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December 30, 2002

Mr. Arthur G. Baggett, Jr. Chairman
 State Water Resources Control Board
 P.O. Box 100
 Sacramento, CA 95812-0100

RE: *Draft Order 2003-XX*
In the Matter of Permit 14853
North Gualala Water Company

Dear Mr. Baggett:

This letter is submitted, according to the workshop notice in the referenced matter dated November 27, 2002, as public comment on the Draft Order in North Gualala matter referenced above. I do not represent any party to the North Gualala proceeding. I have no prior knowledge of the particular facts or setting of the North Gualala case. I have no personal interest in, and I have no opinion one way or the other about, the outcome of the matter as far as the particular wells or groundwater aquifer involved in the Draft Order. I do have, however, a desire to see the sound administration of water rights matters by the State Water Resources Control Board. The views expressed herein are submitted in the spirit of an amicus brief, let's say as a friend of the Board. I believe that the recitation of legal principles set forth in the Draft Order is a matter of significant concern for the Board, for the "water bar" and for the water community in general.

It is important that the Board's water right rulings are perceived as objective and authoritative. The Draft Order contains three misstatements of legal principles which undermine these important Board objectives and, therefore, undermine the Board's credibility to deal with similar issues in the future. These misstatements derive from the fountainhead case of *City of Los Angeles v. Pomeroy*, (1899) 124 Cal 597.¹ Since the Board has just recently ended the long

¹ The Draft Order also misstates legal principles from *City of Los Angeles v. Hunter*, (1909) 156 Cal 603, but errors are likely derived from misunderstanding of *Pomeroy*. Other commentators are addressing the

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running controversy in the Pauma/Pala case, the Board now should make every effort proceed from sound legal predicates to deal with the important and controversial issue of legal classification of groundwater. The Board's jurisdictional determinations regarding groundwater will find acceptance in the regulated community, and ultimately will withstand possible legal challenge, only if the legal underpinnings are authoritative. Those stated in the Draft Order do not meet that standard.

1. The Draft Order Misstates English Common Law at the Time of the *Pomeroy* Decision. The first full paragraph on page 11 of the Draft Order (commencing "The *Pomeroy* opinion is the leading opinion...") misstates the underlying law that forms the context of the *Pomeroy* controversy. This, in turn, leads to a misstatement of the legal issues in the case and further, by turns, leads to a fundamental misstatement of the outcome and holding of the *Pomeroy* case. The Board has an authoritative statement of this matter at its fingertips in the "Sax Report"² which should be substituted for the middle two sentences of the referenced paragraph.

The inaccurate characterization of the applicable background law in the Draft Order is as follows:

"In 1899, the courts believed³, based upon English common law, that a groundwater diverter could take water for use on lands apart from the overlying lands only if the source groundwater was flowing in a subterranean stream. If the source groundwater was percolating, it could be used only on the overlying land, of which it was considered a part."

Whether this statement of the background law surrounding the controversy in *Pomeroy* is considered upside down or inside out, it is most assuredly wrong and should be corrected.

The relevant English common law context, in fact, is clearly characterized in the *Pomeroy* decision itself. Succinctly stated the law was: If the "source groundwater" was percolating groundwater, then *Pomeroy* owned it absolutely⁴ and could appropriate the water for use on remote land. If, on the other hand, the source ground groundwater was part of the Los

Hunter issues. I believe corrections in the presentation of *Pomeroy* will likely lead to a more proper rendition of ruling in *Hunter*.

² *Review of the Laws Establishing the SWRCB's Permitting Authority Over Appropriations of Groundwater Classified as Subterranean Streams and the SWRCB's Implementation of Those Laws*, Prepared for the State Water Resources Control Board by Joseph L. Sax (2002).

³ The Board should consider using another word besides "believed." Used in this phrase, the word implies that the courts might have been mistaken in their belief of what that common law was at that time. The word "interpreted" might be better.

⁴ The Draft Order is reasonably accurate in stating that this point of California law was altered in *Katz vs. Walkinshaw*. *Katz* held that (1) that overlying rights are rights to correlative use of groundwater, not absolute ownership; and (2) that groundwater cannot be taken for use on non-overlying lands if that taking will injure the priority rights of overlying users of the water. However, *Katz* did nothing to change the law, as stated in *Pomeroy*, regarding the characterization of groundwater as part of a stream.

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Angeles River, Pomeroy owned only a riparian right to use the water on the Pomeroy land, and the right to divert and use the water on remote land belonged to the City of Los Angeles under its pueblo water right. It was the ownership of the right to appropriate water for use on distant land that made the Pomeroy land more, or less, valuable in the eminent domain proceeding in *Pomeroy*.

While the portions of the Sax Report are controversial, the legal scholarship in the report is undeniable. Professor Sax puts forward a statement of the legal background, at page 15 of his report, which should be used by the Board instead of the language quoted above:

"*Pomeroy* was an eminent domain valuation case. In order to improve its municipal water supply system, Los Angeles had condemned a narrow strip of land comprising 315 acres, averaging some ¼ mile in width, adjacent⁵ to the Los Angeles River just above where it passes through the narrows⁶ out of the San Fernando Valley, between the eastern extremity of the Cahuenga Mountains and the Verdugo hills. The question in the case was how to value the land taken. It was determined that Los Angeles had a paramount pueblo right to the water of the Los Angeles River. If the water beneath the condemned land was water of the Los Angeles River, the City was entitled to it and the condemnation award could not include the sales value of the water under the land for use elsewhere. Notably, the case had nothing to do with state regulatory jurisdiction over groundwater.⁷ The question was simply whether the water beneath the defendants' land was part of the Los Angeles River (Los Angeles wins), or whether it was part and parcel of the condemned land (defendants win)."

Professor Sax's characterization of the applicable background law that comprised the setting of *Pomeroy* decision should be substituted for the language noted above from the Board's Draft Order. The Draft Order's misstatement of the context of the *Pomeroy* case leads to other infirmities in the Draft Order.

2. The Draft Order Uses Quotations from *Pomeroy* Improperly. The Draft Order misstates the legal context and central legal issue from *Pomeroy*. The Draft Order also focuses on a certain phrases and passages quoted from the *Pomeroy* opinion⁸ and gives the quoted language incorrect emphasis as the rule from the case. Bases upon two brief, out of context, quotations from the *Pomeroy* opinion, the Draft Order creates the pretext that the central issue of

⁵ In fact, the land was on both sides of and underneath the River. *Pomeroy*, at page 606.

⁶ The land is located about a mile west of the "narrows" and the valley, there, is 2 ¼ to 3 miles wide. *Pomeroy*, at page 606.

⁷ Professor Sax does not dispute that the case is relevant to the jurisdictional issue. Elsewhere he states, "If there is any point about which all sides in the debates over subterranean streams agree, it is that one has to look to the decision in *Los Angeles v. Pomeroy*..."

⁸ Professor Sax correctly suggests that a persistent problem in interpretation of the *Pomeroy* decision is the use of out of context quotations from the opinion. "(I)t may well be that *Pomeroy* has been more often plucked for its quotable language than studied for its meaning and context..."

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the *Pomeroy* case was characterization of groundwater movement through the outlet from the San Fernando Valley. As can be seen from the Professor Sax's recitation of the context of the *Pomeroy* case, the *Pomeroy* opinion determined whether the groundwater beneath a narrow strip of land⁹ located along the Los Angeles River, a mile upstream from where the surface stream enters the valley outlet, is part of Los Angeles River or is part of the percolating groundwater of the San Fernando Valley. The 53 page long *Pomeroy* decision is not about the groundwater in the valley outlet. It clearly focuses on the nature of the groundwater beneath the specific river bottom parcel of land owned by Pomeroy.

At page 12 (in the paragraph that begins on page 11, "In describing the water that is subject to permitting..."), the Draft order pulls quoted language from pages 632 and 634 of the Supreme Court opinion and suggests that the ruling in *Pomeroy* was that the bed rock basement complex containing the valley fill alluvium in the 2 mile wide outlet of the San Fernando Valley constitutes the bed and banks of the subterranean Los Angeles River. The Draft Order suggests that the rule of *Pomeroy* is something like: "All groundwater is part of a subterranean stream (1) if it is contained in valley fill alluvium that is bounded by relatively impervious mountain sides that extend below the ground and meet somewhere below the valley and (2) if a river runs out the end of the valley."

If the rule of *Pomeroy* is as suggested in the Draft Order, one wonders: Why did the California Supreme Court devoted 53 other pages to its opinion? It is clear, from the descriptions in the *Pomeroy* opinion that the entire 24 mile long and 12 mile wide, 490 square mile, San Fernando Valley is composed of alluvial fill material laid down within trough formed by the subterranean confluence of the bedrock forming the San Fernando Range on the west, the Verdugo Hills on the north and Cahuenga Hills on the south.¹⁰ If that fact alone were sufficient to determine a subterranean stream the Court would not have spent 53 pages in delineating a rule to distinguish percolating groundwater from groundwater flowing in a subterranean stream. If this were the rule of *Pomeroy*, then the entire San Fernando Valley groundwater was part of a subterranean stream and the court wasted a great deal of ink, and the Board and the regulated community have wasted a lot of time, energy and expense on debating the issue. All groundwater in the San Fernando Valley and in other alluvial valleys would meet this description. Clearly, the Court concluded that the vast majority of groundwater in the San Fernando Valley was percolating and that it was important to identify the part which was the subterranean stream of the Los Angeles River.

The holding of *Pomeroy* is not as suggested. The holding is substantially more complex, articulated and subtle than that. The *Pomeroy* opinion is clear that percolating groundwater is presumed to exist within alluvial valleys in general, and within the San Fernando Valley in

⁹ The Supreme Court describes the property as 315 acres that is nearly 2 miles long and ¼ of a mile wide.

¹⁰ I am enclosing some prints or satellite photo maps which I hope will help to provide some context for these descriptions.

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particular.¹¹ The Court clearly contrasted such percolating groundwater from groundwater within the river bottomland that comprised the Pomeroy property.¹² The jury was instructed in considerable detail, and the Supreme Court endorsed those instructions, in regard to the legal and factual distinctions between these two types of groundwaters. None of this would have been necessary had the rule of the *Pomeroy* case been as suggested by the Draft Opinion's statement of the rule we are to learn from *Pomeroy*.

The quotations pulled out of context from pages 632 and 632 of the *Pomeroy* opinion are from a portion of the opinion where objections from losing counsel are being answered, in a *reductio ad absurdum* fashion. They are not statements of holding in the case. The rule or holding of the case, which is picked up in Water Code §1200, is set forth in great detail on pages 616 to 630 of the *Pomeroy* opinion. Reliance on these out of context quotations undermines the credibility of the Board's Draft Order.

3. The Draft Order Wildly Misstates the Holding of the Pomeroy. The Draft Order misstates the legal context of *Pomeroy* and misses the main legal issue and the central holding of *Pomeroy*. This leads to a highly distorted statement of the holding of the case. At page 10, the Draft Order (in the paragraph beginning "Several California appellate decisions...") states the holding of *Pomeroy* as follows: "The Los Angeles River flows in both a surface and subterranean stream in the reach between the Cahuenga and Verdugo Hills."¹³ The *Pomeroy* case did not hold any such thing. The *Pomeroy* holding, framed by a proper statement of the context and issues of the case is: **The groundwater flowing through the Pomeroy parcel, two miles of river bottom land under and adjacent to the Los Angeles River along the toe of the Cahuenga Hills, a mile west of the San Fernando Valley outlet, is part of the subterranean flow of the River**

¹¹ "Water moving by force of gravity in a valley or basin of wide extent, say twenty-four by twelve miles at the extreme extent, and moving generally through the whole or through a large portion of the basin, along through natural voids or interstices of the earth, composed of alluvial or other deposits lying throughout the entire basin, and made up of loam, sand, gravel, and bowlders (sic) mixed together, and interspersed with irregular and broken strata or masses of clay or cemented sand and gravel, and lying in places as originally deposited by forces of nature..." (*Pomeroy*, at page 626.)

¹² The Court concluded that the jury must find a subterranean stream when "on the lands sought to be condemned there is situated the river bottom of the Los Angeles river, extending the whole length of said land, and occupying nearly the whole thereof, and containing all of the subterranean waters of said land... and that the southern boundary of said river bottom is an impermeable dike of rock known as the Cahuenga hills; and said waters entering from said north side are prevented from continuing their flow to the south and are dammed up by said wall of rock, and that all of the subterranean waters in said river bottom are thereby forced to fill all of the said interstices and void places in the material of which said river bottom is composed... and that there are no impenetrable and continuous barriers extending through the said mass in said river bottom in any direction so as to interrupt and prevent the substantial continuity and contact of all of said subterranean waters (with the surface stream)... and that the remainder of said subterranean waters move underground to the east, although with a varying velocity and much slower than the said surface stream, but in the same general direction with it..." (*Pomeroy*, at page 625.)

¹³ This describes most of the San Fernando Valley. See attached photo maps.

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and is not part of the percolating groundwater that exists in the San Fernando Valley and which feeds the surface and subsurface flow of the River from the north.

Please accept these comments as constructive suggestions on how to make the Draft Order more authoritative. It is my urgent advice that the Board, the water community and the State of California will be best served if the Board significantly revises the statements of legal principles derived from the *Pomeroy* opinion.

Very truly yours,

MCCORMICK, KIDMAN & BEHERNS, LLP


Arthur G. Kidman

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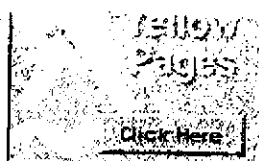
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ATTACHMENT B: Location photo map showing the eastern end of the San Fernando Valley. Los Angeles River runs along the toe of the Cahuenga Hills at the bottom of the map. Arrow points to the vicinity of the Pomeroy Land, about a mile west of the where the River takes a turn to the South.



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ATTACHMENT A: Location photo map showing San Fernando Valley at center. Arrow points to the general vicinity of the Pomeroy land on the south side of the Valley, near the Valley outlet.

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ATTACHMENT C: Closer view of Pomeroy land, which is outlined at the center left. Shows location of Pomeroy land in river bottom of Los Angeles River, about a mile west of where the river turns to the South and flows out of the San Fernando Valley. Pomeroy land was about two miles long and averaged about a quarter mile wide

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