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THOMAS S. VIRSIK

July 21, 2011

Charles R. Hoppin, Chairman  
State Water Resources Control Board  
1001 I Street, 24<sup>th</sup> Floor  
Sacramento, CA 95814

Re: Comments for SWRCB 7/21/2011 Water Diversion Measurement Workshop --  
Tina Shields (IID) letter 7/1/2011

Dear Mr. Hoppin:

I am with the office of Patrick J. Maloney in Alameda. Our office has been a strong advocate for the accurate reporting of water use data for decades. See April 2, 2002 Patrick Maloney letter to Paul Murphey. Our experience in the Salinas Valley, for example, was that the initial modeling conclusions about the cause and rate of seawater intrusion were inaccurate. Only with better data was the real problem understood and at least a partial solution implemented. This Board had a substantial role in those events in the late 1990's.

We represent clients in the Imperial Valley that own lands and whose water rights predate the creation of IID. These are at least the pre-1914 rights recognized by the US Supreme Court. Arizona v. California, (2006) 547 U.S. 150, 175.

Beginning in 2006, these clients filed over 350 statements of water diversion and they continued to update the statements through at least 2009. There was extensive correspondence between SWRCB staff and our office. As far as we can tell, SWRCB has never actually filed the statements of water diversion, even after the 2009 amendments that made more explicit the filing requirements.

This office previously prepared, and the SWRCB accepted for filing, the same sort of statements of water diversion from individual water diverters in Monterey County, on the Salinas River. Yet, with the Colorado River the statements have not yet been officially entered into the eWRIMS database. The SWRCB would have been far ahead with respect to Imperial Irrigation District's (IID) reporting had its staff filed the statements years ago when they were received.

Our clients are aware of the July 1, 2011, letter from IID's Assistant Water Department Manager, Tina Shield, to the SWRCB. They agree with some of it, but take issue with other

statements. Our clients are not surprised that IID admits in at least two places that the present measurement system is inaccurate. (Shields July 1, 2011 letter – 2<sup>nd</sup> ¶, 2<sup>nd</sup> to last sentence; 3<sup>rd</sup> ¶ 3<sup>rd</sup> and 4<sup>th</sup> sentences.) IID is admitting in those statements that what it has been reporting for decades has never been accurate. IID calls it a “magnitude of error.” Yet, in its conclusion IID asks that it be exempted from improving its measurements and reporting.

Since at least 2003, our clients have been trying to engage IID in broad improvements to its measurement systems. The clients have provided to IID modest cost proposals on how to make those improvements by working with the on-the-ground water users. One such proposal is for what our clients call the “Water Exchange” – a water management, conservation, measurement tool for which they received a patent. Our clients’ website explains a little about its use. [www.imperialgroup.info](http://www.imperialgroup.info). As Secretary Ross pointed out yesterday at the agricultural efficiency workshop, there are always innovators; it is getting the rest to follow that can be problematic. In this instance, the party declining to follow is one over whom this Board has authority – an irrigation district.

From our clients’ perspective, IID has available to it a ready means to materially improve its water management by cooperating with its water users – one of the so-called “unique circumstances” which this Board should consider. Or, does the Board wish to set a policy allowing or even encouraging diverters to ignore better technologies and practices that are fiscally reasonable just because the diverter is fearful of what such analysis and improvement may reveal?

IID claims in its last paragraph that the reporting by the United States Bureau of Reclamation (USBOR) is adequate, notwithstanding how IID characterized the measurement quality and its effects in the two prior paragraphs. What IID failed to mention is that during that time – in 2002 to 2003 – that the BOR performed a detailed analysis of IID’s water use (what is sometimes known as a Part 417 analysis). The BOR’s primary recommendation to IID was that IID “develop, maintain and use a district-wide network of water measurement devices for consistent monitoring, recording and reporting of system and on-farm water data.” BOR Determinations and Recommendations, August 29, 2003. So, contrary to what IID is suggesting, the BOR already is an advocate for better measurement and reporting by IID. Moreover, as Chairman Hoppin articulated at yesterday’s workshop, when there are competing systems of reporting, the goal is to harmonize, not ignore the potential differences.

IID’s diversions account for a substantial amount of the total California water diversions. IID’s letter conveniently omits this relevant piece of information. A 10% error of IID’s diversions -- 300K -- represents the entirety of the water transfer to the Coast (QSA) that IID mentions in its second paragraph. Imagine the affect of that amount of water – for better or worse – on the state of the Salton Sea. (The Board may wish to recall how Prof. Burt at yesterday’s workshop characterized the importance to the State of the potential improvements for IID.) As this Board and everyone else is likely aware, the QSA transfer is presently on appeal because the parties had utterly mishandled the Salton Sea. Had IID been forced to collect and make publically available more and better data, the transfer and the role of the Salton Sea in it would have been far different. Using the terminology advocated by Prof. Gleick at yesterday’s workshop, the co-

benefits of a transfer based on good data versus poor or missing data could have been starkly disparate.

The potential benefit to the State in forcing one of its largest diverters to sit down and work cooperatively with the on-the-ground water users to improve the measurement and delivery of water is too important to degenerate into political favoritism. Our clients who have over 350 pending statements of water diversion for the Colorado River as it passes through the IID service area strongly advocate that IID join the balance of the water diverters in improving its measurements and management as the law now requires.

There may be political reasons why IID wishes to maintain its inaccurate data reporting, but the absence of accurate data will only further aggravate the State's water problems.

Very truly yours,

*Thomas S. Virsik*

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Encl. Patrick Maloney April 2, 2002 letter to Paul Murphey, SWRCB

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JOHN F. HANSON, JR.  
OF COUNSEL

April 2, 2002

Paul Murphey  
Division of Water Rights  
SWRCB  
Sacramento, California

Re: Workshop on Professor Sax's Report  
SWRCB No. 0-076-300-0  
April 10, 2002

Dear Mr. Murphey:

Professor Sax's Report is a significant document. The SWRCB should pay particular attention to Chapters V and VI. The solutions Professor Sax proposes in these two Chapters are important to water issues in the state and are particularly important to California's economy over the next fifty years. Our comments on the Report are divided into the following categories:

- A. Background
- B. Responses to the Questions Posed by the Board
- C. People v. Forni
- D. Indefinite Nature of California Water Rights
- E. Existing Statutory structure

Background

Over the last thirty years lawyers in our Office have been involved in a number of different water issues in the State of California:

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1>Developed the arguments and positions at the SWRCB on behalf of private clients which ultimately became People v. Forni.

2>Represented major landowners throughout California and Nevada.

3>Represented major financial institutions with concerns about their investments in California because of the water issue.

4>Co-Authoring an article entitled "Restructuring America's Water Systems" published by the Reason Foundation. Neal, Kathy, Patrick J. Maloney, Jonas A. Marson and Tamer E. Francis, Restructuring America's Water Industry: Comparing Investor-Owned and Government-Owned Water Systems, Jan. 1996 (Reason Foundation, Policy Study No. 200). Many people see this article as an argument for privatization of the water delivery system in America. Morgan, Steven P. and Jeffrey I. Chapman, Issues Surrounding the Privatization of Public Water Service, Sept. 1996 (ACWA). The word "privatization" does not appear in the article. The article has received extensive criticism from organizations like ACWA, but the Reason Foundation article suggests public policy makers should rethink how water is distributed and managed in America and California in particular. The article has been purchased and studied by most significant water interests in the world including but not limited to financial institutions, water purveyors, engineering firms, and think tanks.

5>Developed the Instadjudicator. This is an interactive database that instantly determines a landowner's water rights or water entitlement in the Salinas Valley. The interactive database uses public source inputs such as chains of title, the APN system, assessor map overlays, County and State publicly available databases, defined engineering terms, the results of computer runs from the Salinas Valley Integrated Ground and Surface Water Model and other non-proprietary information. The utility of such a tool is to (1) quickly develop "what if" scenarios, and (2) to identify anomalous or skewed inputs or uses, e.g., identify by inferring from multiple sources that water use in a section of the analyzed area is substantially higher than the surrounding areas viz. unreasonable. We are not suggesting that the Instadjudicator is the only solution to the State's water issues but what is needed is a similar tool for all over-drafted (and ultimately all) basins so there can be a critical analysis of a Basin's water issues and "what if" scenarios can be quickly understood.

Engineers involved in the Mojave case have reviewed the operation of the Instadjudicator and suggested its use would hasten the resolution of the Mojave case. The Instadjudicator was offered to the SWRCB with appropriate technical assistance for its use but the offer was rejected. At a contested hearing the

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SWRCB refused to force the Monterey County Water Resources Agency to release data by which the instant adjudication of the Salinas Valley could be accomplished. Hearing on Motion to Quash Subpoenas, 6/28/00, Application 30532. A staff member of the SWRCB has suggested there are two problems with the Instadjudicator: A) The name and B) that this office developed it.

6>The office is currently working on an analysis of the leadership in the Water and Sewer industry with prominent People of Color. The purpose of this analysis is to compare the existing leadership of the water industry against the demographic make-up of the State now and forty years from now. The preliminary results of this research indicate that the California's water industry is not reflective of the ethnic demographic make-up of the State now or forty years from now.

#### Responses to the Questions Posed by the Board

Professor Sax proposes quantifiable criteria by which the water user could determine whether or not it is pumping percolating groundwater. The first problem with the proposed criteria is that they will involve more engineers arguing arcane hydrologic issues. These arcane hydrological issues are irrelevant if there is an unreasonable use of water. More importantly the percolating groundwater and underground surface water classification will change depending on what crop is used and how much water is being pumped in a given basin. What these criteria do is add further confusion rather than bring more definability to water usage in California. From time to time or place to place making the fine distinctions advanced by Professor Sax may be necessary, but only as a component of an overall solution-oriented water management system, not as the starting point. Making the management of California water more complex is not in the State's interest.

#### People v. Forni

Over thirty years ago adjudication was proposed for the Napa Valley and our vineyard clients decided adjudication would not solve the water problems caused by Frost Protection in the Napa Valley. The clients and their representatives instead worked closely with the staff of the SWRCB led by Ken Woodward, the former Chief of the Division of Water Rights, and the SWRCB to develop the principles which ultimately became People v. Forni. These principles and facts were presented in a highly contested hearing before the SWRCB. The arguments and the facts presented by our clients were the basis for the See decision and from

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the See decision the SWRCB developed the regulation challenged in People v. Forni. People ex rel. SWRCB v. Forni (1976) 54 Cal.App.3<sup>rd</sup> 743; See Decision 1404. Our clients presented these positions because they felt the only way a system for Frost Protection could be developed was if all water sources in the water basin were considered and managed. Under the far-sighted leadership of Chairman Adams and Members Robie and Auer the SWRCB used its Sections 100 and 275 powers and brought stability to the region's water problems and allowed the Napa Valley to prosper. The lesson the SWRCB can learn from Forni is that once it develops a carefully reasoned engineering position it should take an active role in solving a region's water problem before the problem becomes a crisis.

For the last five years another set of clients have advocated a similar solution, the application of Sections 100 and 275 powers to the Salinas Valley's salt water intrusion and nitrate problems and the SWRCB has repeatedly rejected our clients' pleas. The current Chief of the Division of Water Rights has opposed the use of Sections 100 and 275 powers by the SWRCB because "initiating an unreasonable use proceeding would be viewed by the local agency as a 'blind-side' attack, and would probably be considered a back-door adjudication by the agricultural community. Nevertheless, if other efforts fail, this type of action would be preferred over an adjudication because the SWRCB could address administratively rather than in a judicial proceeding in superior court." (Confidential) Memorandum from Harry Schueller on Salinas Valley, June 16, 2000, page 8. The SWRCB's inaction has put in jeopardy the water supply of a major city in California and will likely cost the taxpayers (State and/or local) tens or hundreds of millions of dollars that could have been avoided by forcing a certain limited segment of the agricultural community to use water reasonably in the first place. The SWRCB has the power to solve water problems in this State and most of the issues raised in Professor Sax's Report. It must use the power and not worry about offending local water agencies or limited segments of the agricultural community.

#### Indefinite Nature of California Water Rights

No one really knows who has water rights in California. All water licenses are subject to vested rights. What those vested rights are is anybody's guess. Probably the most interesting statement made in Professor Sax's Report is found in footnote 122 wherein he cites In re Waters of Long Valley for the proposition that there is no such thing as unexercised riparian water rights in California. Long Valley probably does not say that, but the point is there is no water right in

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California if the actual or contemplated water use is unreasonable. The Sax Report is full of references to cases by various California courts over the last century, which apply the reasonableness test to solve a water problem. There are no absolute water rights. A water right disappears in California when the needs of the community demand it.

The most disturbing problem we have in California water issues is that the SWRCB cannot figure out what its position is on most issues and the underflow issue is just a manifestation of the problem. We have staff letters of the SWRCB and Licenses telling the public that certain water rights exist yet frequently in public hearings of all types we have representatives of the SWRCB or other agencies of the State denying the validity of SWRCB's earlier positions. The SWRCB looks like a fool. To the outside world the State of California looks like a fool. In earlier times California could do whatever it pleased. Now, however, we have few major banks or financial institutions left in California and in order to maintain financing for our homes, agriculture and industries we must bring some order and discipline to the State's water system. We have to have more definability in our water system. We cannot reject definability merely because it upsets the sensitivities of certain water agencies or members of the agricultural community. The magic of People v. Forni and other things done in the Napa Valley to define water rights and optimize the region's water resources brought confidence to the investing and lending institutions and helped spur the development of California's wine industry.

#### Existing Statutory Structure and Actions of the SWRCB

Professor Sax's Report fails to recognize how much the Legislature and the SWRCB has actually done to solve the State's water problem. We direct the SWRCB's attention to Water Code Sections 5100 et seq. and 1010 et seq. and the forms prepared by the SWRCB. STATEMENT (1-00) and ST-SUPPL (2-01). No one knows exactly how to fill out the forms because of the SWRCB's inability to define underflow and consumptive use but at least there is a form. SWRCB has expanded the Section 5100 form dramatically in recent years without legislative approval. The forms should be expanded administratively to require water users to report all types of water sources and use. If the SWRCB does this administratively, there will be no need for the legislative action feared by Professor Sax. Once the forms are filed the data should be put into the existing publicly accessible SWRCB databases defined by USGS basin lines. Then Computer tools



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should be developed for each water basin such as an "integrated groundwater and surface water model" throughout the State by which anyone could easily ascertain a reasonable use of water for a given basin.

Such a system would encourage conservation and the orderly transfer of water. Either the SWRCB or somebody else could then stop anybody who is unreasonably using water pursuant to Water Code Sections 100 and 275. Anybody who is using less than a reasonable amount water could transfer water to somebody who has a need for the conserved water. Then the State's water argument will be over reasonable use of water in any given basin not over the application of unclear laws to disputed hydrological facts.

Ultimately if the expanded Section 5100 form is not filled out and filed by a water user, the Legislature could develop legislation establishing a presumption the water user forfeits whatever water rights it has unless the water user can demonstrate good cause for not filing the form. Notwithstanding much of the uncertainty about the present filing system, this office has been active in filing reports for its various clients, relying on various public sources to explain and detail positions where the SWRCB has not provided clarity. This office understands the system to be akin to recording ownership of real property. In other words, if a water user declines to follow the statute and does not file, its claim will be entitled to less weight than any competing claim of a water user who followed procedures and filed reports – similar to that of a property owner who takes title but does not record it. Water users also file Statements with the expectation that this State database will be used by EIR preparers to catalogue and analyze water rights for a given project. Save Our Peninsula Committee v. Monterey County Board of Supervisors (2001) 87 Cal.App.4<sup>th</sup> 99, 122; Petition for Extension of Time for Permit 5882 (Application 10216) (1999).

California's computer industry deals with much more complex than the State's water issues. The SWRCB should rely on this industry for solutions. The SWRCB's existing data system on water rights should be modified to make all pumping data publicly available and a system of inquiry developed so the public can ascertain a reasonable water use standard for each basin.

### Conclusion

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The Sax Report offers important statutory history. The SWRCB should carefully consider the Report's generalized recommendations and develop an action plan to pursue the goal of a more defined system of water rights. This will ultimately lead to an overall solution-oriented water management system.

Very truly yours,

Patrick J. Maloney