

COMMENTS ON WATER CONSERVATION PRICING

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ATTN: California State Water Resources Control Board

RE: Compliance w/ Constitutional Requirements in Drought Water Pricing

Thank you very much for scheduling this Workshop and soliciting public comments about strategies to comply with multiple Constitutional mandates while trying to encourage more water conservation in the urban sector during this latest drought emergency. I hope that these comments will prove useful to you. Public service price levels are indeed a critical aspect of your project, but my main point here is that California regulatory agencies have a fundamental stake in being reasonable in their approaches and taking precautions to avoid becoming “trapped” in complex eddies of “details.” I think Commissioner Marcus put it quite well when she described a lot of her work at the EPA as “determining how many angels could dance on the head of a pin.” Of course many academic experts will insist that only a little more research and only a little more budgetary support for ongoing programs is needed. But “California Water” is one of the most exhaustively “studied” problems in the world and, still, clear “solutions” remain “obscure” after many years of science and policy development. This is not a surprise. It is actually a very common situation encountered when human societies deal with “environmental” crises. Even though a California Court has recently opined that tiered utility rates are “property-associated fees” subject to the proportionality requirements of Proposition 218, I’m here to say that the feared perpetual analytical trap is NOT inevitable. Accelerated “research,” despite the Court’s suggestions, cannot credibly be expected to “help.” Emergency public service price levels can and should be locally set and supervised by State authorities in a candid and humble manner. Adjustments should be expected as the experiment progresses, but it’s important to remember that there isn’t any arbitrary “right” or “legal” way to accomplish this, but rather, I am suggesting that some explanations for public policy are more credible, and thus more “legitimate,” than others. And I hope that these comments contribute to more ecologically and socially sustainable and equitable patterns of California water regulation.

In the water context, familiar regulatory initiatives are often resisted by some factions of the community as certain “facts,” seemingly required for successful management, prove to be particularly elusive. And while some of these “unobtainable facts” may theoretically exist on single dimensions of a conceptual landscape, they often lose meaning or relevance as other equally valid perceptions are included. Such “unobtainable facts” in the water context include “the true value” of water (which is essentially very locally determined and depends very much on the heterogeneous interfaces between natural settings and human “needs” and the technologies employed in “problem solving”) and “the true costs” of providing water (which again vary with diverse arrays resources, technologies, money systems and payment patterns). It is simply not worthwhile to attempt to isolate and define “facts” when we know beforehand that they will disappear when other critical, and often contradictory perceptions are included in our analysis. A different sort of approach is needed because “values” and “costs” of water are perceived and managed so differently according to the different “cultures” of the various actors and agencies involved. In this type of systems approach, “uncertainty” is not a simple lack of knowledge, but rather a positive attribute in its own right as competing institutions negotiate their viability. “Decision-

making under uncertainty” is thus converted into “taking action under contradictory certainties.” (There is an extensive, and by now almost “long established” scientific literature associated with this field).

Water allocation in California is particularly well-suited to this type of analysis because water has always been Constitutionally defined as being a public resource managed by the State for public benefit. Since statehood, the right to the use of water has been recognized by law, but the actual ownership of the water itself, and living resources within it, are held by the state for the benefit of the people of the State (expressly including future generations). Of course it has always been a bit of a trustee’s nightmare to manage simply because the physical characteristics of water, as it is naturally encountered in various forms, each with its own “behaviors” in different aspects of the hydrologic cycle. “Mother Nature” seems almost positively determined to continuously “co-mingle” public and private assets to the eternal frustration of “resource managers.” Public and private assets literally and conceptually “flow together,” both above and below “ground” (“bedrock legal principles?”) surfaces through California’s overlapping physical and social landscapes. “Distribution costs” without any component to reflect the inherently “public” nature of water “assets will never capture any aspect of the potentially unconstitutional “gifting” of public assets to private parties. This is a key difference between water and power as governed by public utilities law. Water is a public trust resource. So, while some parties are insisting that the recent court interpretation of water rates as “property related fees” can’t exceed proportional service costs, traditional fiduciary responsibilities of water trustees require that reasonable efforts be taken to avoid unconstitutional gifting of public assets. So there clearly is a component, independent of “taxes,” which reflects a rationally based need for public compensation. This would apply to any distributions above basic health and safety requirements and would progressively apply to higher quantity users of public water supplies. So the Board is on solid legal ground indeed as it considers possible increases in distribution rates.

But the larger context of “taxes” and the recent public experiences of “bailouts” for some actors but pointedly NOT for others does create a more than routine atmosphere of controversy. The “problem” has to be approached modestly and reasonably, and the various actors have to be encouraged to act similarly. “Percolating groundwater basins” are no longer a religious tenet; rather, the concept is coming to be seen more as a political myth. This is a profound change which some water actors have been assuming would “never happen” in their lifetimes. Yet this, and numerous other long needed reforms are being incorporated into our lives as “the new normal” simply because they can no longer be credibly sustained in a democratic society.

“The true value” of water is elusive indeed. This is partly because so many different “prices” are paid for “it” in so many different markets. Those fighting “unfair taxes” often prefer to speak in terms of “The Market” while zealously guarding the capacity of their particular “gaming field” (my term...) to somehow be an “exempt,” but logically essential component of a larger, almost religious totem. And in the meantime, California has taken steps to recognize a species of a “human right to water” and even started to establish institutions to govern “unthinkable” groundwater regulation. A great deal is happening, and it is perfectly appropriate to engage an open discussion at a Board Workshop. But it is imperative to acknowledge that the Proposition 218 debate concerns an argument that some proponents want to keep restricted to “public service costs” with no reflection whatsoever of the public value of the water delivered or its public opportunity costs. And what are credible estimates of the public value of water? On the high side, we certainly can’t forget that a Vice President of the Pebble Beach Company seriously suggested that his company be credited for a \$250,000 contribution to the Low Income Housing fund for each acre foot of water from its dubious “entitlements” made available to public projects.

But just because there is a wide range of “scientific” estimates for “the value” of water doesn’t mean we can’t be scientific (or “reasonable” in the legal context). The approach to economic regulation that I am advocating is closely related to the development of “Adaptive Management” in the biological context. More than thirty years ago, at an internationally collaborative scientific research institute, the International Institute for Applied Systems Analysis (IIASA) in Laxenburg, Austria, a group of fisheries

biologists from the University of British Columbia at Vancouver, were formulating a new methodology to get beyond institutionally created roadblocks to scientifically managing international fisheries. Their experience, later called “Adaptive Management,” has been very successfully integrated into California Water regulation. At the same time, I had joined another Research Team there, formerly identified as the “Risk Group” but then in the process of becoming the “Institutional Settings and Environmental Policies Work Group.” My most immediate project was to assist a British Cultural Anthropologist in producing a “Discussion Paper” in support of an Interagency United Nations Conference on “People, Resources, Environment and Development: The Case of the Himalayan Foothills” to produce a sort of “roadmap” for the United Nations Environment Program, UNESCO, FAO and other UN Agencies strategically intervene in the International “Eco-Crisis” occurring because of the challenges associated with “Deforestation” there.

While our research was published as: Uncertainty on a Himalayan Scale: An Institutional Theory of Environmental Perception and a Strategic Framework for the Sustainable Development of the Himalayas (Ethnographica, London, 1986), and it became required reading at institutions as diverse as the Inter-American Development Bank, London School of Economics and the Yale Forestry School, there haven’t been wholesale changes in public approaches to regulation. Such processes take time and shifts in public discussion. What is more clear has been the rapid loss of credibility of formerly inviolable public explanations of legal basis for customary business practice. This is particularly clear in the banking context and I have been lucky to have shared a bit of family experience in that context. (I only bring this up because of the particularly overwhelming current public experience with banking and “bailout” and “taxes”).

The Prop. 218 Court Opinion that seems to be driving this discussion made the note that more focused attention has to be paid to the particular elements of “proportionality” of costs and values and I am saying that these factors are swamped by the range of “uncertainty” in estimating the public value of water, or evaluating the public risk of collapsing ecosystems. What you are confronting as a Trustee Agency in establishing emergency drought price levels is not a question that can be solved with “better attention to statistics.” Today’s news headlines, on every conceivable conceptual level, relate to problems where “solutions” depend on the public credibility of the arguments of various actors. My grandfather, Clark A. Warburton was an economist (a “leading” economist according to his 1979 obituary in the Washington Post) who was deeply concerned about the measures being used for “money” by Federal Banking Regulators. He wasn’t an ambitious student or upwardly mobile professional. He was Chief of Statistics at the Federal Deposit Insurance Corporation. A current Director of Monetary Policy at the Federal Reserve called me three weeks ago to ask if I might have heard him mention anything about where he might have felt the pressure not to publish came from when he was working at the FDIC. And he also asked how Clark Warburton might have felt about his monetary work finally being accepted as “factual” by modern banking authorities. I find myself thinking more about how my mother had said he was saying, “But I’m not finished,” as she was taking him to the hospital for the last time.

From my perspective as a California citizen, I can say you are indeed on solid ground in recommending increased “conservation” service fees for water distribution. But it is important to approach this with as much modesty and reasonableness as possible. Thank you for the opportunity to make these comments.