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VIA ELECTRONIC MAIL: commentletters@waterboards.ca.gov



Felicia Marcus, Chair
c/o Clerk of the Board
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Re: 9/23-24/14 BOARD MEETING, Agenda Item 10 – Consideration of a proposed Order denying reconsideration of Order WR 2014-022 DWR, Curtailment Order in the Matter of Diversion of Water From Deer Creek Tributary to the Sacramento River in Tehama County

Dear Chair Marcus:

Thank you for the opportunity to comment on the agenda items for your September 23 and 24, 2014 Board meeting. These comments concern agenda item 10—the proposed Order denying reconsideration of Order WR 2014-0022-DWR.

This firm does not represent any party involved in item 10. Yet, as water right professionals with numerous clients subject to the Board's actions, we have grave concerns about the manner in which the draft order mischaracterizes applicable law. This mischaracterization, if allowed to permeate through adopted Orders and future proceedings, will lead to future litigation.

Specifically, in Section 5.2.2.2 of the draft Order, the Board considered whether its emergency regulations for Deer Creek effected a taking of private property in violation of the state or federal constitutions. In finding it did not, the Board misstates the holding from the Court of Federal Claims' decision in *Casitas Municipal Water Storage v. United States* (2011) 102 Fed.Cl. 443. The draft order also improperly argues water rights are not a form of compensable property right.

The Draft Order Wrongly Characterizes *Casitas Municipal Water Storage v. United States*

The Board's draft Order attributes a conclusion to *Casitas* that the *Casitas* court expressly rejected.

In *Casitas*, the District's licensed water right did not require bypassed fish flows. These flows were later mandated by the federal Endangered Species Act. The District sued for a taking. The Board filed an amicus brief in the case, arguing that there should be no taking because the District's licensed right was already inherently limited to require the fish flows under the public

trust and reasonable use doctrines. The District and other water right interests argued conversely that such a limit could only be imposed by the Board through an evidentiary hearing. (*Casitas Municipal Water Storage v. United States* (2011) 102 Fed.Cl. 443, 473 fn. 46, 474).

The *Casitas* court expressly rejected the Board's argument, and agreed with the water right interests, stating: "[The position that the licensed right was inherently limited to require fishery flows] was of course made without the benefit of a hearing before the Board or without an opportunity for plaintiff to submit contradictory evidence and therefore cannot be credited here." (*Ibid.*)

From this conclusion in *Casitas*, the current draft Order characterizes the *Casitas* decision as finding "that a requirement to reduce diversions that was the result of a State Water Board decision regarding the public trust would *not* constitute a taking." (Proposed Order at p. 20.) This is a gross and misleading over-simplification. The *Casitas* court did not say that any decision of the Board on public trust grounds would not result a taking. Rather, the court said that a decision made to condition a licensed water right after an evidentiary hearing would not constitute a taking. There is a significant legal difference.

Casitas is clear that a Board decision curtailing a person's diversions based on public-trust considerations *could* constitute a taking if the decision were made without the opportunity for a hearing. If the decision were made after an evidentiary hearing, on the other hand, the court believed a takings claim could be eliminated in the context of *Casitas*' water right license.

California Law is Clear that Water Rights are a Compensable Property Right

The draft order also cites to the case of *People v. Murrison*, 101 Cal.App.4th 349, 359 (2002) for the following proposition: "water rights in California are not like real property rights, and by their very nature are 'limited and uncertain'." The draft order then relies on this concept to argue that a Board action that reduces a water right can never be a compensable taking. This is another gross oversimplification that ignores long-standing legal precedent.

Despite the fact that water rights are highly regulated, they are still a form of compensable property right. (*San Francisco v. Alameda County* (1936) 5 Cal.2d 243, 245-247; *Casitas Mun. Water Dist. v. United States* (Fed. Cir. 2008) 543 F. 3d 1276, 1288). See also, *Fullerton v State Water Resources Control Board*, 90 Cal.App.3d 590, 598 (1970):

Although there is no private property right in the corpus of the water while flowing in the stream, the right to its use is classified as real property (*Locke v. Yorba Irrigation Co.*, 35 Cal.2d 205; *Stanislaus Water Co. v. Bachman*, 152 Cal.716.) The concept of an appropriative water right is a real property interest incidental and appurtenant to land (*Inyo Cons. Water Co. v. Jess*, 161 Cal. 516; *Palmer etc. v. Railroad Commission*, 167 Cal. 163, 173; *Silver Lake Power etc. Co. v. Los Angeles*, 176 Cal. 96, 101; *Peake v. Harris*, 48 Cal.App. 363, 379-80).

The Board Should Take Great Care in Regulating under the Guise of the Waste and Unreasonable Use Doctrine

This Board has never before used the waste and unreasonable use doctrine to declare one otherwise reasonable use of water (domestic, irrigation, stockwater) wasteful and unreasonable under drought circumstances in order to make water available for another reasonable use (fish or the environment). This has not occurred before because it is illogical, particularly when done through regulation as opposed to an evidentiary hearing where the factual circumstances regarding each use can be examined properly. When two uses are equally reasonable and there is only enough water for one, the proper course is not to declare the other unreasonable.

The whole purpose of the eminent domain laws and the power of condemnation is to allow the government to use limited resources for the public good when necessary, provided just compensation is paid to those with rights to the resource. These laws encourage the private sector to invest in resource development because individuals are assured their investments have value that cannot be stripped away by government without payment. The laws also ensure limited resources can be used for public purposes when the public values the use.

It is a dangerous precedent for this Board to declare a specific type of use of water reasonable one day and unreasonable the next for the sole purpose of reallocation to a different, favored type of use. A different Board in the future may find it equally reasonable to reallocate water from an environmental use to a favored industrial use and declare the environmental use wasteful and unreasonable under the circumstances.

In short, if this Board is going to create new precedent in order to reallocate water from one valid use to another, it needs to fully appreciate the ramifications of its actions.

Thank you for the opportunity to present these comments.

Very truly yours,



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cc: SWRCB Board Members
Tom Howard, Executive Director