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September 22, 2014

Via email to commentletters@waterboards.ca.gov

Felicia Marcus, Chair
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Re: 9/23-24/14 Board Meeting, Agenda Item 10

Dear Chair Marcus and Board Members:

This comment letter is submitted on behalf of the Northern California Water Association (NCWA). NCWA is concerned with language contained in Proposed Order WR 2014-0022-DWR (Order) suggesting that water rights are not "real property" rights. (Proposed Order at p. 18.) While it is not clear whether the statement "water rights in California are not like real property rights", on page 18 of the Order was inadvertent, NCWA believes that this Board should be informed not only of how water rights have been treated as real property rights *consistently* for the past 160 years, but also how such a sea change in California law could disrupt activities throughout the State.

Until recently, the State Water Resources Control Board (SWRCB) has not only recognized, but has advocated that water rights are real property rights. The SWRCB has done this in various venues, including in the Courts of this State. The most notable instance was in *Fullerton v. State Water Resources Control Bd.* (1979) 90 Cal.App.3d 590, 598 *(Fullerton)*. At issue in *Fullerton* was whether the then California Department of Fish and Game could obtain a water right without exercising some form of physical control over the water.

In *Fullerton*, the SWRCB argued that water rights were possessory property rights, like other interests in real property. The SWRCB representations and arguments to the California Court of Appeal, First Appellate District were sufficient for the *Fullerton* Court to hold that neither the Water Code nor the California Constitution changed the nature of a water right, "including its characterization as essentially a possessory right like other interests in real

property." (*Fullerton* at p. 600.) The *Fullerton* Court expressly stated that it *agreed with the SWRCB* in those arguments. (*Ibid.*) The *Fullerton* Court, in siding with the SWRCB, explained that "[t]he concept of an appropriative water right is a *real property interest* incidental and appurtenant to land." (*Fullerton* at p. 598, emphasis added.) The *Fullerton* Court affirmed more than what was then 125 years of black letter California law when it stated that "[t]he authorities in this state have *uniformly* defined the right to appropriate water as a *possessory property right*." (*Ibid.*, emphasis added.)

The question of whether water rights are real property rights was briefed by NCWA and others before the California Supreme Court in the *California Farm Bureau Federation v. State Water Resources Control Board* proceedings. A copy of that brief is attached for your reference, and was apparently sufficiently persuasive to have the California Supreme Court modify its language to avoid any suggestion that water rights are not real property. As noted in the brief, suggesting water rights are not real property is inconsistent with 160 years of California law, would call into question existing water right adjudications (in Rem proceedings), and potentially jeopardize farm financing where water rights form part of the basis of the collateral for loans. It would also cause havoc with the State's recording system, as water rights are part of real property conveyances, and have been severed from and reserved to parcels predicated on water rights constituting real property.

This Board should reject the invitation to attempt to reclassify water rights through Proposed Order WR 2014-0022-DWR. Without opining on the merits of the Petition for Reconsideration (Petition) or on the Order, the SWRCB can simply deny the Petition on substantive grounds without creating unnecessary concern throughout the water community and inviting likely litigation on this issue.

Sincerely,

Daniel Kelly

cc: David Guy

DK:yd
Enclosure

Case No. S150518

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CALIFORNIA FARM BUREAU FEDERATION, et al.,

Petitioners and Appellants,

v.

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD, et al.,

Defendants and Respondents.

PETITIONERS' AND APPELLANTS' PETITION FOR REHEARING

After Decision by the
Court of Appeal, Third Appellate Dist., No. C050289

From Judgment
of the Sacramento County Superior Court, Case No. 03CS01776
The Honorable Raymond M. Cadei, Judge

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I. INTRODUCTION

To: The Honorable Tani Cantil-Sakauye, Chief Justice of California, and the Honorable Associate Justices of the Supreme Court:

Pursuant to California Rules of Court, rule 8.536 and 8.268, the following Petitioners and Appellants hereby Petition this Court for Rehearing and reconsideration in the above-captioned matter seeking modification to this Court's January 31, 2011 opinion ("Slip Op."), Northern California Water Association, Central Valley Project Water Association; 2017 Ranch Ltd Partnership; Agency 5; Alta Vista Ranch; Marian Anderson; Violet M. Anderson; Anderson-Cottonwood Irrigation District; Arvin-Edison Water Storage District; Jack Baber et al.; Jack W. Baber; Judith S. Baber; Banta-Carbona Irrigation District; Bella Vista Water District; Terry M. Bengard; Tom Bengard; Broadview Water District; Browns Valley Irrigation District; Rosemarie K. Busbee; Calaveras County Water District; Cavanaugh, Carmel; Centerville Community Services District; Centinella Water District; Central San Joaquin Water Conservation District; Chiappe Farms, Inc.; Craig S. Chenowith Trust Date 11/6/96; Chimney Rock Ranch; City of Coalinga; City of Fresno; City of Santa Clara; City of Roseville; City of Tracy; City of West Sacramento; Darin and Laura Claiborne; Clear Creek Community Services District; Colusa County Water District; Colusa Drain Mutual Water Company; Colusa-Solano JPA; Contra Costa Water District; Cordua

Irrigation District; Corning Water District; Cortina Water District; County of Colusa County of Shasta; Jack A. Cushman; Danna & Danna Inc.; Davis Water District; Del Puerto Water District; Delano-Earlmart Irrigation District; Delta Breeze Partners LLC; Denny Land & Cattle Company, LLC; Dixie Valley Ranch; Dunnigan Water District; Eagle Field Water District; East Bay Municipal Utility District; El Dorado Irrigation District; El Solyo Water District; Exeter Irrigation District; Feather Water District; John S. Fobes & Estate of Kenneth D.; Fresno Irrigation District; Fresno Slough Water District; Friant Power Authority; Garcia Family Trust; Garden Highway Mutual Water Company; Georgetown Divide Public Utility District; Glenn-Colusa Irrigation District; Glide Water District; Gorrill Land Company; William T. Gray; Helen K. Dixon Trust/H&L Partnership/Richter Bros./Henry Richter; Dennis Hank; David Hershberger; Hills Valley Irrigation District; Igo-Ono Community Service District; Imperial Irrigation District; James S. Irving; W.G. Irving; Judith W. Isaac; Ivanhoe Irrigation District; James Irrigation District; James J. Stevinson, A Corporation; Richard L. Jennings; Albin Jensen; Jim Jones; Kanawha Water District; Kern-Tulare Water District; KIDCO #11 LP; Kings River Conservation District; Richard Klein; Knaggs Farming Company LP; Knaggs Walnut Ranches Company LP; La Grande Water District; Laguna Water District; Lake Alpine Water Company; Mike Landini; Leal Family Trust; Ledbetter Farms Inc.; Lindmore Irrigation District; Lower Tule River

Irrigation District; M&T Incorporated; MJM Madera Irrigation District; Madera-Chowchilla Water and Power Authority; Glenn E. Mathis, Jr.; Maxwell Irrigation District; Merced Irrigation District; Mercy Springs Water District; Meridian Farms Water Company; Chris Mills; Monterey County Water Resources Agency; Alfred G. Montna & Gail E. Montna Family Trust; Richard Moore; Mountain Gate Community Services; Donald D. Murphy; Nicola D. Muzzi; Natomas Mutual Water Company; Andrew Noble; North Marin Water District; Odysseus Farms Partnership; Orange Cove Irrigation District; Orland Unit Water Users Association; Orland-Artois Water District; Oro Loma Water District; Pacheco Water District; Pajaro Valley Water Management Agency; Panoche Water District; Park Livestock Company; Patterson Irrigation District; Pelger Mutual Water Company; Pixley Irrigation District; Placer County Water Agency; Plain View Water District; Pleasant Grove-Verona Mutual Water Company; Plumas Mutual Water Company; Porterville Irrigation District; John R. Powers, III & Janey H. Revoc Trust dated 9/6/00; Princeton-Codora-Glenn Irrigation District; Proberta Water District; Provident Irrigation District; Rag Gulch Water District; Reclamation District 108; Reclamation District 999; Reclamation District 1004; Reclamation District 1606; Reclamation District 2068; Redfern Ranches, Inc.; Hollis E. Reimers; River Bend Vineyards, Ltd.; River Garden Farms Company; Riverside Vineyards, LLC; Cyrus M. Rollins; Sacramento County Water Agency;

Sacramento Municipal Utility District; San Benito County Water District; San Juan Water District; San Luis Water District; Santa Clara Valley Water District; Saucelito Irrigation District; Garreth B. Schaad; Semitropic Water Storage District; Shafter-Wasco Irrigation District; Shasta Community Services District; Shasta County Water Agency/County Service Area #25 – Keswick; Silverado Premium Properties; Silverado Premium Properties II; Silverado Premium Properties LLC; Maudrie Smith (Tumbling T Ranch); Smith Family Living Trust; Solano County Water Agency; Solano Irrigation District; South Sutter Water District; Southern San Joaquin Municipal Utility District; C. David Spanfelner; Gary A. Spanfelner; William A. Spence; William W. Spence (Louise Spence, Trustee); Michael Spencer; James M. Spurlock; Jerry Spurlock; Robert P. Staudenraus; Stevinson Water District; Stockton East Water District; Stockton East Water District Assignment of Applications 13333-13338; Stone Corral Irrigation District; Stony Creek Water District; Sutter Extension Water District; Sutter Mutual Water Company; Sutter Mutual Water Company; Tea Pot Dome Water District; Terra Bella Irrigation District; The West Side Irrigation District; Thermalito Irrigation District; Thomas Creek Water District; Tranquility Irrigation District; Tranquility Public Utility District; Tri-Valley Water District; Tridam Power Authority; Trust of Jesse Hawkins Cave III; Tulare Irrigation District; Turlock Irrigation District and Modesto Irrigation District; Turlock Irrigation District; U.S. El Dorado National

Forest; UCC Vineyards Group; Robert L. Wallace; Wallace, WP & RL dba Wallace Brothers; Wallace Brothers; Weaver Properties, LLC; William, Jr. Weaver; West Stanislaus Irrigation District; Charles W. Westcamp; Westlands Water District; Westrope Ranches, Ltd.; Westside Water District; Widren Water District; Woodbridge Irrigation District; Yolo County Flood Control and Water Conservation District; Yuba County Water Agency; and Zumwalt Mutual Water Company (collectively "Petitioners").

II. DISCUSSION

Petitioners petition this Court for rehearing and ask this Court to clarify that its holding, that Water Code section 1525's scheme is not an ad valorem tax on a real property interest, does not mean that a water right is not an interest in real property. (See e.g. Slip Op. at p. 24.) The potential confusion stems from the Court's statement that the Petitioner's position is "faulty" and characterizing Petitioner's argument as assuming "that water rights are real property rights, and that the fee imposed by Section 1525 is based upon the ownership of real property." (Slip. Op. at p. 23.)

The Court's determination is based upon a finding that the fee authorized by Water Code section 1525, subdivision (a) is imposed based upon the "use" of water rather than the ownership of the real property interest in the water. (*Id.* at p. 23.) Indeed, given the Court's determination that the fee is based on "use" of water, and not ownership of a water right,

the question of whether water rights are real property rights is not relevant. However, without clarification that, for other purposes, water rights are real property, the Court's declaration that Petitioner's two-pronged assumption is faulty may inadvertently destabilize over 160 years of California law, including state and federal caselaw holding that water rights are real property rights.

A. Water Rights Are Real Property

"The authorities in this state have *uniformly* defined the right to appropriate water as a *possessory property right*." (*Fullerton v. State Water Resources Control Bd.* (1979) 90 Cal.App.3d 590, 598 (*Fullerton*), emphasis added.)[1] Indeed, and since statehood, water rights in California have been considered real property. (See *Fudickar v. Eastside River Irrigation Dist.* (1895) 109 Cal. 29, 36-37 ["the water right is entirely real property"]; *Schimmel v. Martin* (1923) 190 Cal. 429, 432 ["The right to water to be used for irrigation is a right in real property."]; *Chrisman v.*

[1] Federal Courts also uniformly hold that water rights are real property. (See, e.g., *Nevada v. United States* (1983) 463 U.S. 110, 125, citing *Nebraska v. Wyoming* (1945) 325 U.S. 589, 614 ["The property right in the water right is separate and distinct from the property right in the reservoirs, ditches or canals. The water right is appurtenant to the land, the owner of which is the appropriator."]; and *United States v. Gerlach Live Stock Co.* (1950) 339 U.S. 725, 736 ["We think it clear that throughout the conception, enactment and subsequent administration of the plan [for the Central Valley Project], Congress has recognized the property status of water rights vested under California law."].)

Southern California Edison Co. (1927) 83 Cal.App. 249, 258 ["The right to water to be used for irrigation purposes is a right in real property."]; *Stanislaus Water Co. v. Bachman* (1908) 152 Cal. 716, 726 ["The right in water which has been diverted into ditches or other artificial conduits, for the purpose of conducting it to land for irrigation, has been uniformly classed as real property in this state."]; *Hill* v. *Newman* (1855) 5 Cal. 445, 446 ["The right to water must be treated in this State as it has always been treated, as a right running with the land, and as a corporeal privilege bestowed upon the occupier or appropriator of the soil; and as such, has none of the characteristics of mere personalty."]; *Hayes v. Fine* (1891) 91 Cal. 391, 398 ["That . . . water rights [are] real property, and that an agreement for a conveyance thereof is within the statute of frauds, there is no question in this state."]; *South Tule Independent Ditch Co.* v. *King* (1904) 144 Cal. 450, 454 [the right to take water from a ditch "is real property."]; *McDonald & Blackburn v. Bear River & Auburn Water & Min. Co.* (1859) 13 Cal. 220, 232-233 [water rights are "substantive and valuable property," and "the right of water may be transferred like other property."]; *Kidd v. Laird* (1860) 15 Cal. 161, 179-180 ["A right may be acquired to [the] use [of water], which will be regarded and protected as property."]; *Stone v. Imperial Water Co.* (1916) 173 Cal. 39, 42-43 [the right to water is real property]; *Sutter-Butte Canal Co. v. Great Western Power Co.* (1924) 65 Cal.App. 597, 599-600 [water rights are real property and proper action

for recovery is the county in which the property is located]; *Witherill v. Brehm* (1925) 74 Cal.App. 286, 295 ["Water diverted from a stream, and flowing through a ditch to irrigate land, or for domestic purposes, is appurtenant to the land, and is real property, and passes with the deed to the property without specifically mentioning such appurtenance".]; *Locke v. Yorba Irr. Co.* (1950) 35 Cal.2d 205, 211 ["Water rights are a species of real property capable of acquisition by adverse user."]; *Northern California Power Co. v. Flood* (1921) 186 Cal. 301, 305 ["Water running in a ditch from a natural stream to a parcel of land, to be used for beneficial purposes thereon, is a species of real property, and the right to take it and so use it is an appurtenance to the land."]; *Wright v. Best* (1942) 19 Cal.2d 368, 382 ["An appropriative right constitutes an interest in realty."]; *Inyo Consolidated Water Co. v. Jess* (1911) 161 Cal. 516, 520 [a water right is "clearly a property right, and it being incidental and appurtenant to land, it was real property"]; *Palmer v. Railroad Comm.* (1914) 167 Cal. 163, 173 ["The right to the waters of a stream is real property, a part of the realty of the riparian lands originally, and a part of the realty as an appurtenance to any other lands to which it may be rightfully taken when the riparian rights have been divested in favor of the user on nonriparian land."]; *Silver Lake Power & Irrigation Co. v. Los Angeles* (1917) 176 Cal. 96, 101 [a water right is a "property right, and it being incidental and appurtenant to land, it was real property"]; *Peake v. Harris* (1920) 48 Cal.App. 363, 379-380

["The action here involves the title to a water right which is an appurtenance to the lands. . . ."]; *Fudickar v. East Riverside Irrigation Dist., supra,* 109 Cal. at pp. 36-37 ["the water right is entirely real property"].)

The most authoritative treatise on California law of water rights, regularly cited and relied upon by this and other California Courts[2], explains the real property characteristics of appropriative water rights. In his treatise, The California Law of Water Rights, Wells A. Hutchins

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[2] The treatise by Wells A. Hutchins, The California Law of Water Rights, has been cited and relied upon by many California cases, including this Court in the instant case. (See e.g. Slip. Op. at pp. 2-4, fn. 8; See also *In re Water of Hallett Creek Stream Sys.* (1988) 44 Cal.3d 448, 455, 458, 464; *National Audubon v. Superior Court (Dept. of Water & Power)* (1983) 33 Cal.3d 419, 441, 446; *People v. Shirokow* (1980) 26 Cal.3d 301, 304, 307, 308; *In re Waters of Long Valley Creek Stream Sys.* (1979) 25 Cal.3d 339, 361, 362, *North Kern Water Storage Dist. v. Kern Delta Water Dist.* (2007) 147 Cal.App.4th 555, 559; *El Dorado Irrigation Dist. v. State Water Resources Control Bd.* (2006) 142 Cal. App.4th 937, 961, 962, 982; *Barnes v. Hussa* (2006) 136 Cal.App.4th 1358, 1364, 1368, 1370; *State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 740, 741; *Pleasant Valley Canal Co. v. Borror* (1998) 61 Cal.App.4th 742, 750 (fn. 4), 753, 775, 776, 780; *Imperial Irrigation Dist. v. State Water Resources Control Bd.* (1990) 225 Cal.App.3d 548, 572; *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 100-101, 102, 104, 105, 131 (fn. 25), 132, 138; *California Trout, Inc. v. State Water Resources Control Bd.* (1979) 90 Cal.App.3d 816, 820; *Tehachapi-Cummings County Water Dist. v. Armstrong* (1975) 49 Cal.App.3d 992, 999, 1001; *Erickson v. Queen Valley Ranch Co.* (1971) 22 Cal.App.3d 578, 582; *People ex rel. Baker v. Mack* (1971) 19 Cal.App.3d 1040, 1049; *San Bernardino Valley Municipal Water Dist. v. Meeks & Daley Water Co.* (1964) 226 Cal.App.2d 216, 221; *County of Tuolumne v. State Bd. of Equalization* (1962) 206 Cal.App.2d 352, 360, 361, 366; *Beckley v. Reclamation Bd.* (1962) 205 Cal.App.2d 734, 743 (fn. 2), 752;

explains that the right one obtains by the lawful use of water is a private property right, with the concept of it as a real property right resulting from it being incidental and appurtenant to land. (See Hutchins, The California Law of Water Rights (1956) at p. 120-121.) Hutchins also emphasizes that it has been the "uniform holding of the courts that the appropriative right is real property." (*Id.* at p. 121.) Surveying both California and federal caselaw, the treatise notes that although water is an incorporeal hereditament, it is recognized nonetheless as part of the "realty" itself. (*Id.* at p. 122, citing *Rickey Land & Cattle Co. v. Miller & Lux* (9th Cir. 1907) 152 Fed. 11, 15.)

Water rights, as real property, are taxed as real property. The California Constitution, in article XIII, section 11, entitled "Taxation of local government real property," specifically includes the right to use and divert water as part of real property. It provides:

> Lands owned by a local government that are outside its boundaries, including rights to use or divert water from surface or underground sources and any other interests in lands, are taxable . . . .

(Cal Const., art XIII, § 11(a); see also *Scott-Free River Expeditions, Inc. v. County of El Dorado* (1988) 203 Cal.App.3d 896, 904 ["Water is unquestionably a species of real property and the right to use such water, whether that right be riparian, appropriative, or any other such right, is a valuable property right upon which a possessory interest tax may be

levied."]; *Jurupa Ditch Co. v. County of San Bernardino* (1967) 256 Cal.App.2d 35, 40 ["an appropriative right to take water from a stream is real property, is a fee simple interest and subject to taxation ...."]; *North Kern Water Storage Dist. v. County of Kern* (1960) 179 Cal.App.2d 268, 271 ["[a] water right is land" for the purposes of taxation and the California Constitution]; *San Francisco v. County of Alameda* (1936) 5 Cal.2d 243, 246-247 [riparian rights form an important element in the valuation of land for taxing purposes]; Hutchins, The California Law of Water Rights, *supra*, at p. 122 ["For purposes of taxation, appropriative water rights constitute land as that term is used in [former] art. XIII, sec. 1, of the State constitution"] and 9 Witkin, Summary of Cal. Law (9th ed. 1989) Taxation, § 141, pp. 176-177 [right to divert water for nonriparian use is real property].)

While this Court has cited and relied upon *Fullerton, supra,* 90 Cal.App.3d 590 for the proposition that an appropriative water right is incidental and appurtenant to land[3], the *Fullerton* Court also explained that "[t]he concept of an appropriative water right is a *real property interest* incidental and appurtenant to land." (*Fullerton* at p. 598, emphasis added.) The Fullerton Court affirmed more than what was then 125 years of black letter California law when it stated that "[t]he authorities in this state have

[3] Slip Op. at p. 23

uniformly defined the right to appropriate water as a *possessory property right*." (*Ibid.*, emphasis added.) In agreeing with the State in that case, the *Fullerton* Court recognized that neither the Water Code nor the California Constitution changed the nature of a water right, "including its characterization as essentially a possessory right like other interests in real property." (*Id.* at p. 600.)

California courts today continue to rely upon this fundamental principal when resolving issues regarding water rights. (See, e.g., *Nicoll v. Rudnick* (2008) 160 Cal.App.4th 550, 557-558 (*Nicoll*), citing *Fullerton* ["The concept of an appropriative water right is a real property interest incidental and appurtenant to land."].) In *Nicoll*, the Fifth Appellate District made quite clear the fact that prior caselaw on this issue "leaves no room for doubt that such rights are appurtenant to and run with the land . . ." (*Id.* at p. 558.)

The status of water rights as a real property interest forms the legal basis for water rights, as appurtenances to land, to automatically transfer with the title absent an express reservation. This is true whether the transfer of title is voluntary, or occurs through foreclosure. (See *Nicoll, supra*, 160 Cal.App.4th at pp. 559-560 ["water rights are considered appurtenant to the land, they are presumed transferred with the land absent an express reservation."]; see also *Stanislaus Water Co. v. Bachman*, *supra*, 152 Cal. at p. 724 [water rights are "incident of the land and would pass as

such by a conveyance of the land, without express mention and without any reference thereto"]; *Trask v. Moore* (1944) 24 Cal.2d 365, 371 [a conveyance of land upon a foreclosure must carry with it a water right appurtenant to the land]; and *Harper v. Buckles* (1937) 19 Cal.App.2d 481, 484–485 ["The water-right, when acquired, became an easement appurtenant to the land [citation] and passed with it, upon the foreclosure sale in the same manner as any other appurtenance or fixture passes with the title and possession of land."].) For more than 160 years, water rights, as real property, have transferred with the sale of land as part and parcel of the land. Any pronouncement now that water rights are not real property would seriously disrupt and call into question real property transactions throughout the State of California.

The practical implications of effectively overturning 160 years of California caselaw are significant. As discussed, *supra*, real property transactions have treated water rights as real property. This is true with respect to both riparian and appropriative water rights. Holding that water rights are not real property would undermine the State's recording system and could have the real practical effect of operating as a de facto severance of water rights from land. Financial transactions for farm property, among others, often rest on water rights acting as part of the collateral for financial transactions (as part of the realty). Creating uncertainty in the financial sector would not only jeopardize future funding, but could lead to banks

making a call on the loans (for failure of collateral). Moreover, water right adjudications are considered *in rem* proceedings. (*Pleasant Valley Canal Co. v. Borror* (1998) 61 Cal.App.4th 742, 754.) A holding that water rights are no longer considered real property would likely undermine the State's ability to conduct these in *rem* proceedings and could call into question prior adjudications throughout the state.

That water rights are real property and are recognized as such has been a fundamental principle of California water law for more than 160 years. Any deviation from this well-established legal recognition would upset the foundation of California water law and of real property law, overturn more than 160 years of uniform California caselaw, and directly conflict with the California Constitution. Redefining water rights at this stage would seriously undermine the concept of stare decisis and promote instability by creating significant uncertainty with what has been long understood as a real property interest.[4] Indeed, this Court should proceed

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[4] As the United States Supreme Court explained,

> [c]ertainty of rights is particularly important with respect to water rights in the Western United States. The development of that area of the United States would not have been possible without adequate water supplies in an otherwise water-scarce part of the country. . . The doctrine of prior appropriation, the prevailing law in the Western States, is itself largely a product of the compelling need for certainty in the holding and use of water rights. (*Arizona v. California* (1983) 460 U.S. 605, 620, citations omitted.)

with caution where, "as here, numerous precedent[s] applying authoritative, settled [law] that ha[ve] been central to the analysis and holdings of these decisions exist . . ., the principles... of stare decisis apply with special force and it would be inappropriate to overrule or disapprove these precedents." (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 199, fn. 10, internal quotes omitted.)

B. Usufructuary Interests Are Real Property Interests

That water rights are considered *usufructuary* does not make them any less of a real property interest. The Court, in its Opinion, citing 12 Witkin, Summary of Cal. Law (10th ed. 2005) Real Property, § 917 at pp. 1106-1107, notes that a usufructuary right is a right to *use* and does not confer a right of private ownership in the watercourse. (Slip. Op. at p. 23.) The usufructuary nature of water rights is simply a recognition that one cannot own the corpus of the water while it is in the natural stream channel. (See 12 Witkin, Summary of Cal. Law, *supra*, Real Property, § 917 at pp. 1106-1107.) No one can "own" the corpus of the water, but, as explained by more than 160 years of California case law, one can have a right to use water - a usufructuary right - a right that is real property. Without clarification requested by this Petition, one might read this Court's opinion to suggest that water rights are somehow less of a property right simply because they are usufructuary. Although such a suggestion would be wrong as a matter of law the Court should make the requested clarification

again, to ensure the 160 years of California caselaw is not destabilized. (See *Stupak-Thrall v. United States* (9th Cir. 1996) 89 F.3d 1269, 1296 [Judicial statements, that water rights like riparian rights are only usufructuary, "may be technically correct, but it leaves one with the incorrect impression that riparian rights are more insubstantial, and deserving of less protection, than rights in land. Riparian rights are subject to no more regulation . . . than land rights. Riparian rights are property rights."].)

A suggestion that simply because a right is usufructuary, it cannot also be real property, would be in direct conflict with existing state and federal caselaw. Indeed, many interests in real property other than water rights are considered *usufructuary*, like easements, leases, and other interests in land.

For example, this Court, in the instant case, relied upon and cited *United States v. County of Fresno* (1977) 429 U.S. 452 (*County of Fresno*), for the proposition that the State can tax, or in this case "fee," a federal contractor based on the contractor's interest in the federal property. In *County of Fresno*, the United States Supreme Court upheld an opinion by California's Fifth Appellate District that also upheld the taxes, there imposed on federal employees. (See *United States v. County of Fresno* (1975) 50 Cal.App.3d 633.) At issue there was whether the State of California could impose taxes on the possessory interest that federal

employees had in government-owned housing. Interestingly, and relevant to the *usufruct* issue discussed by this Court in the instant case, the Fifth Appellate District opined that "[a] possessory interest assessment is not made against the government or government property; the assessment is against the private citizen, and it is the private citizen's *usufructuary interest in the government land* and improvements alone that is being taxed." (*United States v. County of Fresno* (1975) 50 Cal.App.3d at p. 640, emphasis added.) The very interest in the land taxed in *County of Fresno* was the mere *usufructuary* interest – an interest in real property even though "title" was not held by the federal employees.

This Court has repeatedly recognized that usufructs are real property interests. For example, in *Connolly v. County of Orange* (1992) 1 Cal.4th 1105 at p. 1120, this Court explained:

> That principle, which endures today, was expressed in the earliest of these cases, *State of California v. Moore* [1859], 12 Cal. 56, in which taxation of an individual's interest in a mining claim located on land owned by the United States was in issue. This court explained: "The term 'property in lands' is not confined to title in fee, but is sufficiently comprehensive to include any *usufructuary interest*, whether it be a leasehold or a mere right of possession." (Emphasis added.)

Nearly three quarters of a century earlier, this Court expressly held that property in land that could be taxed included any *usufructuary* interest. (See *L. E. White Lumber Co. v. County of Mendocino* (1918) 177 Cal. 710, 712 ["The sort of property in land which is taxable under our laws is not

limited to the title in fee. It may include any usufructuary interest or even a mere right of possession."].) Other decisions of this Court are on all fours with the reasoning and holding of these cases. (See *Boone v. Kingsbury* (1928) 206 Cal. 148, 190 ["The state may even dispose of the usufruct of such lands, as is frequently done by leasing oyster beds in them, and granting fisheries in particular localities; also, by the reclamation of submerged flats, and the erection of wharves and piers and other adventitious aids of commerce."]; *W. P. Fuller Co. v. McClure* (1925) 196 Cal. 1, 5-8 ["the trial court established a certain fund out of which the advances made upon the appellant's mortgage . . . were to be paid before the beneficiary under the trust deed was entitled to receive any sum accruing from the sale of said property or from its usufruct pending proceedings under the receivership."].)

California appellate courts have similarly held that usufructs are real property interests, following this Court's decision in these cited cases. (See, e.g., *Mitsui Fudosan v. County of L.A.* (1990) 219 Cal.App.3d 525 (*Mitsui*), 528 ["Virtually since its inception it has been the law of this state that [t]he sort of property in land which is taxable under our laws is not limited to the title in fee [citation], but is sufficiently comprehensive to include any usufructuary interest . . . . [citation], internal quotes omitted]"; see also *Cane v. City and County of San Francisco* (1978) 78 Cal.App.3d 654, 658 ["When, however, there is a lease of land owned by the state or a

municipality, the reversion being exempt from taxation, the usufructuary interest alone is subject to tax in proportion to its value; and in the absence of agreement to the contrary, the tax necessarily falls upon the lessee."|; and *Richardson v. Callahan* (1931) 213 Cal. 683, 684 ["Under the provisions of the Civil Code and the decisions of this court, such an instrument is more than a mere usufructuary lease; it is a property right in the nature of a servitude or chattel real at common law, which may be held and enjoyed as an estate for years or perpetually during production. |citations|".|.)

Federal Court decisions are entirely consistent with State judicial precedent finding that usufructs are real property interests. These decisions span more than 100 years. In *Wright v. Central of G. R. Co.* (1915) 236 U.S. 674, the United States Supreme Court examined the concepts of a usufruct and other interests in real property. There, the Court discussed usufructs as leases. "|T|he Code of 1861 had introduced distinctions, hard to grasp for one trained only in the common law of real property, between the usufruct of a tenant and an estate for years . . . and it is argued that these leases created estates of such a nature that the lessee was practically in the position of owner subject to a rent charge, and was taxable for the land." (*Id.* at pp. 680-681).| Other federal decisions treat usufructs as real property interests. (See, e.g., *Boggs v. Boggs* (1997) 520 U.S. 833, 836 ["A lifetime usufruct is the rough equivalent of a common-law life estate."];

Warren v. United States (D.C. Cir. 2000) 234 F.3d 1331, 1338 [discussing a license to enter land as a usufruct]; *City of Marietta v. CSX Transp., Inc.* (11th Cir. 1999) 196 F.3d 1300, 1305 [discussing an easement as a usufruct].)

In sum, without the clarification requested, one might try to read into the Court's opinion what is not there-that the Court concluded that water rights are not real property, in part, because they are *usufructuary*. Many *usufructuary* interests are interests in real property and that term should not be construed to distinguish water rights from real property. One hundred sixty years of caselaw dictates that the opposite is true.

The United States Supreme Court concisely explained the nature of the right. There, the Court explained that,

> While the *right to its use . . . may become a property right*, yet the water itself, the corpus of the stream, never becomes or, in the nature of things, can become, the subject of fixed appropriation or exclusive dominion, in the sense that property in the water itself can be acquired, or become the subject of transmission from one to another. Neither sovereign nor subject can acquire anything more than a mere usufructuary right therein, and in this case the state never acquired, or could acquire, the ownership of the aggregated drops that comprised the mass of flowing water in the lake and outlet, though it could and did acquire the right to its use. (*Federal Power Comm. v. Niagra Mohawk Power Corp.* (1954) 347 U.S. 239, 247, fn. 10, emphasis added.)

Accordingly, a water right holder does not acquire a right to the mass of flowing water, but does acquire a real property right, a usufructuary right, to its use.

C. Water Code Section 102 Does Not Change the Nature of the Right to Use Water

The Court cites Water Code section 102 when analyzing whether the fee imposed by Section 1525 is based upon the use of water. For the same reasons discussed, *supra*, the citation to Water Code section 102, should not be construed to undermine 160 years of California caselaw universally holding that water rights are real property, vested in those who put it to beneficial use.[5] Instead, Water Code section 102 supports the principle that one obtains a right to the use of water, not to the corpus of the water itself.

III. CONCLUSION

There is a great deal at stake if this Court does not clarify the issues raised by the Petition. Based upon the foregoing Petitioners request this

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[5] In any event, Water Code section 102 does not vest ownership of the corpus of the water in the State. Instead, the language of Water Code section 102 simply expresses "a more abstract notion . . . expressing a regulatory or supervisory power rather than anything even approaching a proprietary interest or the right to exercise physical dominion." (*State of California v. Superior Court (Lloyd's of London)* (2000) 78 Cal.App.4th 1019 at p. 1026, emphasis omitted.) The court *agreed with the State* "that it does not 'own' the water of the state in its natural conditions within the meaning of these statutes." (*Id.* at p. 1027.) This Court considered a similar issue in *San Bernardino v. Riverside* (1921) 186 Cal. 7, and came to the same conclusion. (*San Bernardino v. Riverside* (1921) 186 Cal. 7, 29-30.) Federal cases are in accord with these holdings. (See e.g. *John v. United States* (9th Cir. 2001) 247 F.3d 1032, 1041 citing *Federal Power Commission v. Niagara Mohawk Power Corporation* (1954) 347 U.S. 239, 247 fn. 10, ["'Neither sovereign nor subject can acquire anything more than a mere usufructuary right'" in a body of water; a sovereign can 'never' acquire 'the ownership' of a body of water."].)

Court to clarify that its holding, that Water Code section 1525 subdivision (a) is not an ad valorem tax on a real property interest is based upon a determination that the fee is based on the use of water and that its holding does not mean a water right is not an interest in real property.

Respectfully Submitted

SOMACH, SIMMONS & DUNN
A Professional Corporation

Dated: February 15, 2011

By _____
Stuart L. Somach

Attorneys for Petitioner
Northern California Water
Association, et al.

WORD COUNT CERTIFICATION

(California Rules of Court, Rule 8.520(c).)

The text of PETITIONERS' AND APPELLANTS' PETITION FOR REHEARING of 4,773 words according to the "word count" feature of the Word processing program utilized in creating this document.

SOMACH, SIMMONS & DUNN
A Professional Corporation

Dated: February 15, 2011

By _____
Stuart L. Somach

PROOF OF SERVICE

I am employed in the County of Sacramento; my business address is 500 Capitol Mall, Suite 100, Sacramento, California; I am over the age of 18 years and not a party to the foregoing action.

On February 15, 2011, I served the following document(s):

PETITIONERS' AND APPELLANTS' PETITION FOR REHEARING

__X__ (by mail) on all parties in said action, in accordance with Code of Civil Procedure §1013a(3), by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. At Somach, Simmons & Dunn, mail placed in that designated area is given the correct amount of postage and is deposited that same day, in the ordinary course of business, in a United States mailbox in the City of Sacramento, California.

____ Via facsimile transmission.

_____ (by overnight delivery) on all parties in said action, by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing, same-day pickup by Federal Express at the offices of Somach, Simmons & Dunn for overnight delivery, billed to Somach, Simmons & Dunn, and addressed as set forth below.

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury that the foregoing is true and correct under the laws of the State of California. Executed on February 15, 2011, at Sacramento, California.

Yolanda De La Cruz

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