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December 30, 2002

Paul Murphey,
Associate Engineering Geologist
State Water Resource Control Board
P.O. Box 100
Sacramento, California 95812-0100Re: Proposed Order Determining Legal Classification of Groundwater
Pumped By North Gualala Water Company

Dear Mr. Murphey:

This comment letter is being submitted by this law firm in response to the proposed order of the State Water Resources Control Board ("SWRCB") concerning the legal classification of groundwater pumped by the North Gualala Water Company. This law firm was founded in 1920 and represents various local water agencies.

This firm is in full agreement with the comments made by the Association of California Water Agencies ("ACWA") to this proposed decision. We support the contention by ACWA that the proposed decision misapplies the standards used in determining when groundwater is an subterranean stream as set forth in *Los Angeles v. Pomeroy* (1899) 124 Cal. 598. We are sending this letter to comment on the additional failure of the proposed decision to address the required burden of proof.

The party claiming that groundwater is flowing in a subterranean stream has the burden of proof as cited in the *Pauma/Pala case*¹ and *Arroyo Ditch & Water Company v. Baldwin* (1909) 155 Cal. 280. The proposed decision ignored this issue except for a brief description of the burden of proof on page 12. Despite describing the burden of proof the proposed decision failed to correctly apply it.

The proposed decision dealt with conflicting evidence. The *Pauma/Pala case* upheld the requirement that the majority of evidence must show that groundwater is a subterranean stream before the SWRCB permitting authority may be applied. Where

¹ D-1645 (2002) pg 25.

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weight of evidence is equally persuasive the SWRCB can not find that it has permitting authority.

The proposed decision failed to state whether the majority of evidence favored a finding that the groundwater is an underground stream and did not fully explain why the evidence in favor of percolating groundwater was rejected. The proposed decision found an underground stream existed without discussing whether the weight of the evidence met the required burden of proof.

We are concerned that the SWRCB appears to be taking statements out of context in finding support for their decision. The SWRCB found that a statement by North Gualala's expert witness was evidence that the presence of a subterranean channel is undisputed: (Proposed Decision pg 14.)

"Is there a channel present? Probably so. You can map something up there that looks like a subterranean channel."

The answer by the expert appears to be taken out of context yet it is cited by the SWRCB as evidence that there is no dispute on the issue of whether a channel exists in the Proposed Decision. This mischaracterizes the evidence presented by the North Gualala Water Company and as found in the Pauma/Pala case where the weight of the evidence is equally balanced no subterranean stream may be found.

We request the SWRCB reconsider the proposed decision in light of the burden of proof and require that findings must be supported by a majority of the evidence.

Sincerely,

GRIFFITH & MASUDA


James Koontz