



SENT VIA ELECTRONIC TRANSMISSION/FIRST-CLASS MAIL

August 8, 2011

Charlie Hoppin
State Water Resources Control Board
1001 I Street
PO Box 2815
Sacramento, CA 95812-2815

Re: Friant Water Authority

Dear Mr. Hoppin:

This letter is written on behalf of the San Joaquin Tributaries Association (“SJTA”) in response to the June 24, 2011 letter from Friant Water Authority (“FWA”) to the California State Water Resources Control Board (“SWRCB”) concerning the appropriateness of excluding the Upper San Joaquin River from the scope of the current basin plan amendment process. The SJTA agrees with the majority of FWA’s comments, but contends that such comments compel a result different from that posited by FWA or, to date, accepted by the SWRCB. While much of what FWA has written is accurate, FWA does not offer a compelling reason to continue to exclude the Upper San Joaquin River from the current process. Rather, FWA has stated a powerful argument for delaying the SWRCB’s effort to amend the basin plan objectives.

The SJTA disagrees with the FWA’s contention that the San Joaquin River Restoration Program (“SJRRP”) settlement and subsequent federal legislation exempts the Upper San Joaquin River from the basin planning process. As explained in our May 23, 2011 comments, the non-settling parties worked with Senator Dianne Feinstein to ensure that the SJRRP would have no redirected impacts. If the Upper San Joaquin River is excluded from the basin plan amendment process, redirected impacts will apply to the SJTA’s members and others regardless of how the SWRCB addresses the issue. That is, the SWRCB has determined that a percentage of natural flow is needed from the San Joaquin River and its tributaries to mimic the natural hydrograph for the benefit of anadromous fish species in the basin. If the SWRCB adheres to this determination and the amount of flow from the SJRRP is less than that calculated by the SWRCB, the SWRCB might order that the shortage be made up by the USBR or by the SJTA and others. Likewise, if the SWRCB determines that a percentage of natural flow is necessary but implements some lesser amount due to the exclusion of the Upper San Joaquin River, any adverse impacts to anadromous fish species either correctly or incorrectly attributed to lower San Joaquin River flow could affect the SJTA and others. In either case, the non-settling parties will be the

recipients of redirected impacts contrary to the intent of the federal legislation enacting the SJRRP.

Despite FWA's claims to the contrary, the SJRRP and the authorizing federal legislation do not "preempt" the SWRCB from including the Upper San Joaquin River in its current basin plan amendment process. If the SWRCB is going to continue to assert that there is insufficient flow in the San Joaquin River and its tributaries to protect and enhance anadromous fishery resources, the Upper San Joaquin River must be included in the process and contribute to any SWRCB ordered solution.

While the FWA letter provides no justification for excluding the Upper San Joaquin River from the current basin planning process, it does give the SWRCB excellent reasons why the SWRCB should not be moving forward with a basin plan flow objective at this time. The precise quantity, timing and impacts of flows made available to the San Joaquin River and Delta pursuant to the SJRRP are as yet unknown. Similarly, the physical improvements required by the SJRRP and the specific efforts to reestablish populations of fall and spring run Chinook salmon cannot yet be evaluated in terms of their impact on the anadromous fishery resources of the basin as a whole. As FWA states, "[r]establishing the fishery and improving flows and water quality for that reestablishment will be a highly structured and involved process that **will directly or indirectly affect the entire San Joaquin River, its tributaries, and the Delta.**" (FWA letter, p. 3-4) (emphasis added). The SJTA agrees with FWA's reasoning, and contends that the uncertainties concerning the impacts of the SJRRP require the SWRCB to delay the current process until such uncertainties have been resolved.

The SJTA supports the implementation of the SJRRP and its goals; however, it appears to the SJTA that the only party not supporting the SJRRP is the SWRCB. Indeed, if the SWRCB does support the SJRRP, its current efforts do not reflect such support. For example, the SWRCB has "determined" that a percentage of unimpaired natural flow, from February through June, should remain in the San Joaquin River, as measured at Vernalis. Yet, the SWRCB has made no effort to determine if the SJRRP will achieve, surpass, or fall short of such percentage. Such avoidance is particularly confounding since the Upper San Joaquin River accounts for roughly 32 percent of the unimpaired natural flow in the basin. If the SWRCB has made this "determination" based upon what the beneficial resource needs, the SWRCB can in no way exclude the Upper San Joaquin River. By doing so, the SWRCB has created a situation in which the parties to the SJRRP seek to maintain the exclusion while the non-settling parties seek to end the exclusion. In short, the SWRCB's illogical treatment of the Upper San Joaquin River has caused the SJRRP to be a divisive issue between parties that otherwise support the SJRRP.

Moreover, the SWRCB's treatment of the Upper San Joaquin River reveals that its entire basin planning effort is arbitrary and capricious. To the extent the SWRCB "determines" that a percentage of natural flow is required from the Upper San Joaquin River to benefit anadromous fish species, and flows under the SJRRP that are less than the percentage established by the SWRCB, the SJRRP flows are per se unreasonable. To the extent that the SWRCB takes no action to address the deficit by obtaining additional water from the Upper San Joaquin River, its failure to act would be arbitrary and capricious. To the extent the SWRCB attempted to address

the deficit by obtaining additional water from the other tributaries, such action would be arbitrary and capricious and likely constitute a taking of water compensable under the Constitution.

In light of the "determinations" made by the SWRCB to date, there is no legal or factual reason to exclude the Upper San Joaquin River from the present process. However, the SJJRP itself is ample justification for delaying the entire process until such time as the SWRCB can evaluate impact of the flow and fishery reestablishment programs on the San Joaquin River Basin anadromous fishery resources. If the SJJRP is as successful as the SJTA, FWA and others hope it will be, the SWRCB may not need to require a percentage of natural flow and, if it does, such percentage may be dramatically different from that currently being contemplated.

Very truly yours,

O'LAUGHLIN & PARIS LLP



TIM O'LAUGHLIN

TO/tb

cc (via email only): Thomas Howard, Executive Director, SWRCB
Frances Spivy-Weber, Vice-Chair, SWRCB
Tam Doduc, Member, SWRCB
San Joaquin Tributaries Association