare and endangered species, alter the nature of an entire stream system, and in the worst cases, dry up a stream entirely. It is now clear that the Board has the statutory authority to protect biological resources from unconstrained groundwater pumping, and it has a strong foundation for developing the regulatory tools to implement that statutory authority. Professor Sax's Report provides the Board with an opportunity to clarify an area of its authority that has been the subject of continuing controversy, and to provide additional protection for our state's biological resources in the bargain. We strongly urge the Board to seize this opportunity, to develop criteria for determining when groundwater diversions fall within its permitting jurisdiction, and exercise its jurisdiction when groundwater pumping affects surface water resources.

Sincerely,

Brendan Fletcher

Brendan Fletcher
California Program Associate
Defenders of Wildlife

MERCED AREA GROUNDWATER POOL INTERESTES
c/o Ted Selb, Chairman
Merced Irrigation District
P. O. Box 2288
Merced, CA 95344-0288

April 15, 2002

Sent via FedEx #7918-1632-9929

Mr. Paul Murphy
Division of Water Rights
State Water Resources Control Board
P. O. Box 2000
Sacramento, CA 95812-2000

Re: Workshop Comments on Professor Joseph Sax's Report on the Legal Classification of Groundwater

Dear Mr. Murphy:

The Merced Area Groundwater Pool Interests (MAGPI) is an association of public and private water purveyors located in Eastern Merced County, south of the Merced River. MAGPI members include the cities of Livingston, Atwater and Merced, County of Merced, Merced Irrigation District, Stevinson Water District, Merquin Water District, Turner Island Water District, several private water companies and community services districts, essentially representing the entire Merced groundwater basin users.

With the exception of Merced Irrigation District and Stevinson Water District, all of these agencies depend exclusively upon groundwater to provide their citizens with a high quality, affordable, and most importantly, reliable water supply.

Many of our members are also members of other associations, such as the Association of California Water Agencies, the comments of which we also adopt. However, so serious do we take this matter that we feel bound to provide a comment of our own.

Professor Sax suggests, among other things, that the public trust doctrine could and should be relied upon to regulate groundwater. This essentially declares that virtually all groundwater pumping impacts surface water in some manner and may therefore be regulated using some form of an extended surface water regulatory system.

What happens to individual farmers, water agencies and cities if their ability to pump groundwater is suddenly the lowest priority in a new system that cuts off pumping when either the unpredictable surface flow of adjacent rivers is reduced, or when a vague threat to the public trust is perceived by those outside Merced County?

The reliability of the surface water allocation system has been severely impacted by California's failure to properly plan for growth. There is also no doubt that many of the issues raised by Professor Sax will require resolution in the not too distant future. However, the wholesale rejection of California's groundwater allocation system on the basis of regulatory fiat or professorial pronouncement is completely unacceptable.

Professor Sax suggests that the Legislature, which presumably should address the problems he raises, cannot act for reasons he does not discuss, and therefore, suggests a mechanism to avoid elected officials by order of the State Board.

On behalf of MAGPI, I urge you to avoid this legal and perhaps constitutional trap by rejecting or ignoring the report of Professor Sax.

Sincerely,

E.C. "Ted" Selb III
Chairman

cc: MAGPI Membership

DOC # 6

AWC

San Joaquin Valley
AGRICULTURAL WATER COMMITTEE
c/o ~~1189 Whitley~~ 7001 Chase Avenue, Corcoran, California 93212
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EXECUTIVE OFFICE

April 9, 2002

Mr. Arthur Baggett
Chairman
State Water Resources Control Board
P. O. Box 2000
Sacramento, CA 95812-2000

Re: Professor Joseph Sax's Report, Re;
Legal Classification of Groundwater

Dear Mr. Baggett:

The San Joaquin Valley Agricultural Committee, formed in 1979, is comprised of over one hundred water entities within the San Joaquin Valley. The purpose of the Committee is provide a forum for development of policy and position upon specific issues from the individual and collective views of the Members, and collect, coordinate, and disseminate information for the Membership in all matters related to water, energy and drainage in the San Joaquin Valley.

The AWC members rely on several sources of surface waters and the conjunctive use of groundwater to meet the needs of their respective regions. Therefore, they are very interested in issues that could affect either of these water sources.

Collectively, the members have indicated concern as to the conclusions in Professor Sax's report recently provide the SWRCB on the legal classification of groundwater. They do not believe that those conclusions would in any way benefit groundwater programs and practices that are currently in place. In fact, the report's conclusions are viewed as having the potential of creating great uncertainty in groundwater matters, particularly in the San Joaquin Valley.

Due to the concerns of its members, the AWC supports the comments of April 10, 2002, filed with respect to the Sax report by Tim O'Laughlin on behalf of the San Joaquin River Group Authority.

Yours truly,

Brent L. Graham
Secretary

Copy to:
AWC Members

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April 11, 2002

State Water Resources Control Board
P.O. Box 2000
Sacramento, California 95812-2000

RE: SWRCB Jurisdiction over Groundwater;
Professor Joseph Sax's Report on the
Legal Classification of Groundwater

Dear Board Members:

Thank you for the opportunity to present views in regard to the very important topic of the Board's jurisdiction over groundwater, as occasioned by the Board's two day workshop on Professor Sax's Final Report entitled "Review of the Laws Establishing the SWRCB's Permitting Authority over Appropriations of Groundwater Classified as Subterranean Streams and the SWRCB's Implementation of Those Laws." SWRCB No 0-076-300-0, January 19, 2002.

I have worked in the field of water resources law for nearly thirty years and I have been involved in the subterranean stream issue in a variety of contexts throughout my career. I represented a party in the Pauma-Pala case which led directly to Board's referral to Mr. Sax and to the current workshop. This letter, however, and my oral comments are not written on behalf of any client. My comments are submitted as a member of the public, with some informed views on the subject matter, in the hopes of influencing the proper administration of the Board's jurisdiction and of justice.

I believe that Mr. Sax's efforts are to be commended and that his Final Report is a substantial contribution to scholarship on this difficult subject. I prefer Mr. Sax's formulation of guidelines for the exercise of the Board's groundwater permitting authority to the formulation set forth in the Board's draft opinion in the Pauma-Pala case. However, neither approach is supported in law, and the Board's adoption of either one of them will almost certainly engender legal conflict and confusion. Mr. Sax's approach, while laudable for its practical and analytical simplicity, is not supported in statute or Board precedent. His approach would very likely merely shift the locus and focus of the inquiry from the traditional bed and banks inquiry to his new

impacts inquiry, without reducing the number, depth or breadth of conflicts. There is no authority in Water Code §1200 or any other California Statute for the formulation suggested by Mr. Sax.

Of equal importance, in my view, to the question of ***what*** that Board chooses to do on this subject is the question of ***how*** the Board chooses to go about doing it. Having come this far with a relatively open and public discourse, following the controversy created by the Board's draft Pauma-Pala decision, the Board should choose now to either (1) abandon the expansive vision of its jurisdiction over groundwater formulated either in the Board's draft Pauma-Pala decision or in Mr. Sax's Final Report, and return to the confines of the Board's prior precedents (as articulated in the "Comments of the Association of California Water Agencies," dated April 10 and 11, 2002); or (2) embark on a formal rule making procedure, subject to the requirements prerequisite to the adoption of formal regulations. The Board must not depart from current understandings of its jurisdictional limits in the context of determining the Pauma-Pala case, or any other case, where only the contending parties (and, evidently, the Board's own staff) have standing to participate and/or to seek judicial review. Since the rule adopted by the Board will likely effect those well outside the scope of the case and controversy presented in Pauma-Pala, the rule should be adopted in an open and public, participatory process, subject to the checks and balances provided by California law for such rule making endeavors. In short, adoption of a new rule on the Board's groundwater jurisdiction must be treated as a quasi-legislative action, not a quasi-judicial action. The differences in participation and procedure are significant and fundamental to due process under our laws.

In the interest of honoring the Board's request to avoid redundancy, I incorporate and endorse the "Comments of the Association of California Water Agencies..." dated April 10 and 11, into my comments and commend the views expressed therein to your consideration along with those set forth above.

Very truly yours,
MCCORMICK, KIDMAN & BEHRENS, LLP

s/AGK

Arthur G. Kidman

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JOHN F. HANSON, JR.
OF COUNSEL

April 2, 2002

Paul Murphey
Division of Water Rights
SWRCB
Sacramento, California

Re: Workshop on Professor Sax's Report
SWRCB No. 0-076-300-0
April 10, 2002

Dear Mr. Murphey:

Professor Sax's Report is a significant document. The SWRCB should pay particular attention to Chapters V and VI. The solutions Professor Sax proposes in these two Chapters are important to water issues in the state and are particularly important to California's economy over the next fifty years. Our comments on the Report are divided into the following categories:

A. Background
B. Responses to the Questions Posed by the Board
C. People v. Forni
D. Indefinite Nature of California Water Rights
E. Existing Statutory structure

Background

Over the last thirty years lawyers in our Office have been involved in a number of different water issues in the State of California:

1>Developed the arguments and positions at the SWRCB on behalf of private clients which ultimately became People v. Forni.

2>Represented major landowners throughout California and Nevada.

3>Represented major financial institutions with concerns about their investments in California because of the water issue.

4>Co-Authored an article entitled "Restructuring America's Water Systems" published by the Reason Foundation. Neal, Kathy, Patrick J. Maloney, Jonas A. Marson and Tamer E. Francis, Restructuring America's Water Industry: Comparing Investor-Owned and Government-Owned Water Systems, Jan. 1996 (Reason Foundation, Policy Study No. 200). Many people see this article as an argument for privatization of the water delivery system in America. Morgan, Steven P. and Jeffrey I. Chapman, Issues Surrounding the Privatization of Public Water Service, Sept. 1996 (ACWA). The word "privatization" does not appear in the article. The article has received extensive criticism from organizations like ACWA, but the Reason Foundation article suggests public policy makers should rethink how water is distributed and managed in America and California in particular. The article has been purchased and studied by most significant water interests in the world including but not limited to financial institutions, water purveyors, engineering firms, and think tanks.

5>Developed the Instadjudicator. This is an interactive database that instantly determines a landowner's water rights or water entitlement in the Salinas Valley. The interactive database uses public source inputs such as chains of title, the APN system, assessor map overlays, County and State publicly available databases, defined engineering terms, the results of computer runs from the Salinas Valley Integrated Ground and Surface Water Model and other non-proprietary information. The utility of such a tool is to (1) quickly develop "what if" scenarios, and (2) to identify anomalous or skewed inputs or uses, e.g., identify by inferring from multiple sources that water use in a section of the analyzed area is substantially higher than the surrounding areas viz. unreasonable. We are not suggesting that the Instadjudicator is the only solution to the State's water issues but what is needed is a similar tool for all over-drafted (and ultimately all) basins so there can be a critical analysis of a Basin's water issues and "what if" scenarios can be quickly understood.

Engineers involved in the Mojave case have reviewed the operation of the Instajudicator and suggested its use would hasten the resolution of the Mojave case. The Instadjudicator was offered to the SWRCB with appropriate technical assistance for its use but the offer was rejected. At a contested hearing the SWRCB refused to force the Monterey County Water Resources Agency to release data by which the instant adjudication of the Salinas Valley could be accomplished. Hearing on Motion to Quash Subpoenas, 6/28/00, Application 30532. A staff member of the SWRCB has suggested there are two problems with the Instadjudicator: A) The name and B) that this office developed it.

6>The office is currently working on an analysis of the leadership in the Water and Sewer industry with prominent People of Color. The purpose of this analysis is to compare the existing leadership of the water industry against the demographic make-up of the State now and forty years from now. The preliminary results of this research indicate that the California's water industry is not reflective of the ethnic demographic make-up of the State now or forty years from now.

Responses to the Questions Posed by the Board

Professor Sax proposes quantifiable criteria by which the water user could determine whether or not it is pumping percolating groundwater. The first problem with the proposed criteria is that they will involve more engineers arguing arcane hydrologic issues. These arcane hydrological issues are irrelevant if there is an unreasonable use of water. More importantly the percolating groundwater and underground surface water classification will change depending on what crop is used and how much water is being pumped in a given basin. What these criteria do is add further confusion rather than bring more definability to water usage in California. From time to time or place to place making the fine distinctions advanced by Professor Sax may be necessary, but only as a component of an overall solution-oriented water management system, not as the starting point. Making the management of California water more complex is not in the State's interest.

People v. Forni

Over thirty years ago adjudication was proposed for the Napa Valley and our vineyard clients decided adjudication would not solve the water problems caused by Frost Protection in the Napa Valley. The clients and their representatives instead worked closely with the staff of the SWRCB led by Ken Woodward, the former Chief of the Division of Water Rights, and the SWRCB to develop the principles which ultimately became People v. Forni. These principles and facts were presented in a highly contested hearing before the SWRCB. The arguments and the facts presented by our clients were the basis for the See decision and from the See decision the SWRCB developed the regulation challenged in People v. Forni. People ex rel. SWRCB v. Forni (1976) 54 Cal.App.3rd 743; See Decision 1404. Our clients presented these positions because they felt the only way a system for Frost Protection could be developed was if all water sources in the water basin were considered and managed. Under the far-sighted leadership of Chairman Adams and Members Robie and Auer the SWRCB used its Sections 100

and 275 powers and brought stability to the region's water problems and allowed the Napa Valley to prosper. The lesson the SWRCB can learn from Forni is that once it develops a carefully reasoned engineering position it should take an active role in solving a region's water problem before the problem becomes a crisis.

For the last five years another set of clients have advocated a similar solution, the application of Sections 100 and 275 powers to the Salinas Valley's salt water intrusion and nitrate problems and the SWRCB has repeatedly rejected our clients' pleas. The current Chief of the Division of Water Rights has opposed the use of Sections 100 and 275 powers by the SWRCB because "initiating an unreasonable use proceeding would be viewed by the local agency as a 'blind-side' attack, and would probably be considered a back-door adjudication by the agricultural community. Nevertheless, if other efforts fail, this type of action would be preferred over an adjudication because the SWRCB could address administratively rather that in a judicial proceeding in superior court." (Confidential) Memorandum from Harry Schueller on Salinas Valley, June 16, 2000, page 8. The SWRCB's inaction has put in jeopardy the water supply of a major city in California and will likely cost the taxpayers (State and/or local) tens or hundreds of millions of dollars that could have been avoided by forcing a certain limited segment of the agricultural community to use water reasonably in the first place. The SWRCB has the power to solve water problems in this State and most of the issues raised in Professor Sax's Report. It must use the power and not worry about offending local water agencies or limited segments of the agricultural community.

Indefinite Nature of California Water Rights

No one really knows who has water rights in California. All water licenses are subject to vested rights. What those vested rights are is anybody's guess. Probably the most interesting statement made in Professor Sax's Report is found in footnote 122 wherein he cites In re Waters of Long Valley for the proposition that there is no such thing as unexercised riparian water rights in California. Long Valley probably does not say that, but the point is there is no water right in California if the actual or contemplated water use is unreasonable. The Sax Report is full of references to cases by various California courts over the last century, which apply the reasonableness test to solve a water problem. There are no absolute water rights. A water right disappears in California when the needs of the community demand it.

The most disturbing problem we have in California water issues is that the SWRCB cannot figure out what its position is on most issues and the underflow issue is just a manifestation of the problem. We have staff letters of the SWRCB and Licenses telling the public that certain water rights exist yet frequently in public hearings of all types we have representatives of the SWRCB or other agencies of the State denying the validity of SWRCB's earlier positions. The SWRCB looks like a fool. To the outside world the State of California looks like a fool. In earlier times California could do whatever it pleased. Now, however, we have few major banks or financial institutions left in California and in order to maintain financing for our homes, agriculture and industries we must bring some order and discipline to the State's water system. We have to have more definability in our water system. We cannot reject definability merely because it upsets the sensitivities of certain water agencies or members of the agricultural community. The magic of People v. Forni and other things done in the Napa Valley to define water rights and optimize the region's water resources brought confidence to the investing and lending institutions and helped spur the development of California's wine industry.

Existing Statutory Structure and Actions of the SWRCB

Professor Sax's Report fails to recognize how much the Legislature and the SWRCB has actually done to solve the State's water problem. We direct the SWRCB's attention to Water Code Sections 5100 et seq. and 1010 et seq. and the forms prepared by the SWRCB. STATEMENT (1-00) and ST-SUPPL (2-01). No one knows exactly how to fill out the forms because of the SWRCB's inability to define underflow and consumptive use but at least there is a form. SWRCB has expanded the Section 5100 form dramatically in recent years without legislative approval. The forms should be expanded administratively to require water users to report all types of water sources and use. If the SWRCB does this administratively, there will be no need for the legislative action feared by Professor Sax. Once the forms are filed the data should be put into the existing publicly accessible SWRCB databases defined by USGS basin lines. Then Computer tools should be developed for each water basin such as an "integrated groundwater and surface water model" throughout the State by which anyone could easily ascertain a reasonable use of water for a given basin.

Such a system would encourage conservation and the orderly transfer of water. Either the SWRCB or somebody else could then stop anybody who is unreasonably using water pursuant to Water Code Sections 100 and 275. Anybody

who is using less than a reasonable amount water could transfer water to somebody who has a need for the conserved water. Then the State's water argument will be over reasonable use of water in any given basin not over the application of unclear laws to disputed hydrological facts.

Ultimately if the expanded Section 5100 form is not filled out and filed by a water user, the Legislature could develop legislation establishing a presumption the water user forfeits whatever water rights it has unless the water user can demonstrate good cause for not filing the form. Notwithstanding much of the uncertainty about the present filing system, this office has been active in filing reports for its various clients, relying on various public sources to explain and detail positions where the SWRCB has not provided clarity. This office understands the system to be akin to recording ownership of real property. In other words, if a water user declines to follow the statute and does not file, its claim will be entitled to less weight than any competing claim of a water user who followed procedures and filed reports – similar to that of a property owner who takes title but does not record it. Water users also file Statements with the expectation that this State database will be used by EIR preparers to catalogue and analyze water rights for a given project. Save Our Peninsula Committee v. Monterey County Board of Supervisors (2001) 87 Cal.App.4th 99, 122; Petition for Extension of Time for Permit 5882 (Application 10216) (1999).

California's computer industry deals with much more complex than the State's water issues. The SWRCB should rely on this industry for solutions. The SWRCB's existing data system on water rights should be modified to make all pumping data publicly available and a system of inquiry developed so the public can ascertain a reasonable water use standard for each basin.

Conclusion

The Sax Report offers important statutory history. The SWRCB should carefully consider the Report's generalized recommendations and develop an action plan to pursue the goal of a more defined system of water rights. This will ultimately lead to an overall solution-oriented water management system.

Very truly yours,

Patrick J. Maloney

GRISWOLD, LASALLE, COBB, DOWD & GIN, L.L.P.

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April 10, 2002

VIA FAX (916) 341-5400, e-mail & U.S. MAIL

Arthur G. Baggett, Jr., Chair
STATE WATER RESOURCES
CONTROL BOARD
P.O. Box 2000
Sacramento, CA 95812-2000

Re: Kings County Water District Comments on Report Entitled "Review of the Laws Establishing the SWRCB's Permitting Authority Over Appropriations of Groundwater Classified as Subterranean Streams and the SWRCB's Implementation of those Laws," SWRCB No. 0-076-300-0, Joseph L. Sax, Project Director

Dear Chairman Baggett and the Honorable Board Members of the State Water Resources Control Board:

This letter contains the comments[1] of the Kings County Water District (KCWD or the District) on the report entitled "Review of the Laws Establishing the SWRCB's Permitting Authority Over Appropriations of Groundwater Classified as Subterranean Streams and the SWRCB's Implementation of those Laws," dated January 19, 2002, referred to herein as the "Report." The Report was prepared by Joseph L. Sax, who is currently or until just recently was the James H. House and Hiram H. Hurd Professor of Environmental Regulation at Boalt Hall School of Law, University of California. Professor Sax is a well known commentator on the public trust doctrine. See, e.g., Sax, The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention, 68 Mich. L. Rev. 473 (1970).

The District notes that the Report contains numerous difficulties, including questionable use of the "legislative history" of the Water Commission Act of 1913, statutory interpretations based on assumptions not fully stated or supported, and the uncritical acceptance of the "precedential" value of prior decisions of the SWRCB and its predecessor entities, notwithstanding the abridgment

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[1]Some confusion arose regarding the Board's workshop dates. The District's understanding is that the workshop on the Report was originally scheduled for April 10, and 11, 2002, then later changed to April 24, 2002, then changed back to April 10, and 11, 2002. Given the confusion regarding the workshop dates, the District reserves all its rights to submit additional comments and to join in or respond to the comments of other parties.

of the constitutional doctrine of separation of powers, and other constitutional infirmities, such a position entails. These are all matters about which reasonable minds may differ, but which must be fully and accurately set forth to the SWRCB, particularly if the Board is inclined, without legislative mandate, to expand its permitting jurisdiction beyond its statutory authority which is set out in the plain language of Water Code §§ 1200 and 1201.

The District has no doubts that many members of the California water bar will fully analyze these and other difficulties in the Report. The District chooses to focus its present comments on the proper understanding of the public trust doctrine in the context of California water law.

The District believes that the SWRCB, perhaps acting in reference to positions advocated by its staff,[2] may not have an accurate view of the public trust doctrine, and the application of that doctrine to water rights. As explained below, the public trust doctrine does not mean that the water diverters always lose. Indeed, under the public trust doctrine, the water diverters should sometimes certainly win.

I. THE DISTRICT AND ITS WATER MANAGEMENT POWERS AND ACTIVITIES.

The District was formed in 1954 under the County Water District Law (Water Code §§ 30000-33901). The purpose of KCWD is to protect the water supplies in Northern Kings County used by the small farmers in that area. The District's territory includes the site of the Mussel Slough incident on May 11, 1880, which involved small farmers pitted against the machinations of the Southern Pacific Railroad, immortalized in The Octopus.

Within the District are located a number of non-profit marketing cooperatives which permit farmers to obtain just returns for the fruits of their labor by marketing their products in concert.

The District was and is an outstanding example of grassroots community involvement to preserve and protect local surface water and groundwater resources for the benefit of District farmers.

In 1956, the District successfully argued its position in a seminal case, Atchison, Topeka and Santa Fe Railway Co. v. Kings County Water District (1956) 47 Cal. 2d 140, in which the California Supreme Court recognized the validity of the purposes and functions of the District, to protect the

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[2]The adoption of advocacy roles by SWRCB staff erodes the authority and legitimacy of the SWRCB as an impartial decision maker. There should be no advocacy. Staff should present accurate factual and legal information to the SWRCB, which then exercises its independent judgment on that information and reaches decisions on the particular matters before it. The District leaves the problem of staff advocacy for another day.

groundwater supplies of the District and prevent transportation of groundwater to areas outside the District.

> The Kings County Water District was organized February 24, 1954, under the County Water District Law. It comprises approximately 150,000 acres. **It was organized primarily to protect the underground water supplies of the area from excessive pumping and to guard against the transportation of the groundwater to areas outside the District.** Its purposes and functioning generally have been in accordance with the aims and methods approved by law for such an organization. [. . .] ***The protection, conservation and replenishment of the underground water supplies is one of the main functions of the water district in question.*** Atchison, Topeka & Santa Fe Railway Co. v. Kings County Water District (1956) 47 Cal 2d 140, 143, 146 (emphasis added; citations omitted).

The District has broad powers. The District has the power to and may do any act necessary to furnish sufficient water in the District for any present or future beneficial use.

The District may store water for the benefit of the District, conserve water for future use, and may appropriate, acquire, and conserve water and water rights for any useful purpose, including groundwater banking of surface waters, the reclaiming of the return flows of imported waters and other waters which would not otherwise be present in the underground water bearing formations, and the management of such waters.

The District may operate water rights, works, property, rights, and privileges useful or necessary to convey, supply, store, or make use of water for any purpose authorized by the County Water District Law.

The District may sell water or the use thereof for any useful purpose and whenever there is a surplus, may dispose of the surplus to municipalities, public agencies, or consumers, including farmers, located within or without the District.

The District has adopted a Groundwater Management Plan under the provisions of Water Code §§ 10750 et seq., and has revised its Plan.

The District has developed water recharge facilities including a water bank.

The District was also successful in insuring Kings River flows into the Old River channel, also known as the High-Flow Channel, by arguing its case before the State Water Rights Board resulting in Water Rights Decision D1290, thus helping insure substantial groundwater recharge for the District which otherwise would not have taken place.

Since its inception in 1954, Kings County Water District has had a dramatic impact on Northern Kings County by establishing the foundations of a strikingly diverse and flourishing agricultural economy of field crops, seed crops, fruit and nut crops, and vegetable crops largely developed by farmers who cultivate their own land in reliance on a reliable and affordable water supply.

II. THE DIFFICULTIES IN THE REPORT MAY ARISE FROM THE CONTEXT OR CIRCUMSTANCES UNDER WHICH IT WAS COMMISSIONED.

The Report was commissioned to answer the following six questions[3] regarding the legal classification of groundwater. The six questions are:

1. What is the scope of the SWRCB's permitting authority over groundwater?

This question uses the undifferentiated term "groundwater" without distinguishing the legal classification of different kinds of ground waters.

2. What is the current legal test for determining whether groundwater is subject to the SWRCB's permitting authority?

It is known that SWRCB water right staff have long had a water right "bible" summarizing California water law, and which serves as a ready reference for staff. A better question might have been to state what the staff's "bible" states as the legal test for the SWRCB's permitting authority over groundwater, and ask whether that statement is an accurate statement of the law, or should be changed, particularly in light of Barstow v. Mojave Water Agency (2000) 23 Cal.4th 1224, which answered, "no." See the attached Appendix A for a discussion of the Mojave case.

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[3]The six questions were stated in a notice entitled "Public Meetings to Discuss the Legal Classification of Groundwater," date-stamped July 23, 2001, and signed by the Chief, Division of Water Rights. The Notice also announced two public meetings of the SWRCB, which were held on August 20, 2001, and August 23, 2001. The Notice discloses that Professor Sax had already been hired as a consultant to the SWRCB. The Notice is not clear whether public contracting procedures were followed with respect to the hiring of Professor Sax. The Notice does not comply with the Brown Act because, though the Notice announces that public board meetings will be held, it is not clear whether the items thus noticed were discussion items only. The meetings probably should have been characterized as workshops.

3. Under this legal test, what physical characteristics should the SWRCB evaluate in distinguishing subsurface waters subject to the SWRCB's permitting authority from subsurface waters that are percolating groundwater?

This question juxtaposes the term "subsurface waters" and "percolating groundwater." The formulation of the question assumes that some subsurface waters are subject to the SWRCB's permitting authority, that percolating groundwater is a subclassification of subsurface waters, and that percolating groundwater is not subject to the SWRCB's permitting authority.

4. What factors has the SWRCB considered in its past decisions regarding groundwater classification?

This question uses the term "groundwater classification," and assumes that different classes of ground waters exist, without distinguishing whether the classification is legal, scientific, or other wise. Notably, the question as framed, does not refer to the decisions of courts which have established groundwater law.

5. Should the legal test for determining what subsurface waters are subject to the SWRCB's permitting authority be changed? If so, what legal test would be appropriate?

This question assumes the conclusion that the "legal test for determining what subsurface waters are subject to the SWRCB's permitting authority" should indeed be changed. This question (really two questions) is an advocacy question, is inappropriate, and should not have been presented.

6. Can quantifiable criteria be established to implement the legal test? What are the quantifiable criteria?

This question assumes that technical, as opposed to legal, criteria should be employed to determine the scope of the SWRCB's permitting authority over subsurface water. Framing the question in such a manner cedes the adjudicative function entrusted to the SWRCB by the people through their elected representatives to unelected members of the SWRCB staff or unelected consultants hired by the SWRCB. The question is also an invitation to "back door" or sub rosa rule making, in violation of the Administrative Procedure Act, assuming such rule making authority exists in the first place.

The difficulties of the Report may have been inherent by the framing of the questions the Report was directed to address. The above comments to the questions disclose that the questions perhaps were ill-framed, may not have been consistent or clear with regard to nomenclature, and may have contained assumptions which "stacked the deck" by defining the bounds of the universe

of discourse a priori. The questions lack precision. Perhaps they were formulated ad hoc.

The Report concludes with three recommendations for the SWRCB. These recommendations appear to be offered should the SWRCB choose to assert jurisdiction over percolating groundwater, and other ground waters, not flowing in underground streams in known and definite channels, or as underflow of a surface stream. These recommendations are:

(1) Adoption by the Board of clear criteria to implement the existing statutory purpose, by taking [sic] jurisdiction henceforth over groundwater uses that diminish appreciably and directly the flow of a surface stream; and

(2) Proactive use by the Board of its authority under Water Code § 275 and any other sources of jurisdiction it has, to implement the constitutional prohibitions on waste, unreasonable use, and unreasonable methods of use; to protect the public trust, and to safeguard established rights in surface stream flows; and

(3) Where serious basin-wide problems are presented, comprehensive basin management (as with the most successful adjudicated/managed Southern California basins) is the most promising tool to achieve genuine integration of surface water and groundwater administration in California. This suggestion is made in full recognition of the cost, duration and complexity usually associated with settling rights generally within a basin. Nonetheless, that approach seems the most promising way for this state to position itself to address contemporary issues. Unlike proposals for expanding regulatory jurisdiction, basin management offers the possibility of employing the full range of needed management tools, such as professional administration, pumping assessments, importation of new supplies, replenishment programs, achievement of sustainable use, allocation of groundwater storage capacity, quality control, and conjunctive use. Report at p. 92.

The first recommendation is troubling. It posits some power of the SWRCB to "take" or arrogate jurisdiction to itself, and to engage in improper de facto rule making.

The second recommendation refers to Water Code § 275 and the prohibition on waste, unreasonable use, unreasonable method of use, and unreasonable method of diversion of water. This statutory prohibition is essentially a gloss on the Constitutional prohibitions contained in Article X, section 2, of the California Constitution, originally adopted by referendum vote in 1928 as Article XIV, section 3.

The third recommendation advocates more government, and does not acknowledge the many entities in California, including the District and numerous canal companies that take out of the Kings River, that already actively and efficiently manage surface and ground waters at the local level throughout California.

While all water use is subject to the rule of reasonableness, the public trust doctrine too must be understood as a limiting principle, as a rule of reason, and not as a legal *diktat* favoring any one use of water (diversion for trust purposes) over any other use of water (diversion for consumptive uses).

III. THE PUBLIC TRUST DOCTRINE RECOGNIZES THE NEED TO BALANCE PUBLIC TRUST REQUIREMENTS WITH OTHER NEEDS, INCLUDING WATER DIVERSION AND CONSUMPTION.

The public trust doctrine was applied to post-1914 appropriative water rights by the Supreme Court in National Audubon Society v. Superior Court (1983) 33 Cal.3d 419. In 1940, the SWRCB's predecessor granted permits to appropriate much of the inflow to Mono Lake to the City of Los Angeles Department of Water and Power (DWP). National Audubon, 33 Cal.3d at 424.

Mono Lake is located at the base of the eastern slope of the Sierra Nevada mountain range and is "the second largest lake in California." Id. Mono Lake is a navigable waterway, though the Mono Lake tributaries from which DWP diverted water are nonnavigable. Id. at 435.

Since 1970, DWP had diverted virtually all the water, approximately 100,000 acre-feet per year, that would otherwise flow into Mono Lake from its tributary streams. Id at 424. When granting the original permits to DWP, the SWRCB believed it "had to grant the applications [to appropriate water] notwithstanding the harm to public trust uses of Mono Lake" because DWP's planned use was for domestic purposes."[4] Id. at 427.

The National Audubon Society filed suit to stop the harm it claimed was occurring, and would continue to occur, to the environment of Mono Lake on account of DWP's diversions from the tributary streams. Id. at 431. Although the parties "hotly dispute[d]" the long-term effects of continued diversion on the Mono Lake ecosystem, the Court noted that even DWP's estimates

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[4]The Court quoted language from the SWRCB's decision showing the SWRCB's belief: "This office therefore has *no alternative but to dismiss all protests based upon the possible ... [harm to] aesthetic and recreational value[s].*" National Audubon, 33 Cal.3d at 428 (emphasis in original; citations omitted). Water Code § 1254, enacted in 1921, declares that "in acting upon applications to appropriate water the [SWRCB] shall be guided by the policy that domestic use is the highest use . . . of water." Water Code § 1254; National Audubon, 33 Cal.3d at 427.

predicted a much lower lake level resulting in a much smaller lake. Id. at 429. Because the amount of fresh water entering the lake was greatly reduced by DWP's diversions, the salinity level had risen to levels which threatened environmental and recreational uses of Mono Lake.[5] Id. at 429-31.

The Court rejected DWP's challenge to National Audubon's standing to bring suit, basing its decision on Marks v. Whitney (1971) 6 Cal.3d 251, 259, where the Court "expressly held that any member of the general public has standing to raise a claim of harm to the public trust." Id. at 431, n.11. National Audubon based its claim for relief solely on the principles of the public trust doctrine. Id. at 448.

The major issues before the Court were: (1) whether the public trust doctrine is applicable to, and therefore limits conduct affecting, nonnavigable streams which are tributary to a navigable waterway (Id. at 435); (2) whether the public trust doctrine exists separate from or has been "subsumed" by the appropriative rights system (Id. at 445); and (3) whether plaintiffs must exhaust their administrative remedies before the SWRCB prior to seeking judicial relief (Id. at 448).

A unanimous Court supported a strong interpretation of the public trust doctrine. Id. at 445-447. The Court concluded that "the public trust doctrine . . . protects navigable waters from harm caused by diversion of nonnavigable tributaries." Id. at 437. Because "[t]he state as sovereign retains continuing supervisory control over its navigable waters," a party may not acquire "a vested right to appropriate water in a manner *harmful* to the interests protected by the public trust." Id. at 445 (emphasis added). In fact, the state may revoke "previously granted rights" or enforce "the trust against [property rights] long thought free of the trust." Id. at 440 (citing City of Berkeley, 26 Cal.3d 515). The Court noted that the recreational and ecological values at Mono Lake are among the interests protected by the public trust doctrine. Id. at 435. Because the public trust doctrine is a "judicially fashioned" recognition of the state's inherent power over trust resources, the doctrine cannot be modified or repealed by either statute or constitutional amendment. Id. at 446, n.27.

The decision in National Audubon, however, is not one sided in favor of the public trust or public trust "values." The Court points out that flexibility is necessarily inherent in water management. Flexibility also applies to principles of environmental stewardship: "As a matter of practical necessity the state may have to approve appropriations despite foreseeable harm to public

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[5]The Court noted that higher salinity levels threaten to "wreak havoc throughout the local food chain" by harming algae, brine shrimp and brine flies that inhabit Mono Lake. National Audubon, 33 Cal.3d at 430. The Court also noted that the lake is a major stopping point for migratory birds, a nesting site for 95% of the state's population of California gulls, and a source of economic and recreational values for humans, all of which were threatened by continued diversion. Id. at 430-31. The Court was also concerned that reduced lake levels would result in a threat to human health from airborne silts rising from the dry lake bed. Id.

trust uses." National Audubon Society v. Superior Court (1983) 33 Cal.3d 419, 446.

The public trust doctrine cannot be applied in a vacuum without regard to competing considerations. Nor can the public trust doctrine be applied to the full logical extent of its scope. To do so would cause the public trust doctrine to "occupy the field of allocation of stream waters to the exclusion of any competing system of legal thought." National Audubon Society v. Superior Court (1983) 33 Cal.3d 419, 445.

Like the public trust, the California water rights system "embod[ies] important precepts which make the law more responsive to the diverse needs and interests involved in the planning and allocation of water resources. To embrace one system of thought and reject the other would lead to an unbalanced structure, . . ." Id. at 445 (emphasis added).

Thus, the concepts embodied in the public trust doctrine and the appropriative water rights system administered by the SWRCB must be "balanced" or "accommodated" with each other given the water needs of the state.

> **The population and economy of this state depend upon the appropriation of vast quantities of water for uses unrelated to in-stream trust values.** California's Constitution, its statutes, decisions, and commentators, 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 they harm public trust uses,** and can be justified only upon theories of reliance or estoppel. Id. at 446 (citations omitted; emphases added).

Notwithstanding its statements in support of the public trust doctrine, the National Audubon Court also stated that:

> [a]s a matter of current and historical necessity, the Legislature, acting directly or through an authorized agency such as the [SWRCB], 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. Id. 446 (emphasis added).

In addition, the Court also stated the need to protect trust values:

> 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**. 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. **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, **and to preserve, so far as consistent with the public interest,** the uses protected by the trust. Id. at 446-447 (emphasis added; citations omitted).

National Audubon imposes an "affirmative duty" upon the state "to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible." Id. at 446. Even when the state does take the public trust into account in deciding to allocate trust property, "the state is not confined by [that] decision[]" and may "reconsider allocation decisions." Id. at 447. Although the Court noted that there were "rare instances" when the state may have abandoned its public trust interest in certain property, the Court indicated an unwillingness to find such abandonment unless the legislative intent to that effect was clearly discernible. Id. at 438-40. Even when the Legislative intent is clearly to abandon the public trust in property, the Court implied that "the abandonment of [the public trust must also be] consistent with the purposes of the trust." Id. at 441.

Although the Court's opinion supported the imposition of public trust considerations upon post-1914 appropriative water rights, the Court pointed out that public trust uses of water, as with all uses of water, must comply to the constitutional standard of reasonable beneficial use. Id. at 443 (citations omitted). Water may not be wasted simply to supply public trust uses. Hence, the state may "grant usufructuary licenses" to divert and transfer water "even though this [activity] does not promote, and may unavoidably harm the trust uses at the source stream." Id. at 446.

The Court saw the diversion of water from in-stream uses as necessary "to make efficient use of California's limited water resources." Id. The Court also noted that "the public trust doctrine does not prevent the state from choosing between trust uses," uses which include commercial as well as recreational and environmental uses.[6] Id. at 440 (citations omitted). Furthermore, although the

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[6]The court noted that permitting the state to "prefer one trust use over another" does not necessarily lead to the conclusion that the state "abrogate[s] the public trust merely by authorizing

state may resume trust uses when it chooses, the Court noted that the state may have to pay for "expenses incurred in improvements made under [a revoked] grant," presumably under a "theory of reliance." Id. at 438, 446 (quoting Illinois Central Railroad v. Illinois (1892) 146 U.S. 387, 455-456).[7]

In National Audubon, the Court did not hold that the SWRCB could retroactively or otherwise apply the public trust doctrine to riparian rights. The Court did not hold that the SWRCB may apply the public trust doctrine to pre-1914 appropriations. Nor did the Court hold that the public trust doctrine may be applied to the overlying right to percolating groundwater, or to appropriations of percolating groundwater.

National Audubon was a resolution of the conflicting contentions between the plaintiffs and DWP, which if applied in an internally consistent manner, would each negate the other.

> Plaintiffs, for example, argue that the public trust is antecedent to and thus limits all appropriative water rights, an argument which implies that most appropriative water rights in California were acquired and are presently being used unlawfully. Defendant DWP, on the other hand, argues that the public trust doctrine as to stream waters has been "subsumed" into the appropriative water rights system, and, absorbed by that body of law, quietly disappeared; according to DWP, the recipient of a [SWRCB] license enjoys a vested right in perpetuity to take water without concern for the consequences to the trust. National Audubon, supra, 33 Cal.3d at 445.

As quoted above, however, the Court clearly stated it could accept neither position, for to do so would "embrace one system of thought" and lead to "an unbalanced structure." Id. To further clarify its opinion, the Court explicitly stated that its decision did not:

> dictate any particular allocation of water. Our objective is to resolve a legal conundrum in which two competing systems of thought--the public trust doctrine and the appropriative water rights system--existed independently of each other, espousing principles which seemingly suggested opposite results. National Audubon, supra,

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a use inconsistent with the trust." National Audubon, 33 Cal.3d at 439, n.21.

[7]On the exhaustion of administrative remedies issue, the Court concluded that although a person may seek relief for harm to public trust interests directly before the SWRCB, the courts have "concurrent jurisdiction" to hear such cases. National Audubon, 33 Cal.3d at 449, 452. The Court construed Water Code § 2501 to permit public trust claims before the SWRCB and relied on a long line of decisions to justify concurrent court jurisdiction. Id. at 449.

33 Cal.3d at 452.

Simply put, National Audubon did not apply the public trust doctrine retroactively to pre-1914 appropriations, and certainly not to riparian rights or overlying rights to percolating groundwater. The Court recognized that applying any one system or view, at the expense of alternative views or systems, would lead to a an "unbalanced" or "totalitarian" system of legal rules, and ultimately to a delegitimizing of self-governance under rule by law.

Thus, the larger lesson of National Audubon, a decision of the Bird Court, is that a mechanical or non-dialectic application of rules without limiting principles, risks a gradual decline in public acceptance and respect for the enactments of legislative bodies, the decisions of courts, weakens the legitimacy of these institutions themselves, and perforce the legitimacy of derivative institutions such as the SWRCB.

Consistent with National Audubon, the Racanelli Decision (United States v. State Water Resources Control Board (1986) 182 Cal.App.3d 82) recognized the importance of water diversion projects, in particular the State Water Project ("SWP") and the federal Central Valley Project ("CVP"). The State is a party to the Racanelli decision and is bound by the Court's rulings in that case under the doctrines of res judicata and collateral estoppel.

In the Racanelli decision, the Court disapproved the SWRCB's use of the "without project" methodology as the exclusive methodology used for setting comprehensive water quality standards for the Delta. The "without project" standards were deemed appropriate, however, to address the water quality impacts of the federal and State projects themselves.

The Court directed the SWRCB to take a broader perspective.

> . . . The without project standards were formulated to protect the quality of Delta waters only from degradation by the projects; the Board made no effort to protect against water quality degradation by other users--namely, upstream diverters or polluters. As a consequence, the Board erroneously based its water quality objectives upon the unjustified premise that upstream users retained unlimited access to upstream waters, while the projects and Delta parties were entitled only to share the remaining water flows. United States, supra, 182 Cal.App.3d at 118.

The Court pointed out that the SWRCB, in its dual role of setting water quality standards and regulating water rights, ". . . is directed to consider not only the availability of unappropriated water but also all competing demands for water in determining what is a **reasonable level of water quality protection**." Id. (emphasis added; citations omitted).

> . . . the Board need only take the larger view of the water resources in arriving at a reasonable estimate of all water uses, an activity well within its water rights function to determine the availability of unappropriated water. We think a similar global perspective is essential to fulfill the Board's water quality planning obligations. United States, supra, 182 Cal.App.3d at 119 (citations omitted; emphasis added).

In setting Delta water quality standards using only the "without project" methodology, the Court held that the SWRCB improperly limited itself.

> . . . the Board compromised its important water quality role by defining its scope too narrowly in terms of enforceable water rights. In fact, however, the Board's water quality obligations are not so limited. . . [I]n order to fulfill adequately its water quality planning obligations, we believe the Board cannot ignore other actions which could be taken to achieve Delta water quality, such as remedial actions to curtail excess diversions and pollution by other water users. . . . In summary, we conclude that the Board failed to carry out properly its water quality planning obligations. United States, supra, 182 Cal.App.3d at 120 (emphasis added).

The Racanelli decision recognized that the SWRCB's principal mechanism for enforcement of water quality standards is by regulating water rights. United States, supra, 182 Cal.App.3d at 125. Imposing conditions on the CVP and SWP is permissible to regulate the water quality impacts of the projects themselves.

But the projects cannot be made responsible for water quality or wildlife impacts attributable to other diverters. The water users of the projects cannot legally or constitutionally be made to bear a greater or disproportionate burden for water quality and wildlife protection.

> We think the Board could properly conclude that the public interest in the projects requires that they be held responsible only for water quality degradation resulting from the projects' own operations. Although we hold the without project standards inadequate to fulfill the Board's obligations to set water quality objectives for the Delta, we nevertheless find no legal impediment to the Board's use of such standards to enforce water quality objectives against the projects themselves. The implementation program was flawed by reason of the Board's failure, in its water quality role, to take suitable enforcement action against other users as well . . . . We presume the Boards scheduled 1986 hearings will . . . result in a comprehensive program to implement [Delta water quality] objectives which will include the projects and other users along the watercourse. Id. at 126 (emphasis added).

The Racanelli decision, in recognizing the public interest[8] in the CVP and SWP, upheld the validity of D1485 and the "without project" concept as to the project's responsibilities. Thus, the extent of the CVP's and SWP's responsibility for water quality protection is established by D-1485.

In addition, D1485 made finalization of the Coordinated Operation Agreement ("COA") possible because, for the first time, the projects knew the scope of their water quality responsibilities and could set each project's respective share to meet those responsibilities.

D1485 and the "without project" standards complied with CEQA and NEPA requirements. D1485 has been approved by the Racanelli decision as a suitable level of water quality responsibility to impose on the CVP and SWP, made the COA possible, and met all environmental review and compliance requirements. In approving the "without project" methodology and standards, and recognizing the public interest in the projects, Racanelli is consistent with the concept of National Audubon to balance competing legal systems, and to avoid an "unbalanced structure."

Nevertheless, some advocates of the public trust doctrine urge the "unbalanced structure" that was rejected in National Audubon.[9] For example, in Decision 1641, the Pacific Coast Federation of Fisherman's Associations ("PCFFA") attacks the SWRCB's approval of the San

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[8]It is important to note that the projects (and the millions of people dependent on them) have never been credited for the environmental benefits deriving from the projects. Prior to the projects, the maximum salinity intrusion (1000 mg/l chloride measured ½ hour after high tide) was generally much farther east than after the projects were developed. The 1000 mg/l salinity intrusion in each of the years (except 1928) during the 1928-1934 critical period, before the projects, was far easterly of the intrusion during the 1976-1977 drought which was the worst two year drought on record. See map entitled "Location of Maximum Annual Salinity Intrusion," included as Figure 30 to DWR, Sacramento-San Joaquin Delta Atlas, August 1987, showing that the 1000 mg/l maximum salinity intrusions for the years 1933, 1920, 1926, 1924, 1939, 1934 and 1931 intruded farther east into the interior Delta than 1977.

[9]Another example of a one-sided principle, this one enshrined in statute, is the Endangered Species Act. ("ESA") The ESA is a draconian and absolutist statute, reflective of the hubris of the positive law, and poorly designed for application in contexts involving multiples uses, including the impacts a listing of one species may have on other listed, and thus protected, species. The ESA also may conflict with equally important policies established in other laws, such as the Migratory Bird Treaty Act and the Reclamation Act of 1902. The problems in the Klamath Basin are a painful illustration of the "unbalanced structure" resulting from a zero sum game application of one principle irregardless of other principles, the very approach rejected in National Audubon.

Joaquin River Agreement ("SJRA")[10] which included the Vernalis Adaptive Management Plan ("VAMP") to provide flows for fisheries in the San Joaquin River and Delta. PCFFA urges, purely as a matter of administrative law, that D1641 does not "implement" the "natural" chinook doubling requirement of the 1995 Bay-Delta Water Quality Control Plan.

In other words, after going through the process of separating its water quality function from its water rights function, as recommended in the Racanelli Decision, United States v. State Water Resources Control Board (1986) 182 Cal.App.3d 82, adopting the 1995 WQCP, and then adopting D1641, a process encompassing almost 15 years, the SWRCB is still nowhere close to getting it right, according to the PCFFA. Under the PCFFA approach, no water right decision could be adopted but one that somehow guaranteed the doubling of "natural" chinook fish populations through reduced diversions, notwithstanding the myriads of other factors affecting fish populations. These factors include the effects of foreign species of plants and animals that continue to be introduced to the Delta and other California waters, the effects of drought, of commercial fishing (present as well as past), subsistence fishing/poaching, unscreened diversions, agricultural return flows, urban runoff to the Bay and Delta, and industrial and storm water discharges.

At the same time, the PCFFA approach would not recognize the benefits of water projects on salinity control in dry and drought years, or the availability of stored waters to support flows beneficial to fish and wildlife that would not be available under dry conditions, absent the diversions. Hence, the PCFFA approach, and others like it, urges the unbalanced interpretation of the public trust and the SWRCB's duty thereunder that was rejected in National Audubon. Similarly, any attempt by the Board to exceed its statutory authority, and contravene California common law, by asserting public trust jurisdiction over overlying rights to public groundwater, will result in a violation of the rule of National Audubon.

IV. THE REPORT SHOULD BE WITHDRAWN, AND NO ACTION TAKEN.

As discussed above, the Report contains various difficulties, including a suggestion to resort to the public trust doctrine to regulate ground water withdrawals, including ground water not subject

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[10]Between numerous entities including the California Department of Fish and Game, California Department of Water Resources, USBR, U.S. Wish and Wildlife Service; the San Joaquin River Group Authority, Modesto Irrigation District, Turlock Irrigation District, Merced Irrigation District, South San Joaquin Irrigation District, Oakdale Irrigation District, the Friant Water Users Authority, the Public Utilities Commission of the City and County of San Francisco, the San Joaquin River Exchange Contractors Water Authority, Central California Irrigation District, San Luis Canal Company, Firebaugh Canal Water District, Columbia Canal Company; Metropolitan Water District of Southern California, State Water Contractors and Natural Heritage Institute. Many of these entities hold pre-1914 rights.

to the SWRCB's permitting jurisdiction. The District believes the Report is premised on an inaccurate understanding of the public trust doctrine, as set out in National Audubon, and that combined with its other difficulties, the Report is not useful and should be withdrawn from active discussion and no action taken thereon by the SWRCB.

Very truly yours,

GRISWOLD, LaSALLE, COBB, DOWD & GIN, L.L.P.

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Brian Ehlers
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APPENDIX A

Excursus re City of Barstow v. Mojave Water Agency (2000) 23 Cal.4th 1224

On August 21, 2000, the California Supreme Court issued its opinion in *Barstow v. Mojave Water Agency*. The case involved the Mojave River adjudication which started in the early 1990's. A prior attempt at an adjudication in the 1980's, in the form of a stipulated judgment, was unsuccessful due to lack of sufficient agreement among the parties.

The Mojave River adjudication is an adjudication of all of the surface and ground waters of the Mojave River Basin. The purpose of the adjudication is to ensure a balance between water use and water supply after many years of overdraft in the Mojave River Basin.

The case originally started when the City of Barstow sued upstream users, including the City of Adelanto and the Mojave Water Agency (MWA), claiming that upstream groundwater production adversely impacted Barstow's water supply. In addition, Barstow sought a writ of mandate to compel the MWA to import supplemental SWP water.

Eventually, the Complaint was served on approximately one thousand parties in the Basin who had been producing water during the five water years prior to commencement of suit (1986-1990). Virtually all of the parties, with the exception of small producers (<10 AFY), eventually agreed to a stipulated judgment under which all producers would be assigned a "free production allowance" based on historical use. All free production allowances would ramp down in future years to promote [i.e., compel] water conservation and thereby presumably end the overdraft in the Basin. A producer who pumped above his free production allowance would be subject to assessments which would be collected and used for purchasing a supplemental water supply. The program evidently assumes the availability of the supplemental supply.

Ten alfalfa and dairy farmers refused to stipulate to the judgment. The trial court nevertheless entered an interlocutory judgment imposing the physical solution contained in the stipulated judgment on all of the parties, including the non-stipulating farmers.

The farmers relied on their correlative rights as overlying landowners to the percolating groundwater naturally occurring beneath their land. The Court held that the trial court could not apply an equitable apportionment to water use claims without adequately considering and reflecting the priority of the water rights in the Basin, referring to well known footnote 100 in City of Los Angeles v. City of Fernando (1975) 14 Cal 3d 199, 293 n.100.[11]

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[11]Footnote 100 indicates that overlying rights have priority over appropriative rights if the amounts required by overlying uses consume all the basin's native supply, except for such appropriative claims as may have ripened into prescriptive rights. However, "[s]uch prescriptive

The Court essentially affirmed traditional groundwater law and reaffirmed that a trial court, if it is to impose a physical solution to adjudicate groundwater, must consider the relative priorities of the legal water rights of the water users in the Basin, absent 100% stipulation of the parties. With respect to the stipulating parties, the Court pointed out that those parties had essentially waived their legal water rights and had them replaced by the water rights as defined in the stipulated judgment.

The Court refused to adopt the "equitable apportionment" theory espoused by the U.S. Supreme Court in Nebraska v. Wyoming (1945) 325 U.S. 589, 618 (used to settle interstate water disputes), in which legal water rights are not a determinative criterion in fixing the relative priorities of competing water rights.

The Court also pointed out that footnote 61 in its San Fernando decision (14 Cal.3d at 265-266) can not be interpreted to support an equitable apportionment that ignores legal water rights.

> Case law simply does not support applying an equitable apportionment to water use claims unless all claimants have correlative rights; for example, when parties establish mutual prescription. Otherwise, cases like *City of San Fernando* require that courts making water allocations adequately consider and reflect the priority of water rights in the basin. (*City of San Fernando*, *supra*, 14 Cal.3d at p. 293, fn. 100.) The Court of Appeal's reasoning is consistent with this principle. As the Court of Appeal aptly observed, we have never endorsed a pure equitable apportionment that completely disregards overlying owners' existing legal rights. Thus, to the extent footnote 61 in *City of San Fernando* could be understood to allow a court to completely disregard California landowners' water priorities, we disapprove it. 23 Cal.4th at 1248.

The Court's opinion does contain some troubling language in footnote 13, however, where the Court stated:

> Although we do not address the question here, . . . in theory at least, a trial court could apply the *Long Valley*[12] riparian right principles to reduce a landowner's future overlying water right use below a current but unreasonable or wasteful usage, as long as the trial court provided the owners with the same notice or due process protections afforded the riparian owners under the Water Code. [citations omitted] *If Californians expect to harmonize water*

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rights would not necessarily impair the private defendants' rights to ground water for *new* overlying uses for which the need had not yet come into existence during the prescriptive period." This means unused overlying rights may always be asserted notwithstanding a prior adjudication, which can only bind those who were water users and parties to the case when the judgment was entered.

[12] In re Waters of Long Valley Creek Stream System (1979) 25 Cal.3d 339.

> *shortages with a fair allocation of future use, courts should have some discretion to limit the future groundwater use of an overlying owner who has exercised the water right, and reduce to a reasonable level the amount the overlying user takes from an overdrafted basin.*" 23 Cal.4th at 1249 (Emphasis added).

Though not fully clear, footnote 13 in the Court's opinion may be interpreted to allow a reduction of overlying uses in an overdrafted basin if the overlying user is making an unreasonable use of water under the circumstances in existence at the time the case is decided. Cal. Const. Art. X, § 2 (former Art. XIV, § 3) provides:

> . . . 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.

The reasonable beneficial use doctrine of Art. X, § 2, applies to the correlative right of an overlying owner. Tulare Irrigation District v. Lindsay-Strathmore Irrigation District (1935) 3 Cal.2d 489, 525. Concepts of reasonableness can change over time. Id. at 567.[13]

The question that arises is whether, under the Constitutional language and the reasonable beneficial use doctrine, overlying uses such as irrigation of alfalfa in the Mojave Desert, or any arid land, could be deemed an unlawful "waste of water" such that the overlying use could be curtailed notwithstanding the property right in the water right. This question is really a question about values in a time of increasing scrarcity of the water resource, caused by the increasing inelasticity of supply and demand reflective of competing values and interests.

As National Audubon provides, these competing values must be balanced in a reasonable manner, with no one value or system predominating over all others. The values implicit in the rhetorical demonization of "low value" crops such as alfalfa do not attain preference by the self-righteousness of their presentation or that of their presenters. In a free economy, who can say, or arrogate to oneself to say, what is a "low" value?

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[13] "What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time."

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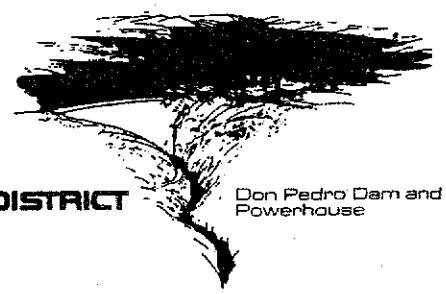

April 10, 2002

Mr. Arthur Baggett, Chair
State Water Resources Control Board
P. O. Box 2000
Sacramento, CA 95812-2000

Dear Mr. Baggett:

Re: Professor Sax's Report on the State Board's Groundwater Jurisdiction

The Turlock Irrigation District urges the State Board to reject Professor Sax's recommendations in his report and to not take any regulatory or adjudicatory action based upon that report.

Professor Sax has the goal of creating a paradigm shift in California water law by creating a new paradigm, i.e., the State Board has jurisdiction over groundwater. Unfortunately, as an advocate and not as an objective law professor, Professor Sax's research report weaves arguments that ignore basic tenets of California law and legislative history. It is not paradigm-shattering research.

- Professor Sax turns an establish law of statutory interpretation on its head by attempting to create an ambiguity in statutory language where none exists.

- Professor Sax attempts to justify state administrative agency activism to implement his new paradigm when that authority lies with the Legislature, which has repeatedly refused to expand the State Board's jurisdiction over groundwater.

- Professor Sax subordinates groundwater rights to surface water rights when they are co-equal rights under California law.

- Professor Sax glosses over the long-standing California legal structure of local control over groundwater since it is the existing paradigm and the antithesis of his new paradigm.

- Professor Sax ignores the substantial practical disruptions and the societal and legal costs that would occur as a result of the State Board attempting to implement his new paradigm. Perhaps, he believes that since paradigm shifts can be revolutionary, it is the price society pays when the existing paradigm is destroyed.

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The Turlock Irrigation District will be providing more detailed comments on the report through the San Joaquin River Group. Any action by the State Board to implement Professor Sax's new paradigm without clear Legislative authority would be improper.

Sincerely,

Larry Weis
General Manager

cc: 10 copies to

Paul Murphey
Division of Water Rights
State Water Resources Control Board
P. O. Box 2000
Sacramento, CA 95812-2000

E-mail copy to WrHearing@Waterrights.swrcb.ca.gov

Arrowhead Mountain Spring Water Company
A Division of
Great Spring Waters of America, Inc.
5772 East Jurupa Street
Ontario, CA 91761

Telephone: (909) 390-0925
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April 10, 2002

Paul Murphey
Division of Water Rights
State Water Resources Control Board
P. O. Box 2000
Sacramento, California 95812-2000

Re: Comments Regarding Sax Report

Dear Mr. Murphey:

Perrier Group of America, Inc, (Perrier) produces spring water from groundwater sources throughout California for the purpose of bottling the water and making it available for millions of Californians. The spring water is routinely withdrawn from boreholes that must satisfy the standards of the California Department of Health Services and the United States Food and Drug Administration to qualify as "spring water." The water extracted must be deemed *not* to be under the influence of surface water before Perrier may seek to make use of the supply.

The majority of Perrier's spring water supply requirements are met through groundwater boreholes. Virtually our entire California operation depends upon our ability to continue extracting spring water from existing sources. Hopefully, you can appreciate that we have a great interest in the paper prepared by Professor Sax and why we are very concerned about the development of a new rule or test for classifying groundwater that would apply to our existing facilities.

None of our boreholes are located within or draw water from known and defined channels. Nor do they produce spring water from depths that would be subject to surface water influence. Nevertheless, we are concerned that the adoption of the practical impact test proposed by Professor Sax would create added risk and add an unnecessary regulatory burden for our company by casting a net over some of our existing operations and investments.

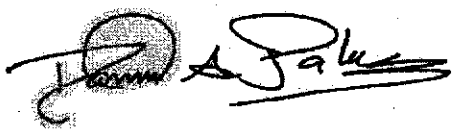
If the new impact test proposed by Professor Sax was applied retroactively by the SWRCB, it could serve to materially damage our business interests, and it could do so without anv

demonstration of a need to adopt a different regulatory standard. The historical legal presumption in California, as well as most states, is that groundwater is *presumed* to be percolating groundwater. As we understand it, despite the presumption, the objective test proposed by Professor Sax will shift the burden to existing users to *prove* that the water they withdraw through their boreholes is percolating. As a result, our company could be required to assume added legal and engineering expense. Our delivery of drinking water to millions of Californians could be impaired or disrupted Most importantly, decades of reliance and millions of dollars could be placed at risk by the SWRCB imposing new or different requirements from those that already exist.

Groundwater is hugely important not only to our business but to the overall economy of California. Given the existence of the historical legal presumption that groundwater is percolating and the great harm and disruption that may result from the adoption of a new administrative test, we think that any change in the way the SWRCB permits groundwater should be led by the Legislature: not by a mere administrative interpretation. At a minimum, any new test should not be applied to existing groundwater boreholes and production facilities.

We stand ready to participate as a stakeholder in any future technical work groups or processes you may establish.

Sincerely,



David G. Palais, Ph.D., R.G.
Natural Resource Manager
Perrier Group of America

SOUTHERN CALIFORNIA WATER COMPANY

A SUBSIDIARY OF AMERICAN STATES WATER COMPANY

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April , 2002

Mr. Paul Murphey
Division of Water Rights
State Water Resources Control Board
P. O. Box 2000
Sacramento, California 95812-2000

Re: Comments Regarding Sax Report

Dear Mr. Murphey:

The American States Water Company is a publicly traded company doing business in California as Southern California Water Company ("SCWC"), an investor-owned utility. We appreciate the opportunity to present comments to the State Water Resources Control Board ("SWRCB") regarding Professor Joseph Sax's paper regarding the legal classification of groundwater.

SCWC is responsible for meeting the water supply needs of more than 240,000 customers' accounts, or one out of every 30 Californians. To satisfy these water supply demands in a reliable, efficient manner, SCWC has worked in coordination with State, regional and local agencies across California. SCWC is the retail service arm for 75 California cities.

SCWC has invested tens of millions in groundwater production facilities that represent the primary and, in some cases, sole water supply for our customers. SCWC recognizes that its ability to continue to beneficially use our water resources is dependent upon the success of the management institutions that administer use of water to reduce conflicts. Accordingly, as there has not been any State agency with comprehensive permitting and regulatory authority over groundwater, SCWC has invested millions of dollars in developing consensus-based groundwater management efforts. Where it has not been possible to achieve a consensus, the Company has pressed forward to protect the interests of its customers and ensure a reliable water supply that can be managed on a sustainable basis.

Given SCWC's historic reliance on groundwater and its participation in regional and local groundwater management efforts, it should come as no surprise that it has a strong interest in the question of whether groundwater is within the jurisdiction of the SWRCB. If the SWRCB, by interpretation or administrative regulation, should conclude that existing groundwater production facilities are subject to SWRCB permitting authority, the cost and reliability of its water supplies could be severely jeopardized. Moreover, its efforts over several decades to participate in comprehensive management efforts through groundwater adjudication or by special act agency administration could be frustrated.

SCWC has produced percolating groundwater for more than 100 years. Its groundwater supplies have laid the foundation for local agency land use approvals, for the regulatory decisions of the Public Utilities Commission and for court determinations regarding the relative rights of producers.

In many cases, SCWC now produces water under the administration of a Watermaster in an adjudicated basin. In other areas, it has participated in the development of special legislation designed to provide added regulatory power over groundwater (See e.g., Ojai Groundwater Basin Management Agency) or participated consensual programs through Water Code Section 10750 et seq. In Orange County, it has supported the successful management of the Orange County Water District.

Typically, adjudicated basins operate under well defined rules and regulations. In most cases, they have formed or appointed Watermasters that generally oversee groundwater management in a manner that is protective of the public interest, as well as the rights of the parties. They have the power to control production, storage and recharge within their defined boundaries. As noted by Professor Sax, the history of the basin adjudications in California has been largely successful. (See Bloomquist, Dividing the Waters (1992).) In fact, comprehensive basin management, as exemplified in the most successful of Southern California's adjudicated basins, may be the most promising tool to achieve genuine integration of surface water and groundwater administration in California.

In view of the foregoing, we urge that the SWRCB exempt from its regulatory authority under any new test it develops for classification of groundwater:

- All groundwater production facilities in existence on the date the SWRCB adopts the new test; and

- Production in groundwater basins for which the SWRCB determines that there is a comprehensive groundwater management program presently in place, whether it be through special act agency or adjudication.

SCWC appreciates the efforts of the SWRCB to work with the water community in order to resolve this important issue in a manner that is consistent with established California law and SWRCB practice. We hope to continue to provide constructive comment and positive participation as this process moves forward.

Sincerely,

Susan L. Conway
Vice President, Regulatory Affairs

SLC:gb

Building Industry Association
of the San Joaquin Valley

VIA FAX and U.S. MAIL

April 8, 2002

Mr. Paul Murphey
Division of Water Rights
State Water Resources Control Board
P O Box 2000
Sacramento, CA 95812-2000

RE: SAX REPORT ON SWRCB GROUNDWATER AUTHORITY

Dear Mr. Murphey:

The Building Industry Association of the San Joaquin Valley only learned last week of the January 19, 2002 report by Joseph L. Sax entitled "Review of the Laws Establishing the SWRCB's Permitting Authority Over Appropriations of Groundwater Classified as Subterranean Streams and the SWRCB's Implementation of Those Laws". We are very alarmed at the stated intent of the report, as reflected by the six questions addressed:

1. What is the scope of the State Water Resources Control Board ("SWRCB") water right permitting authority over groundwater?
2. What is the current legal test for determining whether groundwater is subject to the SWRCB's permitting authority?
3. Under this legal test, what physical characteristics should the SWRCB's evaluate in distinguishing subsurface waters subject to the SWRCB's permitting authority from subsurface water that are percolating groundwater?
4. What factors has the SWRCB considered in its past decisions regarding groundwater classification?
5. Should the legal test for determining what subsurface waters are subject to the SWRCB's permitting authority be changed? If so, what legal test would be appropriate?
6. Can Quantifiable criteria be established to implement the legal test? What are the quantifiable criteria?

Professor Sax's analysis to address the first question by creatively interpreting the Water Commission Act of 1913 and the court case of *Los Angeles v. Pomeroy* to determine legislative intent are of great concern. BIASJV simply does not agree with Sax's conclusion in this matter, as we believe the public record indicates a clear legislative intent to completely separate the governance of groundwater from surface water and specifically limit the permitting authority only to surface waters.

Additionally, Professor Sax clearly demonstrates on pages 91 and 92 of the report a flagrant disregard for proper Legislative processes and a system of checks and balances to control the tyranny of bureaucracy, when he states:

"The issues described in the preceding paragraphs are only some of those that legislative rewriting of Water Code § 1200 at this late stage would generate. In acknowledgment of such practical concerns, and in light of the history of proposed legislative groundwater reform in California, I suggest an alternate approach, a three-point strategy for dealing with the problem of groundwater/surface water management in California:

(1) Adoption by the Board of clear criteria to implement the existing statutory purpose, by taking jurisdiction henceforth over groundwater uses that diminish appreciably and directly the flow of a surface stream; and

(2) Proactive use by the Board of its authority under Water Code § 275 and any other sources of jurisdiction is has, to implement the constitutional prohibitions on waste, unreasonable use, and unreasonable methods of use; to protect the public trust; and to safeguard established rights in surface stream flows; and

(3) Where serious basin-wide problems are presented, comprehensive basin management (as with the most successful adjudicated/managed Southern California basins)306 is the most promising tool to achieve genuine integration of surface water and groundwater administration in California. This suggestion is made in full recognition of the cost, duration and complexity usually associated with settling rights generally within a basin.307 Nonetheless, that approach seems the most promising way for this state to position itself to address contemporary issues. Unlike proposals for expanding regulatory jurisdiction, basin management offers the possibility of employing the full range of needed management tools, such as professional administration, pumping assessments, importation of new supplies, replenishment programs, achievement of sustainable use, allocation of groundwater storage capacity, quality control, and conjunctive use.

-end of report-"

In conclusion, BIASJV believes that absent the adoption of new state legislation clearly establishing the SWRCB's permitting authority over groundwater, it would be an abuse of authority for the SWRCB to attempt to implement such authority at this time. The debate about such regulatory control properly belongs in the State Legislature.

Thank you for the opportunity to offer our comments regarding this important matter.

Sincerely,

Jeffrey B. Harris
President and CEO

JBH:cc

c: Senator Jim Costa
Senator Chuck Poochigian
Assemblyman Mike Briggs
Assemblyman Sarah Reyes
Assemblyman Dean Florez
Brian White, CBIA
Robert Keenan, BIA-Tulare/Kings Counties
Brian Todd, BIA-Kern County

FILE

STATEMENT OF STEVE CHEDESTER, EXECUTIVE DIRECTOR OF THE SAN JOAQUIN RIVER EXCHANGE CONTRACTORS WATER AUTHORITY BEFORE THE STATE WATER RESOURCES CONTROL BOARD

Good morning. My name is Steve Chedester. I am the executive director of the San Joaquin River Exchange Contractors Water Authority, which consists of: Central California Irrigation District, San Luis Canal Company, Firebaugh Canal Water District and Columbia Canal Company. These four entities irrigate and farm approximately 240,000 acres on the west side of the San Joaquin Valley, and they and their predecessors have done so in essentially the same way since the late 1800s.

We have submitted our written legal comments to Professor Sax's groundwater report. In those comments, we take issue with several elements of the report, and we urge the Board not to expand its jurisdiction over groundwater.

The purpose of my comments today is to focus on the conjunctive use nature of the Exchange Contractor service area, and, as a policy decision, to encourage the board to recognize that within conjunctive use service areas, the board would be better to defer to local management of groundwater resources.

As the board is aware, the Exchange Contractors have pre-1914 and riparian water rights on the San Joaquin River, and have agreed not to exercise those rights so long as they are delivered substitute water by the Bureau of Reclamation pursuant to the terms of the Exchange Contract.

What the board may not be as familiar with is the fact that the Exchange Contractor

service area is highly managed, by necessity, and not by threat of regulation, as a conjunctive use area. Due to the fact that the Exchange Contract imposes monthly limitations on the quantity of irrigation water that can be delivered, the Exchange Contractors routinely find themselves short of water during their highest summertime water demand period.

As a result, the Exchange Contractors have developed, and rely upon, conjunctive use of surface and groundwater resources. The members of the Exchange Contractors manage their groundwater resources through price incentives and disincentives, depending upon hydrologic conditions. They also effectively manage groundwater use in adjacent areas by entering into cooperative agreements with the result that these areas do not pump groundwater where to do so may encourage salt intrusion into the groundwater system.

We have retained hydrologists to help develop the water budget for our service area, and we manage our groundwater and surface water consistent with the recommendations in those studies.

We also have cooperative groundwater management agreements between our members and the cities within our service area to expand conjunctive use management into those areas whose groundwater pumping relies on recharge from our irrigation deliveries. In addition, we have cooperatively worked with Fresno and Madera Counties when they were writing their respective County Groundwater Ordinances, and in fact we received an exemption from Fresno County's ordinance because we demonstrated that we are responsively managing our groundwater resource.

The board should always defer to local agencies exercising groundwater management where the infrastructure and management protocol is in place to do so. Furthermore, the board should never exercise jurisdiction over groundwater pumping from wells in a conjunctive use

service area that are pumped in a manner that is consistent with that particular service area's groundwater management plan.

Thank you.

FILE

Rio Alto Water District

P.O. Box 5068, Cottonwood, California 96022
Telephone 530-347-3835 • Fax 530-347-1007

April 10, 2002

Mr. Arthur Baggett, Chairman
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812

RE: Submission of Written Comments for the April 10th Hearing Regarding Professor Sax's report on the Legal Classification of Groundwater.

Dear Chairman Baggett and Board Members:

Rio Alto Water District is located between Red Bluff and Redding in the far northern end of the Northern Sacramento Valley. We are 100% reliant on groundwater as a source of potable water.

Because our District boundary coincides with the Shasta-Tehama County line, we have been involved with the development and operation of two groundwater management programs; one established by the Redding Area Water Council for the Redding Groundwater Basin and the other by the Tehama County Flood Control and Water Conservation District which is a County-wide Plan. Our District, like many other agencies in the Northern Sacramento Valley, is a strong advocate of local control of local groundwater resources.

As an active member of ACWA's Groundwater Committee, I have had the opportunity to closely observe the process by which ACWA has, for the past two years, formulated their responses to your Board on the Legal Classification of Groundwater . I hold in high regard the team of lawyers and technical experts that ACWA has assembled in that effort.

Rio Alto Water District fully supports and endorses the substance of the written and oral comments submitted to you by ACWA on April 10, 2002. We believe that the recommendations proposed by ACWA provide an equitable resolution of this issue for the water users of California and for the State Water Resources Control Board.

Thank you for this opportunity to provide input in this hearing process.

Sincerely,

Roger Sherrill

Roger Sherrill, General Manager
Rio Alto Water District

cc: Rio Alto Water District Board of Directors
ACWA

Building Industry Association
of Tulare/Kings Counties, Inc.

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Fax: (559) 625-2690
Email:build@biatk.com

April 16, 2002

Mr. Paul Murphey
Division of Water Rights
State Water Resources Control Board
PO Box 2000
Sacramento CA 95812-2000

Re: Sax Report on SWRCB Groundwater Authority

Dear Mr. Murphey:

The Building Industry Association of Tulare/Kings Counties recently learned of the Joseph L. Sax report entitled, "Review of the Laws Establishing the SWRCB's Permitting Authority Over Appropriations of Groundwater Classified as Subterranean Streams and the SWRCB's Implementation of Those Laws". We are very alarmed at the stated intent of the report, as reflected by the six questions addressed:

1. What is the scope of the State Water Resources Control Board ("SWRCB") water right permitting authority over groundwater?
2. What is the current legal test for determining whether groundwater is subject to the SWRCB's permitting authority?
3. Under this legal test, what physical characteristics should be SWRCB's evaluate in distinguishing subsurface waters subject to the SWRCB's permitting authority from subsurface water that are percolating groundwater?
4. What factors has the SWRCB considered in its past decisions regarding groundwater classification?
5. Should the legal test for determining what subsurface waters are subject to the SWRCB's permitting authority be changed? If so, what legal test would be appropriate?
6. Can quantifiable criteria be established to implement the legal test? What are the quantifiable criteria?

Professor Sax's analysis to address the first question by creatively interpreting the Water Commission Act of 1913 and the court case of *Los Angeles v. Pomeroy* to determine legislative intent are of great concern. We simply do not agree with Sax's conclusion in this matter, as we believe the public record indicates a clear legislative intent to completely separate the governance of groundwater from surface water and specifically limit the permitting authority only to surface waters.

Professor Sax clearly demonstrates a shocking disregard for proper Legislative processes and a system of checks and balances to control the abuses of bureaucracy.

The BIA of Tulare/Kings Counties believes that absent the adoption of new state legislation clearly establishing the SWRCB's permitting authority over groundwater, it would be an abuse of authority at this time. The debate about such regulatory control properly belongs in the State Legislature.

Thank you for the opportunity to offer our comments regarding this important matter.

Sincerely,

Robert Keenan
Executive Vice President

cc: Senator Jim Costa
Senator Chuck Poochigian
Assemblyman Roy Ashburn
Assemblyman Mike Briggs
Assemblywoman Sarah Reyes
Assemblyman Dean Florez
Brian White, CBIA
Brian Todd, BIA - Kern County
Jeff Harris, BIA - San Joaquin Valley

BUILDING INDUSTRY ASSOCIATION OF KERN COUNTY

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April 15, 2002

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Greg Hash
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Marion Malamma
First American Title

Mike Kane
Granite Construction

Darryl Tucker
McAllister Ranch/Jasman Development

David Dmohowski
Project Design Consultants

Mike Granlee
Stewart Title

Mr. Paul Murphey
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento CA 95812-2000

Re: Assessment of Joseph L. Sax's Final Report on Review of the Laws Establishing the SWRCB's Permitting Authority Over Appropriations of Groundwater Classified as Subterranean Streams and SWRCB Implementation of Those Laws

Dear Mr. Murphey:

Thank you for the opportunity to comment on the above report.

The Building Industry Association of Kern County is the voice for builders, land developers and their affiliated industries in Kern County. We are also an active, charter member of the Business, Industry & Government (BIG) Coalition of the Southern San Joaquin Valley.

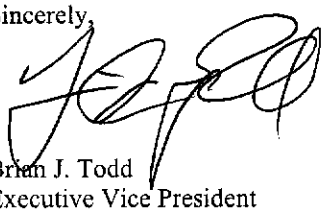
After reviewing the "Sax Report," we have many concerns. The report encourages the State Water Resources Control Board (SWRCB) to expand its regulatory authority over groundwater by reinterpreting the meaning of subsurface flows. It recommends that the SWRCB change its test for determining what subsurface flow versus percolating groundwater by using an impact test rather than considering physical characteristics. Such a dramatic change in law should not occur outside of the legislative facet of government.

In addition, the six quantifiable criteria proposed by Professor Sax dramatically shift the burden of defending uses of groundwater onto the property owner. This would be costly and detrimental to overlying landowners who are legally entitled to use the groundwater beneath their property.

The recommendations within the Sax Report would drastically change the regulation of groundwater within the State of California. The changes suggested by the report can only be accomplished through a change in the current law, which would have to be done by the Legislature.

We strongly request the recommendations offered by Professor Sax be rejected by the State Water Resources Control Board.

Sincerely,



Brian J. Todd
Executive Vice President

Cc: Hon. Charles Poochigian
Hon. Jim Costa
Hon. Roy Ashburn
Hon. Dean Florez
Hon Mark Salvaggio

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Ernest A. Conant, PC
PARTNER

Joseph Wooldridge
1913-1996

A. Cameron Paulden
1927-1984

April 15, 2002

Mr. Paul Murphey
Division of Water Rights
State Water Resources Control Board
P. O. Box 2000
Sacramento, CA 95812-2000

Re: Workshop regarding Professor Joseph Sax's Report on Legal Classification of Groundwater

Dear Mr. Murphy:

I was unable to attend either of the workshops on April 10 or April 11 and provide this response to the Board's March 7, 2002 Notice. On behalf of the clients listed below for which we serve as general counsel, I am writing to express our support for the comments submitted by the Association of California Water Agencies.

In summary, while we appreciate the efforts of Professor Sax and acknowledge that his report is one of the more scholarly works on the subject, we disagree with some of his conclusions, as more particularly described in ACWA's comments. The State Board's jurisdiction over groundwater has been clearly defined by Water Code §1200, court cases and various decisions of the State Board prior to the draft decision regarding the Pala and Pauma Basins. There is no reason or justification for expanding the State Board's jurisdiction which has historically been clearly defined.

Should you require any additional information, please do not hesitate to contact me. Thank you for this opportunity to comment.

Very truly yours,

Ernest A. Conant

EAC:meh

cc: Arvin-Edison Water Storage District
Wheeler Ridge-Maricopa Water Storage District
Semitropic Water Storage District
North Kern Water Storage District
Shafter-Wasco Irrigation District
Southern San Joaquin Municipal Utility District
Rag Gulch Water District
Kern Water Bank Authority
James Irrigation District
Angiola Water District
Del Puerto Water District
Stallion Springs Community Services District
Golden Hills Community Services District
Santa Ynez River Water Conservation District

FDP/PGM

Business Industry Government

COALITION
of the
South San Joaquin Valley

315 W. Oak, Visalia CA 93291

Phone: (559) 625-5571 Fax: (559) 625-2690 Email: bigcoalition@biatk.com

Participants . . .

Counties
Fresno
Kern
Kings
Madera
Tulare

Cities
Avenal
Bakersfield
Coalinga
Corcoran
Delano
Dinuba
Farmersville
Firebaugh
Fowler
Hanford
Huron
Kerman
Kingsburg
Lemoore
Maricopa
Parlier
Porterville
Reedley
Tulare
Visalia
Wasco
Woodlake

Community Colleges
College of the Sequoias
West Hills College

Building Industry Associations
Kern County
San Joaquin Valley
Tulare/Kings Counties

Chambers of Commerce
Greater Fresno Area
Greater Tulare
Hanford
Lemoore
Porterville
Visalia

Economic Development
Fresno EDC
Kings County EDC
Tulare County EDC
Visalia EDC

Farm Bureaus
Fresno County
Tulare County

April 15, 2002

Mr. Paul Murphey
Division of Water Rights
State Water Resources Control Board
PO Box 2000
Sacramento CA 95812-2000

Re: Assessment of Joseph L. Sax Final Report on Review of the Laws Establishing the SWRCB's Permitting Authority Over Appropriations of Groundwater Classified as Subterranean Streams and the SWRCB's Implementation of Those Laws

Dear Mr. Murphey:

Thank you for the opportunity to comment on the above report.

The Business, Industry & Government (BIG) Coalition of the South San Joaquin Valley encompasses Madera, Fresno, Kings, Tulare and Kern Counties.

The BIG Coalition is a collaborative organization involving business, industry, education, agriculture and local government to advocate for the mutual interests which uniquely affect our South San Joaquin Valley communities.

After reviewing the "Sax Report," our Coalition has many concerns. The report encourages the State Water Resources Control Board to expand its regulatory authority over groundwater by reinterpreting the meaning of subsurface flows. It recommends that the SWRCB change its test for determining what subsurface flow versus percolating groundwater is by using an impact test instead of looking at physical characteristics. Such a dramatic change in law should not occur outside of the legislative arena.

In addition, the six quantifiable criteria proposed by Professor Sax dramatically shift the burden of defending one's use of groundwater onto the property owner. This would be costly and detrimental to overlying landowners who are legally entitled to use the groundwater beneath their property.

The recommendations within the Sax Report greatly change the regulation of groundwater within the State of California. The changes suggested within the report can only be accomplished through a change in the current law, which would have to be done by the Legislature.

We strongly urge that the recommendations offered by Professor Sax be rejected by the State Water Resources Control Board.

Sincerely,

Robert Keenan, BIG Coordinator

cc: State Legislators
BIG Participants

FDP/PGM

PORTERVILLE

The Good Life

April 16, 2002

Mr. Paul Murphey
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000

Subject: Assessment of Joseph L. Sax Final Report on Review of the Laws Establishing the SWRCB's Permitting Authority Over Appropriations of Groundwater Classified as Subterranean Streams and the SWRCB's Implementation of Those Laws

Dear Mr. Murphey:

Thank you for the opportunity to comment on the subject report.

The Business, Industry & Government (BIG) Coalition of the South San Joaquin Valley, of which Porterville is a part, encompasses Madera, Fresno, Kings, Tulare and Kern Counties.

Porterville has many concerns about the "Sax Report." The report encourages the State Water Resources Control Board to expand its regulatory authority over groundwater by reinterpreting the meaning of subsurface flows. It recommends that the SWRCB change its test for determining what subsurface flow versus percolating groundwater is by using an impact test instead of looking at physical characteristics. Such a dramatic change in law should not occur outside of the legislative arena.

In addition, the six quantifiable criteria proposed by Professor Sax dramatically shift the burden of defending one's use of groundwater onto the property owner. This would be costly and detrimental to overlying landowners who are legally entitled to use the groundwater beneath their property.

The recommendations within the Sax Report greatly change the regulation of groundwater within the State of California. The changes suggested within the report can only be accomplished through a change in the current law, which would have to be done by the Legislature.

We strongly urge the State Water Resources Control Board to reject the recommendations offered by Professor Sax.

Sincerely,

Gordon T. Woods
Mayor

GTW:HLH:vs

cc: State Legislators
BIG Coalition
Harold L. Hill, City Engineer
89-9674-S

TDR/PGM

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(559) 582-9248

April 17, 2002

Mr. Paul Murphey
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000

Re: Assessment of Joseph L. Sax
Final Report

Dear Mr. Murphey:

Thank you for the opportunity to comment on the Report on Review of the Laws Establishing the SWRCB's Permitting Authority Over Appropriations of Groundwater Classified as Subterranean Streams and the SWRCG's Implementation of Those Laws as assessed by Joseph L. Sax.

I am a participant of The Business, Industry & Government (BIG) Coalition of the South San Joaquin Valley which encompasses Madera, Fresno, Kings, Tulare and Kern Counties.

The BIG Coalition is a collaborative organization involving business, industry, education, agriculture and local government to advocate for the mutual interests which uniquely affect our South San Joaquin Valley Communities.

After reviewing the "Sax Report," our Coalition has many concerns. The report encourages the State Water Resources Control Board to expand its regulatory authority over groundwater by reinterpreting the meaning of subsurface flows. It recommends that the SWRCB change its test for determining what subsurface flow versus percolating ground water is by using an impact test instead of looking at physical characteristics. Such a dramatic change in law should not occur outside of the legislative arena.

In addition, the six quantifiable criteria proposed by Professor Sax dramatically shift the burden of defending ones' use of groundwater onto the property owner. This would be costly and detrimental to overlying landowners who are legally entitled to use the groundwater beneath their property.

The recommendations within the Sax Report greatly change the regulation of groundwater within the State of California. The changes suggested within the report can only be accomplished through a change in the current law, which would have to be done by the Legislature.

I strongly urge that the recommendations offered by Professor Sax be rejected by the State Water Resources Control Board.

Sincerely,

Paul Daley

Comments to the State Water Resources Control Board on
Professor Joseph Sax's Report on the Legal Classification of Groundwater
Presented by Peter Yolles, The Nature Conservancy
April 10, 2002

Members of the Board,

My name is Peter Yolles of The Nature Conservancy. The Nature Conservancy's mission is to preserve the plants, animals and natural communities that represent the diversity of life on Earth by protecting the lands and waters they need to survive. The Nature Conservancy, along with its partners, is working to protect and restore aquatic health to rivers and streams throughout California. In many cases, groundwater has a significant impact on the volume, temperature and timing of surface flows that are critical to maintain valuable aquatic habitat.

Because of the critical connection between groundwater and ecologically healthy rivers, The Nature Conservancy supports the Board's efforts to explore tools that will enable it to clarify its permitting authority over groundwater appropriations and, more specifically, encourages the Board to pursue Professor Sax's three-point strategy for dealing with the problem of groundwater/surface water management in California.

The Nature Conservancy has been working in two watersheds that illustrate both the peril of mismanaged groundwater use and the promise of comprehensive basin management. Around the Cosumnes River, the last remaining undammed river flowing westward from the Sierra Nevada, excessive groundwater pumping has lowered the groundwater table, changing the Cosumnes from a gaining to a losing river. A consequence of this change is that the river ceases flowing earlier in the year, stays dry longer into the Fall, and dries over an increasingly long reach, compared to historic

conditions. As a specific example, historical records indicate that the river now experiences its first continuous flow in the Fall (necessary for salmon migration upstream from the Delta to their spawning grounds) an average of more than one month later than under historic conditions. Other known or potential impacts on public trust values include lowering of the groundwater table within the riparian zone, loss of riparian vegetation, impairment of oak forest regeneration, and loss of seasonal wetlands. Making changes so that the Board has the tools, when local and regional solutions are insufficient, to manage "groundwater uses that diminish appreciably and directly the flow of a surface stream," as Professor Sax states (p. 92), may help prevent any increment of further lowering of groundwater that will, in our view, have a significantly negative effect on these habitats and public trust values in the Cosumnes and other rivers.

The Board's role can be a positive force in more efficient water use and planning in California. For example, on Mill Creek, The Nature Conservancy has signed a cooperative agreement with the Department of Water Resources for a conjunctive use project. In a groundwater basin hydraulically connected to the river, The Conservancy pumps water to irrigate restored oak woodlands during summer and fall. When the spring-run salmon are returning, The Conservancy ceases pumping, thereby increasing natural flows and improving spawning and rearing habitat. Conjunctive use projects, such as this one on Mill Creek, exemplify the potential benefits of comprehensive basin management and the promise of the Board's continuing its pursuit of clarifying its jurisdiction over groundwater appropriations.

In summary, The Nature Conservancy encourages the Board to utilize Professor Sax's recommendations of establishing formal criteria to determine when groundwater is

subject to the Board's permitting jurisdiction, and to pursue his three-point strategy. As the Cosumnes River and Mill Creek examples illustrate, the Board's jurisdiction can have beneficial impacts on the health of the State's rivers and streams if it follows the recommendations of the Sax Report.

Thank you.

Any comments or questions can be directed to:

Peter Yolles
Senior Field Representative
California Water Program
The Nature Conservancy
201 Mission Street, 4th Floor
San Francisco, CA 94105
Tel: (415) 281-0432
Fax: (415) 777-0244