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Division of Water Rights
State Water Resources Control Board

FROM: Karen for Michael V. Sexton, Esq. DATE: August 17, 2001

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RE: Public Meeting to Discuss the Legal Classification of Groundwater:
Sacramento: August 20, 2001

ENCLOSURE; Written comments to be submitted to the SWRCB with
regard to the above-entitled matter.

(x) Original has been mailed.

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August 17 2001

State Water Resources Control Board
Division of Water Rights
1001 I Street, 14th Floor
Post Office Box 2000
Sacramento California 95812-2000

Via facsimile & CA Overnight

Re: Public Meeting to Discuss the Legal Classification of Groundwater:
Sacramento: August 20,2001

Dear Board Members:

Our offices represent a number of public water agency and landowner clients. They are listed below. We are submitting these comments on behalf of those clients in response to the July 23, 2001, Notice of Public Meeting to Discuss the Legal Classification of Groundwater. The issues suggested for comment in the State Board Notice are six and we will combine and discuss them in the order presented in the Notice.

ISSUES 1 & 2: What is the scope of the SWRCB's water right permitting authority over groundwater; and what is the current legal test for determining whether groundwater is subject to the SWRCB's permitting authority?

Biggs-West Gridley Water District; Butte Basin Water Users Association; Butte Water District; Byron-Bethany Irrigation District; Chowchilla Water District; Cordua Irrigation District; Delano-Earliinart Irrigation District; Exeter Irrigation District; Garden Highway Mutual Water Company; Ivanhoe Irrigation District; Joint Water Districts Board; Lindmore Irrigation District; Lindsay-Strathmore Irrigation District; Los Molinos Mutual Water Company; Nevada Irrigation District; Orange Cove Irrigation District; Orland Unit Water Users' Association; Oroville-Wyandotte Irrigation District; Plumas Mutual Water Company; Reclamation District 1004; Richvale Irrigation District; San Joaquin River Exchange Contractors Water Authority; Solano Irrigation District; Sutter Extension Water District; Terra Bella Irrigation District; Tudor Mutual Water Company; and Western Canal Water District.

ANSWER: *TtiePomeroy* decision (1899) 124 C 598: *ThePomeroy* decision sets forth California case law on the subject of when the SWRCB can exercise jurisdiction over groundwater pursuant to Water Code § 1200; *i.e.*, the SWRCB has no jurisdiction over groundwater as opposed to surface water unless groundwater flows in "subterranean streams" through known and definite channels. The *Pomeroy* decision gives the test which distinguishes between a subterranean stream and percolating groundwater.

Instruction No. XII given the jury by the *Pomeroy* trial court states in part:

"XII. In addition to these rights and benefits arising from the flow of the river through this land, the defendants are the absolute owners of all such water as may be present in the soil of this land and which does not constitute a part of the water of the river. This is usually called percolating water. There is, however, no magic in the word 'percolating', and the fact that any witness may apply that word or refuse to apply it to any particular class of waters of which he may speak is not conclusive of the question whether or not such water does or does not form part of the river. That question is to be determined by you from a consideration of the facts proven. The right and ownership of the defendants in this class of waters is distinct from and much greater than their right to the waters of the stream. As to the waters of the stream, they have a right only to the use of it on this land and they do not own its *corpus*, or its body, or the very water itself, and they have no right to take it away from the land and use it on other lands, or to sell or dispose of it for use on other lands or at other places. But as to this other water, if any there be in this land, not a part of the stream, they are the absolute owners of it, to the same extent and as fully as they own the soil, or the rocks or timber on the land" See *Pomeroy* at page 622.

As demonstrated by the Supreme Court's apparent affirmation of the above jury instruction given in 1898-1899, the critical issue of whether subsurface waters are subject to SWRCB jurisdiction is a factual question to be determined by either a local trial court or jury or the SWRCB.

The legal test, however, remains the same as expressed in Water Code § 1200 and *Pomeroy, supra*.

"Whenever the term stream, lake or other body of water, or water occurs in relation to applications to appropriate water or permits or licenses issued pursuant to such applications, such term refers only to surface water, and to subterranean streams flowing through known and definite channels." See Water Code § 1200.

Certainly the *San Luis Rey* decision of the SWRCB should be strictly limited by the facts presented. It should not be liberally interpreted or expanded beyond existing statutory and case

law which limits the SWRCB jurisdiction to groundwater flowing through subterranean streams in known and definite channels. See also *Arroyo D & WCo. v. Baldwin* (1909) 155 Cal App. 280 at page 284.

ISSUES 3 & 4: Under this legal test, what physical characteristics should the SWRCB evaluate in distinguishing subsurface waters subject to the SWRCB's permitting authority **from** subsurface waters that are percolating groundwater; and what factors has the SWRCB considered in its past decisions regarding groundwater classification?

ANSWER: Our thoughts on these two issues are rather simple; *i.e.*, we encourage the SWRCB to continue to use a conservative application of the *Pomeroy* legal standard in determining the facts of each individual case presented to you to determine your jurisdiction. Whether the existence of subsurface bed and banks are impermeable with flowing groundwater is a factual issue that must be constrained and limited to the Pala and Pauma Basins. The decision should not be treated as precedent for future SWRCB determinations of whether or not subsurface waters constitute a subterranean stream or are percolating ground waters not subject to SWRCB jurisdiction. Instead, our office, on behalf of our clients, adopts ACWA's recommendation given by Steve Hall earlier this morning.

ISSUE 5: **Should the legal test for determining what subsurface waters are subject to the SWRCB's permitting authority be changed? If so, what legal test would be appropriate?**

ANSWER: No! Again, we adopt ACWA's recommendation given earlier this morning!

ISSUE 6: **Can quantifiable criteria be established to implement the legal test; and what are the quantifiable criteria?**

ANSWER: We suggest that the SWRCB should not propose "quantifiable criteria" for how to factually classify "subsurface waters" as either being part of a subterranean stream or percolating groundwater which would implement the legal test. We make this comment because, the extraction and use of groundwater in California is increasingly subject to local control. For example, in the Butte Basin area in northern California within the Sacramento Valley, groundwater is subject to local control by the County of Butte (as well as other counties within the Sacramento Valley, *i.e.*, Glenn County) and local water and irrigation districts through the adoption of AB 3030 Plans resulting from the Costa Bill adopted by the state legislature in 1992. See Water Code §§ 10750 et seq. Many local water districts and water agencies have adopted and are implementing 3030 Plans exercising local control over the use of groundwater supplies within the boundaries of their respective districts. Likewise, *Baldwin v. County of Tehama* decision (1994) 31 CA 4" 166 allows the use of the "police power" to the 58 counties in the State of California to monitor and control the extraction and distribution of groundwater through the adoption of local county ordinances. In fact, the County of Butte electorate in 1996 adopted what is referred to as "Measure G." Measure G requires that a

county permit be obtained from Butte County prior to extraction of groundwater which leaves county boundaries as well as groundwater substitute pumping to replace surface water which leaves county boundaries.

Local public and private agencies formed the Butte Basin Water Users' Association (including the County of Butte as well as local water and irrigation districts) in 1992 and developed a hydrologic groundwater model currently used to monitor the health of the Butte Basin groundwater aquifer.

We urge the SWRCB to limit any assertion of jurisdiction over groundwater to those limited factual circumstances that make SWRCB jurisdiction appropriate. The *San Luis Rey* decision should make clear that the decision is limited to those particular facts and is not precedent for future SWRCB action.

We appreciate the opportunity to submit comments to you in this public meeting as to how you treat future application of not only the *San Luis Rey* decision but existing case law established by *Pomeroy, supra* and the statutory law set forth in Water Code § 1200.

Respectfully submitted,

MINASIAN, SPRUANCE, BABER,
MEITH, SOARES & SEXTON, LLP

Original signed by Michael V. Sexton

Biggs-West Gridley Water District
Butte Basin Water Users Association
Butte Water District
Byron-Bethany Irrigation District
Chowchilla Water District
Cordua Irrigation District
Delano-Earlimart Irrigation District
Exeter Irrigation District
Garden Highway Mutual Water Company
Ivanhoe Irrigation District
Joint Water Districts Board
Lindmore Irrigation District
Lindsay-Strathmore Irrigation District
Los Molinos Mutual Water Company

Nevada Irrigation District
Orange Cove Irrigation District
Orland Unit Water Users' Association
Oroville-Wyandotte Irrigation District
Plumas Mutual Water Company
Reclamation District 1004
Richvale Irrigation District
San Joaquin River Exchange Contractors
Water Authority
Solano Irrigation District
Sutter Extension Water District
Terra Bella Irrigation District
Tudor Mutual Water Company
Western Canal Water District

MVS/kc

cc: All Parties Listed