

VIA EMAIL

May 28, 2014

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Re: Office of Administrative Law File No. 2014-0523-05E  
Emergency Regulation Article 24 Curtailment of Diversions Based on Insufficient Flow  
Title 23, Sections 877, 878, 878.1, 878.2, 879, 879.1, 879.2

This office represents, Farmland Management Services, which operates property located within the Stanford Vina Ranch Irrigation Company, and holds water rights to Deer Creek which are proposed to be curtailed and adversely affected under the Emergency Regulations.

Farmland Management Services, and the property owner, hereby join in the comments submitted to the State Water Resources Control Board and the Office of Administrative Law by the Stanford Vine Ranch Irrigation Company, and Rumiano Farms on the proposed emergency regulations. The actions contemplated by the proposed regulations would constitute a due process violation, and would violate other basic tenets of California law.

#### Water Right Priority

The law establishes a method for allocating water right in times of shortage. The law also establishes a method for reallocating water right to the environment when needed, and to the extent needed. The State Water Board must insure that any action to impose drought related curtailments complies with the law – the Governor’s April 25, 2014 Emergency Drought Proclamation requires as much, providing:

The Water Board will adopt and implement emergency regulations pursuant to Water Code section 1058.5, as it deemed necessary to prevent the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water, to promote water recycling or water conservation, and to require curtailment of diversions when water is not available under the diverter's priority of right.

Courts have made very clear:

Every effort, however, must be made to respect and enforce the rule of priority. A solution to a dispute over water rights must preserve water right priorities to the extent those priorities do not lead to unreasonable use. *El Dorado Irrigation District v. State Water Resources Control Board* (2006) 142 Cal. App. 4th 937, 966.

The Court in *El Dorado* explained that the role of the State Water Board "was not simply to determine which choice it thought was the most 'fair,' untethered from any guiding principles. On the contrary, in making that choice the Board's 'first concern' should have been to recognize and protect . . . prior appropriative right[s], if possible". Id. at pp. 970 - 971. The California Supreme Court has recently confirmed that water right priorities are the "central principle in California water law." *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1243. The State Water Board cannot assign responsibility for meeting the public trust or fishery needs in a manner that undermines water right priorities without substantial justification for doing so. *El Dorado Irrigation District v. State Water Resources Control Board* (2006) 142 Cal.App. 4th 937.

#### Due Process of Law

Once rights to use water are acquired, they become vested property rights. As such, they cannot be infringed by others or taken by governmental action without due process and just compensation. *United States v. State Water Resources Control Board* (1986) 182 Cal. App. 3d 82, 101. In adopting an emergency regulation that would allow the State Board to curtail water rights, the State Water Board is performing an adjudicatory function (Id. at p. 113), and findings are required in order to bridge the analytical gap between the raw evidence and ultimate decision. Id.

#### Public Trust

While the California Supreme Court emphasized that appropriative water rights are always subject to a duty of continuing supervision and imposition of public trust considerations, it has clarified that public trust uses have no priority over other water uses, and all competing uses of water must be balanced. *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 445-47. Balancing is an essential component of public trust determinations; in fact the Board must consider whether the protection of public trust values is consistent with the "public interest," considering all of the beneficial uses to be made of water, including consumptive uses. *State Water Resources Control Board Cases CO44714* (2006) 136 Cal.App.4th 674. As the State Water Board has recognized: "Due to factual differences regarding public trust resources and competing uses of water in different situations, the effect of the public trust doctrine differs in each situation in which it is applied." *In*

*the Matter of Fishery Resources and Water Right Issues of the Lower Yuba River* (2001) D-1644 at p. 33.

We do not dispute that sometimes the use of water under a claim of prior right must yield to the need to preserve water quality to protect public trust interests, and continued use under those circumstances may be deemed unreasonable. . . . At the same time, however, when the Board seeks to ensure that water quality objectives are met in order to enforce the rule against unreasonable use and the public trust doctrine, the Board must attempt to preserve water right priorities to the extent those priorities do not lead to unreasonable use or violation of public trust values. In other words, in such circumstances the subversion of a water right priority is justified only if enforcing that priority will in fact lead to the unreasonable use of water or result in harm to values protected by the public trust. *El Dorado Irrigation District v. State Water Resources Control Board* (2006) 142 Cal. App. 4th 937, 967.

### Emergency Regulations

The State Water Board does not have the authority to adopt the emergency regulation that it has proposed. As stated recently by the Mendocino County Superior Court, prior California cases have determined:

. . . blanket rules or broad regulations, whether they be prohibitions, or limitations on right to use water, do not withstand constitutional challenge when such rules broadly and uniformly affect groups of vested rights holders – in particularly riparians, overlyers and pre-1914 appropriative right holders – absent specific and particularized findings as to how those individual rights are exercised or their access to water put to a reasonable and beneficial use is affected. *Light v. State Water Resources Control Board* (2012) Mendocino County Superior Court, Order granting petition for Writ of Mandate in Consolidated Actions, Case No. SCUk CVG 11 59127, at p. 24.

Similar to the frost protection rule adopted by the State Water Board in Section 862 of Title 23 of California Code of Regulations, here the State Board is making a broad and unsupported finding that every water user in these watersheds presents a risk to fish and wildlife and water quality objectives, which in turn is an unreasonable method of use of water. The State Water Board's determination to adopt an emergency regulation to curtail water diversions here mirrors their prior action in Mendocino County: "The crux of the problem is that there were no findings as to the particular water right holders. At the administrative level there were no findings about the specific individual use or method of use by the [water] rights holders and to what extent that particular use poses a risk to the salmonid population." *Id.* at p. 25.

The rule of reasonable use in Article X Section 2 of the California constitution not only limits the rights of water users, it also protects their actual reasonable beneficial uses. "Their individual rights cannot be adequately protected when their individual uses were never examined". *Id.* at p. 27, citing *Tulare* 524-25.

James F. Eastman, Esq.  
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## CONCLUSION

We urge the OAL to reject the emergency regulations proposed by the State Water Board, as the regulations violate California law.

Very truly yours,

A handwritten signature in black ink, appearing to read "Jeanne Zolezzi". The signature is written in a cursive, flowing style.

JEANNE M. ZOLEZZI  
Attorney-at-Law

JMZ:pg

cc: Mr. Jim Neyhard  
Donna Frankel, Esq.  
Mr. Jeff Hillberg  
Mr. Mark Hutson