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To: [Scoping_Delta_Plan@Delta Council](mailto:Scoping_Delta_Plan@Delta_Council)
Subject: Reasonable Use
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Attachments: [SWCRB Comment letter re Reasonable Use wcp 1-18-11.doc](#)

Please refer to Mr. O'Lauhglin's correspondence attached hereto.

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SENT VIA EMAIL

January 18, 2011

Mr. Charles R. Hoppin
Chair, State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

RE: Comment Letter from San Joaquin River Group Authority
Delta Watermaster's Report entitled *The Reasonable Use Doctrine and
Agricultural Water Use Efficiency*

Dear Mr. Hoppin:

These comments are submitted on behalf of the San Joaquin River Group Authority ("SJRG"). The SJRG supports efforts to improve water use efficiency, and all of our members have engaged in a variety of efforts, including the use of structural and engineering improvements, regulatory requirements and economic incentives, to improve the efficiencies in the diversion, delivery and use of water within their service areas. Despite our agreement with the goal of improving the efficiency of water use, the SJRG contends that the Delta Watermaster's Report entitled "*The Reasonable Use Doctrine and Agricultural Water Use Efficiency*" ("Report") should not be adopted by the Board at this time, as it (1) has no solid legal foundation, (2) ignores or misunderstands the practical repercussions associated with its recommendations, and (3) does not represent the proper use of the Board's present or future resources. Commensurate with the intent of the Legislature, the Board and Watermaster should focus their resources on making sure that those who divert are doing so pursuant to a valid water right, and not dilute such resources in the creation of a new investigative unit that focuses on the relative efficiencies of otherwise legal beneficial uses of water.

A. The Underlying Premise of the Report is Legally Incorrect

The Report begins by claiming that its "underlying premise...is that the inefficient use of water is an unreasonable use of water." (Report, p. 3.) This assertion is legally incorrect and undermines the Report's appropriateness, reliability, and recommendations.

Contrary to the Report's assertion, mere inefficiency of use does not equate to an unreasonable use prohibited by Article X, Section 2 of the California Constitution. For example, the Big Bear Municipal Water District sought to amend a judicially-adopted physical solution by claiming, in part, that its proposed adoption would increase the efficiency of water use consistent with Article X, Section 2. The reviewing court rejected this argument, stating:

“ . . . even if we assume . . . that such a plan would increase the ‘efficiency’ in the use of the lake’s water . . . there is nothing in Article X Section 2 of the California Constitution which refers to, much less ‘mandates,’ the most ‘efficient’ use of water resources. The [Constitution] refers to the ‘beneficial’ use of water and to the ‘reasonable’ use and diversion of water, and **it is obvious that the most efficient use of water is not necessarily its most beneficial or reasonable use.**” (Big Bear Mun. Wat. Dist. v. Bear Valley Mut. Wat. Co. (1989) 207 Cal.App.3d 363, 377-378.)(emphasis added.)

A similar conclusion was reached in a case concerning the allocation of unused subsurface storage space. A claim was made by some parties that the unused space be assigned in proportion to the parties’ extraction allocations because such an allocation would lead to greater efficiency. The court disagreed, finding that “[e]fficiency is not, however, synonymous with reasonable or beneficial use,” and “[e]ven assuming Appellants’ have demonstrated their proposal would result in greater efficiency . . . that is not enough to satisfy the Constitutional mandate.” (Central and West Basin Water Replenishment Dist. v. Southern Calif. Wat. Co. (2003) 109 Cal.App.4th 891, 914.)

When it comes to irrigation, the reason that “efficiency” is not a synonym for “reasonable” is because there is no fixed or established requirement as to how much water may be used for a particular purpose, nor is there one concerning just what methods of diversion are acceptable. In the absence of such definitive requirements, whether or not a particular use or method of diversion is reasonable is a question of fact. (*See, e.g.,* Joslin v. Marin Mun. Wat. Dist. (1967) 67 Cal.2d 132, 140.) In terms of quantity, as the California Supreme Court has explained on several occasions, the question of how much water is needed or applied for irrigation is complicated and varies depending upon a variety of factors including soil composition, size of the area, climatic conditions, the available water supply, altitude and the type of crops being grown. (Pabst v. Finmand (1922) 190 Cal.124, 135; Joerger v. Pacific Gas & Elec. Co. (1929) 207 Cal. 8, 22.) Moreover, the quantity of water used cannot be reduced by alleging that another, less needful crop, could otherwise be grown. (*See, e.g.,* Antioch v. Williams Irr. Dist. (1922) 188 Cal. 451, 467-468; Allen v. Cal. Water & Tel. Co. (1946) 29 Cal.2d 446, 483.)

The analysis regarding the reasonableness of the method of diversion is similar to that for quantity and is dependent upon the specific circumstances being reviewed. (Witherill v. Brehm (1925) 74 Cal.App. 286, 295-296.) For example, the fact that a pipe may leak or an earthen ditch may seep is not sufficient to support a finding that the method of diversion is unreasonable, even if such losses could be prevented or reduced by available technological means. (*Id.*; Joerger, supra, 207 Cal. at 23 [irrigator not required to use the best method of delivery or take extraordinary precautions to prevent waste]; Erickson v. Queen Valley Ranch Co. (1971) 22

Cal.App.3d 578, 584 [diverter cannot be compelled to divert according to most scientific methods].) As explained by the California Supreme Court, diverters

“ . . . cannot be compelled to construct impervious conduits in order that seepage water may be made available to appellant. An appropriator is not compelled either to irrigate in the most scientific manner known or to divert in the most scientific manner known.” (Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist. (1935) 3 Cal.2d 489, 573.)

Reviewing the above cases shows that there is no support for the idea that “inefficiency” equals “unreasonable use” for purposes of Article X Section 2. Neither the Watermaster nor the Board has the legal authority to determine, as a general matter, that diverters “who do not employ some or all of these technologies, where they are economically justifiable, locally cost effective and not harmful to downstream agriculture and other environmental needs, are simply using water unreasonably.” (Report, p. 10.) The very notion is antithetical to the established jurisprudence on the matter and must be rejected.

B. Even Assuming More Efficient Irrigation Practices Can Be Required or Induced, the Law Does Not Require the Savings to Automatically Accrue to the Benefit of Others.

The Report suggests that one of the primary benefits of any mandated increases in efficiency will be the availability of “wet” water which can meet the needs of the Delta or parties. (Report, p. 3.) While certain improvements in efficiency could potentially make new or additional water available for the environment or other uses, it is not necessarily, nor even likely, to be so, and the chances of such “saved” water being available for the Delta is even more remote.

The largest providers of water in California are the United States, via the CVP, and DWR, via the SWP. The CVP is comprised of 20 different reservoirs with a combined storage of 11 million acre-feet and has contracts to deliver in excess of 9.3 MAF annually. The SWP is comprised of 28 dams and reservoirs and has contracts to deliver 4.2 MAF annually. As is well known, allocations to CVP and SWP contractors have often been less than 100% (*see, e.g.*, http://www.usbr.gov/mp/cvo/vungvari/water_allocations_historical.pdf). Thus, as an initial matter, improvements in efficiencies by CVP/SWP contractors will not make additional water available for the Delta, the environment or other users of water, but rather such savings will be used by the CVP and SWP to increase contract deliveries or remain in storage. While this may well be a very good outcome, it is certainly not the outcome touted by the Report.

The same result will likely occur on the east side of the San Joaquin Basin. Any “wet” water created as a result of increased efficiencies in these areas will either be kept in storage for use in drier periods, go to groundwater storage, be used for other, currently unmet needs within the Districts, or transferred to other local entities. Additionally, even if the “wet” water is actually taken from the original water right holder, there is still no guarantee that it will end up dedicated to the environment or benefit the Delta. Under the water rights system in California, such water will become available for appropriation (Stevinson Wat. Dist. v. Roduner (1950) 36

Cal.2d 264, 270; Meridian, Ltd. v. City & County of San Francisco (1939) 13 Cal.2d 424, 445-446), and as natural flow may be lawfully taken at any time by riparians, or by other appropriators.

In any event, the “wet” water saved by increased inefficiency could end up in the tributaries to the Delta, and perhaps even the Delta itself. The Board, however, should not be swayed by the siren song claiming that a reallocation of water to the Delta and the environment can be achieved via a more aggressive use of the “reasonableness doctrine.” Such song has been given voice time and again – most recently in Virginia Cahill’s July 9, 2008 memorandum to the Delta Vision – and promises the hope that reallocation of water via policy as opposed to a contested water right hearing, is within reach. As many parties, including the SJRGA, demonstrated in the Delta Vision process, the law will not permit a reallocation of water from one use to another through the application of Article X, Section 2, either directly or indirectly.

C. The Idea That Certain Types of Irrigation Are Per Se Unreasonable Based Simply on a Comparison of the Initial Quantity Delivered is False.

The Report makes sweeping factual statements to the effect that certain irrigation practices, such as flood irrigation and delivery via rotation are *per se* inefficient and unreasonable. (Report, p. 10-12.) These statements are incorrect, as “least use” is not synonymous with “beneficial use.” For example, the Report suggests that water can be saved if flood irrigators switch to drip and sprinkler irrigation. (Report, p. 10.) While such a switch may result in the delivery of less water over specific time-periods, it will not necessarily result in less overall use of water. One of the purposes of low volume delivery systems is to keep the soil moisture content as optimum as possible by keeping as much water as possible available to the crop in its root zone. Done successfully, this method can reduce crop stress by using more water and therefore increase crop yield. As can be seen, this method can actually increase the amount of water consumed by the plant as it will continue to draw upon the water because it is constantly available. Several of our districts have areas that use low volume drip, buried drip and micro-spray systems, and in many cases, yields do go up; however, the amount of water used by the crop is the same as if delivered via flood irrigation. Thus, increased efficiency can be achieved, but such increase will not necessarily result in the use of less water.

Further, it is not the case that water delivered in excess of the evapotranspiration or consumptive needs of the crop is unreasonable or wasteful. When managed properly, such “excess” water can and does help prevent the intrusion of salt into the root zone, a purpose which is specifically identified in the Basin Plan as a beneficial use of water. (p. II-1.00.) Further, such water often recharges groundwater, accretes to rivers and streams, and generates valuable return flows that are used by others. Each of these beneficial uses are considered critical, so much so that before any out-of-district transfer can be made, impacts to these beneficial uses must be identified, described, evaluated and mitigated as part of the CEQA review.

The bottom line is that one size does not fit all. The fact that the use of certain technologies associated with the diversion, conveyance and use of water may seem more efficient than use of the existing technologies does not mean that either (1) use of more efficient technologies will result in the use of less water, or (2) the present uses, even the non-primary

uses such as groundwater recharge and return flows, are not more beneficial despite being less efficient. The complexities associated with irrigated agriculture, recognized by the courts for almost a century, have not changed. While technological advances have been made, some of which can result in the more efficient use of water, the use of such technologies cannot be mandated under the reasonable use doctrine to apply equally to the industry as a whole or to any particular geographic region.

D. Mandated Use of Some Efficiency Technologies Can Be Astronomically Expensive.

The SJRGA's districts are comprised of tens of thousands of acres each and contain several hundred miles of ditches, canals and laterals. Some of these conveyance facilities are already lined or piped, particularly in areas of significant seepage. While all non-piped conveyance facilities suffer losses due to evaporation, making their use less efficient than a fully piped system, one cannot seriously argue that all non-piped systems should be piped. In our districts, recent estimates indicate that the piping of canals will cost in excess of \$500 per foot. Assuming a district has 100 miles of canals, ditches and laterals (or 528,000 feet), the cost to pipe it all would be \$264,000,000. The associated water savings are not worth the expense.

E. The Report's Legal Recommendations Are Inappropriate and Must Be Rejected.

The Report makes three legal recommendations: (1) That the SWRCB develop a new investigative unit to enforce the prohibition against the unreasonable use of water; (2) That the SWRCB "streamline" the existing procedures to make it easier to bring a successful enforcement action for unreasonably using water; and (3) That the SWRCB find an existing agricultural user and bring an enforcement action against him as an example to others. (Report, p. 14-15.) The SJRGA contends that none of these recommendations should be taken seriously, let alone implemented.

The first recommendation – to create a new investigative unit focused on unreasonable use – is an improper diversion of valuable resources that are needed to address the existing problem of illegal diversions. SB 7X8, which is the source of the new SWRCB resources that the Watermaster wants to re-direct, specifically called for the dedication of additional SWRCB attention and resources to address the problem of illegal diversions of surface water from the Delta. It was well understood to apply to actual diversions taking place without a water right, and not to apply to crack down on otherwise lawful diversions that are not as comparatively reasonable as others. The Report's recommendation to dilute resources away from the framework that led to the passage of SB 7X8 is not within the intent of the Legislature in SB 7X8. Such recommendation must be rejected.

The second recommendation – to "streamline" the existing process for bringing enforcement actions by enabling the SWRCB to start by issuing a CDO– runs afoul of the well-accepted notions of due process. The Report characterizes the existing process as "cumbersome," as if the careful and thorough investigation of claims was a bad thing. The existing process is indeed cumbersome, but with good reason. Such process is designed to ensure that no person is subjected to a significant fine and/or a forfeiture/reduction of their water right unless and until

the SWRCB has substantial evidence to support a finding of waste, has conducted a thorough investigation, the person has a chance to answer any allegation brought by the SWRCB, and that the person has a chance to cure. (*See* Calif. Code of Regs., tit. 23, §§ 856, 857; *see also* Calif. Code of Regs., tit. 23, §§ 4000 et seq.; *see also* Wat. Code §§ 1831 et seq.) The requirement that a CDO not be issued until after there has been an investigation, hearing and order of correction comports with the mandates of the Constitution and general precepts of administrative law that require notice and a hearing before an individual can be deprived of a significant property interest or subjected to a monetary fine or sanction. (*See, e.g., Nasir v. Sacramento County Off. of the Dist. Atty.* (1992) 11 Cal.App.4th 976, 985-986.)

When it comes to potential governmental deprivation of an individual's liberty or property, our Constitutional, statutory and regulatory scheme is designed to protect the rights of the *individual*, not to make such deprivation easier by the government. The Report's recommendation that the SWRCB amend its policies and procedures to enable it to issue CDOs for alleged violations of the reasonable use doctrine before there has been an investigation, notice and hearing is contrary to the accepted principles of due process and must be rejected.

The third recommendation – that the SWRCB should aggressively seek out and bring an enforcement action against “an unreasonable agricultural use of water where such use is higher than similar cases in similar locations or circumstances” – is also cause for concern. First, the recommendation suggests that an enforcement action will be brought for the primary purpose of “sending a message” to other water users, and not for the primary purpose of enforcing the law. The SJRGA and its members support the SWRCB taking appropriate action to enforce the law, including the law prohibiting the waste and unreasonable use of water, but we do not support the SWRCB's exercise of power for the purpose of “sending a message.” If the SWRCB has credible information suggesting a waste of water is occurring, it should take all necessary steps to investigate and, if appropriate, enforce the law. The SWRCB should do so without regard to the size of the right at issue, the owner of the right, the size of the parcel or the location of the parcel. While selective enforcement by the SWRCB based on the above-factors may not result in a denial of equal protection, it will nonetheless be unsavory and may provide avenues for affected parties to assert that bias has played a role. The SWRCB should not seek out any specific agricultural user, but should apply the law to all users in an even-handed, neutral way based upon the information it obtains through its investigations.

Just as troubling as the notion of selective enforcement embedded in the third recommendation is the idea that a successful enforcement action can be brought against one whose water use is higher than similar uses in similar locations or circumstances. This idea is contrary to the express will of the Legislature, which established in Water Code section 100.5 that conformity of use, method of use or method of diversion with local custom shall not be determinative of the reasonableness of the use. Rather, such conformity is only one factor that can be considered. In accordance with the long-line of cases discussed above demonstrating that whether or not a use is reasonable within the meaning of Article X, Section 2 is a question of fact depending upon many factors, Section 100.5 prohibits the SWRCB from taking the type of action suggested in the third recommendation. A user cannot be found to be using water unreasonably simply because he uses more water than a similarly situated user in similar circumstances.

These comments highlight some of the more egregious errors and problems contained in the Report, and the SJRGA believes that these comments should be sufficient for the SWRCB to reject the Report and its recommendations. However, these comments are by no means exhaustive, and to the extent the SWRCB moves forward with any of the recommendations contained in the Report, it can expect that the SJRGA will submit lengthy, detailed declarations and testimony from agronomists, engineers, irrigators and district managers providing factual support for the wisdom expressed by the courts for almost 100 years that what comprises “reasonable and beneficial use” cannot be reduced to a generic formula or technology. The SJRGA recommends that the SWRCB reject the Report in its entirety, and that it direct the “Delta” Watermaster to focus his attentions on the legal Delta and the myriad of problems there.

Very truly yours,

O’LAUGHLIN & PARIS LLP

A handwritten signature in blue ink, appearing to read "Tim O'Laughlin".

By: _____
TIM O’LAUGHLIN

TO/tb

cc: SJRGA