NAGLEE BURK IRRIGATION DISTRICT
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June 30, 2014

State Water Resources Control Board
c/o Clerk of the Board
Via Electronic Mail: commentletters@waterboards.ca.gov

Re: 7/1-2/14 Board Meeting
Item 5 – Consideration of a proposed Resolution regarding drought related emergency regulations for curtailment of diversion to protect senior water rights

Ladies and Gentlemen of the Board:

The Naglee Burk Irrigation District holds and administers the riparian rights in Old River and Tom Paine Slough of approximately 4230 acres of farm land within its boundaries on behalf of its constituent landowners. In addition to those riparian rights, the district holds a pre-1914 appropriative right in Old River affecting about 57% of the land within its boundaries based upon a September 1912 posting and recordation of the notice of appropriation in San Joaquin County. This district is located within the Delta as defined in Water Code § 12220.

On behalf of its constituent landowners this district respectfully urges the SWRCB not to adopt the proposed regulation, and also urges you not to curtail pre-1914 and riparian diversions in the San Joaquin River watershed and in the Delta.

The proposed regulation fails to meet "due process" requirements of Cal. Const., Art. I, § 7; it is an unlawful delegation of adjudicatory function to SWRCB staff; and curtailments under it would constitute a "taking or damaging" of real property forbidden by Cal. Const., Art. I, § 19(a) without prior payment of just compensation determined by a jury, the economic impact of which has not been analyzed in SWRCB staff report.

1) **As the information provided to you in your staff report indicates, the "Sacramento-San Joaquin Basin" contains "unimpaired flow" which riparian diverters are collectively entitled to use through the rest of the water year (i.e., until Oct. 1, 2014). There is never a period projected when there is "no" unimpaired flow.**

The report states:

"When available, the Board relies on the technical expertise and data produced by DWR in calculating projected supplies. DWR annually forecasts unimpaired runoff, or full natural flows, for certain watersheds in its Bulletin 120 (DWR, 2014), and in subsequent monthly updates. The full natural flow, as

defined by DWR, is the natural water production of the river basin, unaltered by upstream diversions, storage, or export or import of water to or from other watersheds." [Staff Report, p. 10]

Appendix 5 of the SWRCB staff report indicates that "[u]nimpaired flow estimates (also described as 'full natural flow' estimate by the Department of Water Resources (DWR) can be compared to reported water diversion values to determine if water is available to divert under a post-1914, pre-1914 and ripariant water rights or claims of water right." [Appendix 5, p. A5-1]

The staff report (describing the "Curtailment Analysis Methodology") states:

"The general analysis for determining the necessity for curtailment of water rights in any watershed compares the current and projected available water supply with the total water right diversion demand." [Staff Report, p. 9]

The staff report (describing the "Curtailment Projections Analysis") states:

"Supply and demand data may be compared to determine when, and to what priority level, curtailments should occur. Demand data is first sorted by priority date to create a running list of demand data that starts with the most senior water right holders. Demand groupings for riparian, pre-1914, and post-1914 water rights are tallied to create different levels of demand to compare against projected, or observed, available supply. The groupings are developed based on the available supply and the need to refine what priorities of water rights require curtailment. These demand levels include the quantity of water needed to satisfy the demand under each priority level for each month. These demand levels may then be plotted against the monthly quantities of forecasted supply to create a graphical representation of supply and demand. The point at which the supply curve and demand curves intersect indicates the initial determination of what water right priority levels need to be curtailed at that time. Appendix 9 is an example of a supply and demand curve for the Sacramento River watershed." [Staff Report, p. 13]

Appendix 9 shows that during the months of July, August and September the projected "unimpaired (i.e., natural) flow" in the "Sacramento-San Joaquin Basin" is between (an estimated) 250 and 200 thousand acre feet (Taf) (per day). Assuming that this projection is correct (and that is debatable [1]), the plain fact shown by the staff's analysis and Appendix 9 is that there is *never* a period of "no natural flow"

[1] Although the staff report describes Appendix 9 as pertinent to the "Sacramento River watershed," the chart itself purports to be of the "Sacramento-SJ Basin." This is just one of the mistakes evidenced in the staff report. A more serious mistake appears to be the total quantification of projected flow. Bulletin-120 (dated 5/8/2014) projects the unimpaired flow between "Inflow to Shasta" and "San Joaquin, Mil." (i.e., the stations along the Sacramento and San Joaquin river watersheds) for the month of July totals 474 Taf (per day). The total unimpaired flow for August at the same stations is 380 Taf (per day). And for September the projected flow at those stations totals 361 Taf (per day). *All* of which are *significantly <u>higher</u>* than the totals shown on the graph in Appendix 9.

Whatsmore, if one looks at just one station in the San Joaquin River watershed, Tuolumne River at La Grange (which was chosen because Appendix 5 had no data for that station for the month of April [see p. A5-4],and Note 1 to that appendix states, "if the monthly unimpaired runoff is missing, the subtotal's percent average underestimates the true percent average" [see p. A5-5]), and compares the "projected" flow in Bulletin-120 for the months of April and May (170 Taf and 200 Taf, respectively) with the *actually measured* flow (by gage height) reported on the USGS National Water Information System for those same months (1460 cfs and 160 cfs, respectively, which convert to 2895 Taf per day (April) and 317 Taf per day (May), even the Bulletin-120 projections (which are higher than the graph shown in Appendix 9) were below observed conditions.

in the Sacramento-San Joaquin Basin." The unimpaired "natural" flow is between 200 and 250 Taf (per day) based upon the lowest estimate shown therein. This is the flow which riparians in the "watersheds" of these rivers are correlatively entitled.

2) Curtailment of riparian diversion without a prior hearing and without prior payment of just compensation violates Sections 7 and 19(a) of Article I of the California Constitution.

The staff's implementation of the proposed emergency regulations by issuance of a curtailment order without any prior hearing would impair or destroy the riparian owner's property right to the admitted "unimpaired (natural) flow" and would "take or damage" that property without payment of just compensation required by Cal. Const. Art. I, §§ 7, 19(a).

Riparian right to the use of water in a contiguous stream or body of water is a part and parcel of riparian land [*Lux v. Haggin* (1884) 69 Cal. 255, 391; *Miller & Lux v. Madera Canal & Irrg. Co.* (1909) 155 Cal. 59, 73; *Joslin v. Marin Municipal Water Dist.* (1967) 67 Cal.2d 132, 137]

> "As we said in *Ivanhoe Irr. Dist.* v. *All Parties, supra*, 47 Cal.2d 597, 623: "*Within the scope of reasonable beneficial use*, vested rights of the riparian owner continued to attach to his land as a part and parcel of the land itself, and as such was necessarily protected from unlawful encroachment by both state and federal Constitutions. The result is that this vested right *as now defined* may not be destroyed or infringed upon without due process of law or without just compensation under either Constitution." [*Joslin v. Marin Municipal Water Dist.* (1967) 67 Cal.2d 132, 143-144]

While the SWCRB staff may consider the threat of diversion of previously stored water as an emergency, they propose to destroy or infringe the rights of riparian owners along the riversheds to the correlative use of the admittedly "unimpaired (natural) flow" without due process, and without the prior payment of just compensation. This will invite "inverse condemnation" actions and the costs of defending those actions and payment of any judgments in favor of the riparian landowners has not been considered by the staff.

Whatsmore, when waters are "mixed" (here previously stored appropriated water and the "unimpaired (natural) flow" of the rivers), "The burden of proof rests with the party causing the mixture. He must show clearly to what portion he is entitled. He can claim only such portion as is established by decisive proof. *The enforcement of his right must leave the opposite party in the use of the full quantity to which he was originally entitled.*" [*Butte Canal & Ditch Co. v. Vaughn* (1858) 11 Cal. 143, 152-153 (italics added)]

This district simply does not understand how the proposed entire and *a priori* curtailment of a riparian's diversion (even if the threat is to previously stored water traveling down the watershed) comports with the foregoing principles. It seems that the intent of these regulations is *not* to protect the rights of senior water rights holders, but rather to protect the rights of junior appropriators.

3) The Staff Report ignores the patent fact that the Delta has tidal inflow and therefore riparian lands bordering the sloughs and channels of the Delta always have sufficient water to divert.

It has long been recognized that riparian owners in the Delta always have a sufficient quantity of water to divert because of the tidal inflow. In the June 1969 report entitled "The Delta and The State Water

Project" the DWR noted that, "[a]ctually, in the Delta, the question of quantity is of little concern, since the Delta is never short of water. If flow from the tributary streams were insufficient to meet Delta use water from the Pacific Ocean would flow through the San Francisco Bay system and fill the Delta channels." [see: The Delta and The State Water Project, pp. 35-36]

The fact that Delta may not have a current of fresh water inflow from its tributary rivers is immaterial to the riparian exercise of the right to divert from the Delta. "The principle upon which these [riparian] rights are founded is equally applicable to all bodies of water, whether large or small, tidal or non-tidal." [*Turner v. James Canal Co.* (1909) 155 Cal. 82, 88 (quoting from 1 Farnham on Waters, sec. 63, p. 280) "So far as the right to use a reasonable share of the water of Fresno slough for the irrigation of land riparian thereto is concerned, *it is of no consequence how, or from what source, the water comes into the slough.*" [*Id.,* p. 91 (italics added)]

CONCLUSION

For the foregoing reasons the proposed regulation should not be adopted.

Sincerely,

Robert Mehlhaff
Secretary and General Counsel
Naglee Burk Irrigation District

B120 (05/08/14 1040)

Department of Water Resources
California Cooperative Snow Surveys

May 1, 2014 FORECAST
OF UNIMPAIRED RUNOFF
(in thousands of acre-feet)

April-July Forecast

	April thru July	Percent of Average	80% Probability Range
NORTH COAST			
Trinity River at Lewiston Lake	160	25%	120 - 290
Scott River near Fort Jones	32	19%	
SACRAMENTO RIVER			
Sacramento River above Shasta Lake	100	33%	
McCloud River above Shasta Lake	210	54%	
Pit River above Shasta Lake	550	53%	
Total inflow to Shasta Lake	900	50%	740 - 1130
Sacramento River above Bend Bridge	1210	49%	1070 - 1500
Feather River at Oroville	540	31%	460 - 780
Yuba River at Smartsville	320	32%	280 - 410
American River below Folsom Lake	390	32%	340 - 460
SAN JOAQUIN RIVER			
Cosumnes River at Michigan Bar	25	20%	20 - 50
Mokelumne River inflow to Pardee	160	35%	120 - 220
Stanislaus River below Goodwin Res.	240	34%	195 - 340
Tuolumne River below La Grange	430	35%	330 - 590
Merced River below Merced Falls	175	28%	135 - 280
San Joaquin River inflow to Millerton Lk	370	29%	290 - 540
TULARE LAKE			
Kings River below Pine Flat Res.	400	32%	310 - 520
Kaweah River below Terminus Res.	72	25%	61 - 115
Tule River below Lake Success	7	11%	5 - 11
Kern River inflow to Lake Isabella	95	20%	80 - 140
NORTH LAHONTAN			
Truckee River,Tahoe to Farad accretions	60	23%	
Lake Tahoe Rise, in feet	0.4	29%	
West Carson River at Woodfords	20	38%	
East Carson River near Gardnerville	70	38%	
West Walker River below Little Walker	60	39%	
East Walker River near Bridgeport	8	13%	

Water-Year (WY) Forecast and Monthly Distribution

	Oct thru Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Water Year	80% Probability Range	WY % Avg
Trinity, Lewiston	38	49	154	80	60	17	3	0	0	401	361 - 535	29
Inflow to Shasta	697	284	588	356	200	175	169	145	141	2755	2525 - 3080	46
Sacramento, Bend	922	419	877	529	260	230	191	160	162	3750	3570 - 4135	43
Feather, Oroville	308	258	462	290	110	75	65	60	52	1680	1545 - 1975	37
Yuba, Smartville	91	188	245	192	95	25	8	1	0	845	804 - 945	36
American, Folsom	48	237	232	233	125	29	3	0	0	907	857 - 990	34
Cosumnes, Mich.Bar	7	20	28	19	5	1	0	0	0	80	75 - 108	21
Mokelumne, Pardee	9	33	47	76	74	9	1	0	0	249	209 - 310	33
Stanislaus, Gdw.	25	36	62	111	95	31	3	0	0	363	318 - 470	31
Tuolumne, LaGrange	20	52	94	170	200	50	10	3	1	600	497 - 775	31
Merced, McClure	10	13	33	75	75	20	5	0	0	231	191 - 345	23
San Joaquin, Mil.	45	23	46	111	170	70	19	11	5	500	410 - 680	27
Kings, Pine Flat	39	20	45	125	185	70	20	10	6	520	426 - 650	30
Kaweah, Terminus	8	6	12	28	31	10	3	1	1	100	88 - 146	22
Tule, Success	3	2	3	4	3	0	0	0	0	15	13 - 20	10
Kern, Isabella	37	11	17	26	38	21	10	8	7	175	157 - 225	24

Notes:
50 year averages are based on years 1961 to 2010.
Unimpaired runoff represents the natural water production of a river basin,
unaltered by upsteam diversions, storage, or by export or import of water
to or from other watersheds. Groundwater changes due to human activity or not considered.
Forecasted runoff assumes median conditions subsequent to the date of forecast.
Runoff probability ranges are statistically derived from historical data.
The 80% probability range is comprised of the 90% exceedance level value

and the 10% exceedance level value.
The actual runoff should fall within the stated limits eight times out of ten.
Forecast point names are based on USGS gage names.

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Streamflow Measurements for the Nation

USGS 11289650 TUOLUMNE R BL LAGRANGE DAM NR LAGRANGE CA

Available data for this site: Surface-water: Field measurements | GO

Stanislaus County, California
Hydrologic Unit Code 18040002
Latitude 37°39'59", Longitude 120°26'28" NAD27
Drainage area 1,538 square miles

Output formats

HTML table with channel data
HTML table without channel data
Tab-separated data with channel data
Tab-separated data without channel data
Graph of data
Reselect output format

Meas. Number	Date	Time	Time Datum	Measurement Used?	Who	Measuring Agency	Stream flow (ft³/s)	Gage Height (ft)	Rating No.	Shift Adj. (ft)	% Diff.	GH Change (ft)	Meas. Duration (hr)
420	2014-05-20	15:12	PDT	Yes	Orb/jrg	USGS	160	3.73	25.0	-0.03	0.6	0.00	0.27
419	2014-04-17	10:28:37	PDT	Yes	ORB/JRG	USGS	1460	6.91	25.0	0.00	2.8		0.40
418	2014-04-15	12:58:53	PDT	Yes	Orb/jrg	USGS	151	3.67	25.0	-0.03	2.0	0.00	0.35
417	2014-01-15	10:31:30	PST	Yes	Orb	USGS	158	3.74	25.0	-0.03	-1.9	0.00	1.00
416	2013-12-10	13:32	PST	Yes	Orb	USGS	164	3.75	25.0	-0.03	0.6	0.01	0.80
415	2013-10-31	12:40:26	PDT	Yes	Orb/wrb	USGS	264	4.14	25.0	0.00	3.9	0.00	0.30
414	2013-09-10	14:03:30	PDT	Yes	Orb	USGS	110	3.42	25.0		-0.9	-0.01	0.93
413	2013-07-25	10:46	PDT	Yes	ORB	USGS	110	3.44	25.0	0.00	-3.5	0.00	1.38
412	2013-05-15	10:34:04	PDT	Yes	mhw/orb	USGS	163	3.72	24.0	0.15	0.6	0.01	1.30
411	2013-03-20	11:12:01	PDT	Yes	mhw	USGS	161	3.73	24.0	0.16	-3.6	0.00	1.40
410	2013-01-15	13:17	PST	Yes	MHW	USGS	170	3.76	24.0	0.16	-1.7	-0.01	1.20
409	2012-11-27	14:08	PST	Yes	MHW	USGS	177	3.75	24.0	0.16	3.5	-0.02	1.20
408	2012-10-10	09:47	PDT	Yes	MHW	USGS	175	3.77	24.0	0.16	0.0	0.01	1.10
407	2012-09-13	08:55	PDT	Yes	MHW/LJF	USGS	95.5	3.30	24.0	0.22	-0.6	0.01	0.80
406	2012-08-14	08:43	PDT	Yes	MHW/LJF	USGS	114	3.44	24.0	0.20	-1.7	-0.01	0.80
405	2012-06-19	17:00	PDT	Yes	MHW/LJF	USGS	132	3.52	24.0	0.19	1.5	0.01	0.90
404	2012-05-16	09:55	PDT	Yes	MHW	USGS	293	4.30	24.0	0.09	-0.7	0.02	1.40
403	2012-02-29	10:10	PST	Yes	MHW	USGS	329	4.48	24.0		2.2	0.01	1.60
402	2011-12-28	09:45	PST	Yes	MHW	USGS	366	4.64	24.0		-1.1	-0.02	1.50
401	2011-11-02	09:33	PDT	Yes	MHW	USGS	361	4.63	24.0		-1.6	0.01	1.40
400	2011-09-23	09:58	PDT	Yes	MHW	USGS	301	4.45	24.0		-3.8	0.02	1.60
399	2011-08-04	12:05	PDT	Yes	MHW/LJF	USGS	2480	8.50	24.0		-1.2	-0.10	1.40
398	2011-06-15	10:00	PDT	Yes	MHW	USGS	6010	11.91	24.0		-1.6	-0.11	1.60
397	2011-04-26	10:18	PDT	Yes	MHW	USGS	5470	11.61	24.0		-4.5	0.11	1.60
396	2011-03-09	09:50	PST	Yes	MHW	USGS	3940	10.00	23.0	0.00	4.2	-0.07	1.70
395	2011-01-11	09:45	PST	Yes	MHW	USGS	3480	9.64	23.0	0.00	2.1	0.09	1.50
394	2010-11-17	09:52	PST	Yes	MHW	USGS	369	4.58	23.0	0.16	3.4	0.01	1.40
393	2010-10-05	11:42	PDT	Yes	MHW	USGS	352	4.58	23.0	0.16	-1.4	-0.01	1.40
392	2010-08-31	09:50	PDT	Yes	MHW	USGS	314	4.38	23.0	0.18	2.6	-0.02	1.30
391	2010-07-29	09:17	PDT	Yes	MHW/LJF	USGS	483	5.00	23.0	0.14	-1.4	-0.01	1.40
390	2010-06-15	10:40	PDT	Yes	MHW	USGS	3700	9.92	23.0	0.00	0.3	-0.18	1.70
389	2010-05-04	10:30	PDT	Yes	MHW	USGS	3370	9.54	23.0	0.00	1.8	0.04	1.50