

# **PUBLIC TRUST ALLIANCE**

**A Project of the Resource Renewal Institute**

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**San Francisco, CA 94123**

Policy Statement at Joint Place of Use Hearing before SWRCB 4/27/09

Good morning. I'm Michael Warburton and I'm Executive Director of the Public Trust Alliance, a project of the non-profit Resource Renewal Institute. Since our founding in 2001, we have been calling attention to the Public Trust Doctrine as a valuable tool to defend our most valuable heritage, and to forge reasonable paths forward in times of crisis. The Doctrine reflects public interests inherent in the "property" that is affected by the suggested change of place of use and it can't be ignored. While more specific statutes should be enough to guide responsible action, my organization is gravely concerned that "emergency" inspired over-reaching for the benefit of private actors will be substituted for deliberate debate and defense of public interests in this proceeding.

From our perspective, ensuring responsible action is what this hearing is about. The legal obligation of the State Water Resources Control Board is to oversee not only an "efficient" allocation of public water, but a "responsible" one as well. The very capacity of our land to support life is at stake in public decisions like this and we don't want to see transparency or accountability diminished for short term convenience. We want to make sure that future generations of Californians will live in an ecologically viable California. In a time of economic and climatic crisis, it becomes more important to concentrate on the contours of long term responsibility than to argue and point fingers at fleeting short term indicators or current market prices which are notoriously unreliable in measuring long term public value.

Unfortunately, there is a lot of political pressure and a seeming willingness to abandon deliberate decision making in favor of establishing new legal conditions that have long been sought by water contractors. We are being told that the merged place of use definitions will only affect water already in the projects, but what it will probably do is open the projects to a lot more water that would never come in without the relaxed standards. Without other institutional supports, merged place of use makes accounting and transparency of transfers far more difficult. Past experience with the petitioners shows that predictable costs are most often borne by our environment. Quite frankly, I haven't been able to determine if the petitioning public agencies have even sought the advice of their own lawyers about their legal obligations to protect trust resources for the people of California..

In public planning processes, we have tried to articulate enduring public interests, both of designated legal trustees and public beneficiaries. We see the continuing jurisdiction of the State Board not as a meaningless recitation included in all State licenses, but as an actual legal responsibility. Our Supreme Court has made it clear many

times that no matter how much some people wish that public obligations would just disappear, there is a required public inquiry when trust resources are involved. And there is an affirmative obligation to protect trust values whenever feasible.

A few points to think about in the case coming up: The status of the “Emergency” which is being relied upon to justify accelerated action is very much in the hands of the petitioners themselves and their own definitions. That is not a recipe for healthy public credibility or anything approaching responsible public regulation. Now is not the time to respond to calls for more “flexibility” by relaxing boundaries for accountability without fundamental protections for public rights. The financial industry wanted a little flexibility and they told us it was just common sense to allow the merger of banking, investment banking, and insurance businesses when separation had been required in the past. Now we’re beginning to find out what it means to lose public accountability in financial markets and it’s going to get a lot worse before it gets better. We can’t afford to have that happen with our water and the ecological systems that ultimately support us.

In California water, the separation between the operations of Federal and State projects have generated different standards of accountability, benefit and repayment in addition to the simple geography. Federal regulators and contractors have ignored State responsibilities and even the application of science has been suspended to the extent that it was difficult to get judicial notice of reality. The public has good reasons not to trust regulators who have gotten too cozy with their contractors. We all know about the revolving doors which find professionals negotiating on behalf of the public one minute and just a few minutes later with executive positions on contractor staffs. There is a tremendous need for transparency and clear boundaries for accountability. Regulatory energy would far better be applied solving fundamental problems rather than creating more zones of uncertainty and accounting difficulty.

We are now experiencing an economic crisis in which people can’t even know the value of the homes they’ve lived in for many years and many have lost any hope of a protected retirement. A great deal of wealth that people were counting on evaporated in very predictable consequences of irresponsible deregulation. But we’re not just in an economic crisis. As a society, we’re just beginning to see the scale of damage to our legal institutions and public understanding of the rule of law that has occurred over the last decade. The former president of a major stock exchange has pleaded guilty to running the biggest Ponzi scheme in history. Last night, a television news commentator described the different official legal approaches to state sanctioned torture as a “policy difference” between the Bush and Obama Administrations. There is a very real risk that people in our state will take those words at face value and think that is the extent of what is going on. If the legal profession itself gets too lax on the concept of “rule of law,” everybody loses. I just read a tentative ruling by a San Diego judge in a CEQA case that reminded me that in that town, the developer always wins when public assets are being given away. The rhetoric that people are hearing from public authorities is becoming less and less believable in nearly every forum. The only cure for this is increased transparency so people can see for themselves how closely the rhetoric matches the

reality that they live with. A trumped up “emergency” should not be used to avoid environmental analysis of long term water transfers. Yet that seems to be the direction that this is going.

If this relaxation of institutional boundaries of accountability is accomplished under the guise of this year’s drought “emergency,” it will be done at the cost of adopting the legal standard of a banana republic and deliberately placing California’s most precious trust assets at completely foreseeable risk. We don’t need to do that. I hope that evidence presented and examined here will lead to a responsible decision that supports the health of all Californians in the long term.