
State Water Resources Control Board

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SUBJECT: STATUS OF WATER SUPPLY PURSUANT TO WATER CODE SECTION 106.3
AS A PUBLIC TRUST RESOURCE UNDER PROPOSITION ONE

ISSUE

The Water Quality, Supply, and Infrastructure Improvement Act of 2014 (Proposition 1), approved by the voters last November, enacts Division 26.7 (commencing with section 79701) of the Water Code. Proposition 1 authorizes new funding for various water-related projects, including \$2.7 billion in funding for public benefits associated with water storage projects. (Wat. Code, § 79750.) Water Code section 79753, subdivision (a) sets forth five types of public benefits for which funding may be provided. These include “[w]ater quality improvements in the Delta, or in other river systems, that provide significant public trust resources.” (Wat. Code, § 75753, subd. (a)(2).) Water Code section 79754 directs the California Water Commission (Water Commission or Commission) to develop and adopt, by regulation, methods for quantification and management of the public benefits described in Water Code section 79753. These regulations shall include priorities and relative environmental value of water quality benefits provided by the State Water Resources Control Board (State Water Board or Board). (*Id.* § 79754.)

Section 106.3, subdivision (a) of the Water Code declares it to be “the established policy of the state that every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes” (human right to water). The statute requires state agencies to consider the human right to water when “revising, adopting, or establishing policies, regulations, and grant criteria” when they are “pertinent” to the uses of water described by the statute. (Wat. Code, § 106.3, subd. (b).) However, the statute “does not

expand any obligation of the state to provide water or to require expenditure of additional resources to develop water infrastructure” except for obligations that may exist under subdivision (b). (*Id.* subd. (c).)

You have asked: Is providing water supply for the purpose of satisfying the human right to water a “public trust resource” within the meaning of Water Code section 79753.

BRIEF RESPONSE

No. The “public trust resources” described Water Code, section 79753, subdivision (a)(2) refer to uses protected by the Public Trust Doctrine. The Public Trust Doctrine is a long-established feature of California law highly relevant to Proposition 1 and which may reasonably be assumed to be known to the Legislature. Had the Legislature intended a special meaning for the term “public trust resources” as used in section 79753, to include non-public trust uses such as domestic use, it could have expressed its intentions explicitly.

The Public Trust Doctrine, as developed by California courts, does not include water supply for human consumption as a protected use. In California, courts have articulated the Public Trust Doctrine’s scope and requirements at length, but have nowhere identified the uses included in human right to water as being within the public trust. In the case of *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419 (*Audubon*), the California Supreme Court held that the uses protected by the Public Trust Doctrine do not encompass all public uses of water, even where there is a strong public interest in those uses. The doctrine only protects public trust uses. The *Audubon* court also rejected the argument that domestic water supply automatically trumps the Public Trust Doctrine in water allocation decisions.

The human right to water legislation made no attempt to modify the Public Trust Doctrine and makes no reference to it. Hence, the legislation cannot reasonably be interpreted to expand the scope of public trust uses. Nothing in Proposition 1 indicates the intent to modify the Public Trust Doctrine or to define “public trust resources” as used in Proposition 1 to include resources outside the scope of the Public Trust Doctrine. Rather, the Legislature intended to make some of the funding in Proposition 1, including the funding subject to section 79753, subdivision (a)(2), available for enhancement of instream beneficial uses protected by the Public Trust Doctrine, while other funding is made available to protect potable water, including providing for the needs of disadvantaged communities.

ANALYSIS

1. The “public trust resources” described by Water Code, section 79753, subdivision (a)(2) refer to resources protected by the Public Trust Doctrine.

A. Principles of statutory interpretation:

The primary task of statutory interpretation is to determine the lawmakers' intent. (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 724.) To do so, a court turns first to the words of the statute themselves for the answer. (*Ibid.*; accord *Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, 501; *People v. Knowles* (1950) 35 Cal.2d 175, 182.) The plain meaning controls if there is no ambiguity in the statutory language. (*People v. King* (2006) 38 Cal.4th 617, 622.) Where the statutory language is unambiguous, it is unnecessary to resort to other indicia of the lawmakers' intent. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.)

In interpreting a statute, courts should avoid a construction that "implies that the Legislature was ignorant of the meaning of language employed." (*Reimel v. Alcoholic Beverage Control Appeals Board* (1967) 256 Cal.App.2d 158.) When a statute uses words with settled legal meaning, it provides "some indication that such meaning was intended." (*Id.* at 167–68; accord *Perry v. Jordan* (1949) 34 Cal.2d 87, 92; *City of Long Beach v. Payne* (1935) 3 Cal.2d 184, 191.) Words or meaning may not be inserted into a statute under the guise of interpretation. (*In re Miller* (1947) 31 Cal.2d 191, 199.)

B. The Public Trust Doctrine is a long-established feature of California law highly relevant to Proposition 1 and which may reasonably be assumed to be known to the Legislature.

The Public Trust Doctrine is ancient and well known. It traces its origin to the Roman law principle that certain natural features—the air, rivers, the sea, and the seashore—are property "common to mankind" and incapable of private ownership. (See Institutes of Justinian 2.1.1; *Audubon, supra*, 33 Cal.3d 419, 432–33.)¹ From this ancient origin, English common law developed the concept of the public trust, in which the sovereign owns navigable waterways and the lands lying beneath them "as trustee of a public trust for the benefit of the people." (*Colberg, Inc. v. State* (1967) 67 Cal.2d 408, 416.) "When the [American R]evolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government." (*Martin v. Waddell* (1842) 41 U.S. (16 Pet.) 367, 412; accord *Phillips Petroleum Co. v. Mississippi* (1988) 484 U.S. 469, 476; *Shively v. Bowlby* (1894) 152 U.S. 1, 14.)

In the United States, it has long been settled law that Public Trust Doctrine rights and responsibilities pass to newly-created states upon statehood. (E.g. *Utah v. United States* (1971) 403 U.S. 9, 10; *Illinois Central Railroad Co. v. Illinois* (1892) 146 U.S. 387, 435; *Weber v. Board of Harbor Commissioners* (1873) 85 U.S. (18 Wall.) 57, 57; *Pollard's Lessee v. Hagan* (1845) 44 U.S. (3 How.) 212, 216; see also U.S. Const. art. IV, § 3, cl. 1.) California law has recognized

¹ The administration of Emperor Justinian (r. 527–65) undertook the main work of codifying and systemizing the vast body of Roman law. (Davies, *Europe* (1996) pp. 184, 239.) The resulting texts are credited with transmitting Rome's legal heritage to the modern world. (See *id.* at 184.)

Public Trust Doctrine principles since the era of statehood. In reviewing bay fill related to 1850's era construction in San Francisco, for example, the California Supreme Court had occasion to observe that California "holds the complete sovereignty over her navigable bays and rivers, and ... her ownership is, by the law of nations, and the common and civil law, attributed to her for the purpose of preserving the public easement." *Eldridge v. Cowell* (1854) 4 Cal. 80, 87.) The Public Trust Doctrine applies to navigable waters, protecting uses of lakes (e.g., *State of California v. Superior Court* (Lyon) (1981) 29 Cal.3d 210 [Clear Lake]; *State of California v. Superior Court* (Fogerty) (1981) 29 Cal.3d 240 [Lake Tahoe]; *Los Angeles v. Aitken* (1935) 10 Cal.App.2d 460 [Mono Lake]), navigable rivers (e.g., *People v. Gold Run D. & M. Co.* (1884) 66 Cal. 138 [Sacramento River]; *Hitchings v. Del Rio Woods Recreation & Park Dist.* (1976) 55 Cal.App.3d 560 [Russian River]), and bays and estuaries [e.g., *City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 523–24]. Waterways are "navigable" for the purpose of implementing the Public Trust Doctrine even if they are only capable of being navigated by small, recreational craft (*Audubon, supra*, 33 Cal.3d 419, 435 fn. 17.) In *Audubon*, the Supreme Court found that the Public Trust Doctrine "protects navigable waters from harm caused by diversion of non-navigable tributaries." (*Id.* at p. 437.) A variant of the public trust applies to activities that harm fisheries in non-navigable waters. (E.g., *People v. Stafford Packing Co.* (1924) 193 Cal. 719, 725; *People v. Truckee Lumber Co.* (1897) 116 Cal. 397, 399–400; see also *California Trout, Inc. v. State Water Resources Control Board* (1989) 207 Cal.App.3d 585, 630.) The question of whether the public trust extends to groundwater withdrawals that harm public trust uses in navigable waterways is currently being litigated. (*Environmental Law Foundation v. State Water Resources Control Board* (Super. Ct. Sacramento County, 2014, No. 80000583).)

C. Had the Legislature intended a special meaning for the term "public trust resources," it could have expressed its intentions explicitly.

Water Code section 79753 is part of Water Code chapter 26.7, a statutory scheme to "provide[] a comprehensive and fiscally responsible approach for addressing the varied challenges facing California's water resources." (Wat. Code, § 79701.) Within this scheme, the Legislature provided extensive definitions of various terms. These include precise definitions for technical and legal terms, including "Delta conveyance facilities" (Wat. Code, § 79702, subd. (f)), "state small water system" (*id.* subd. (z)), "public agency" (*id.* subd. (s)), and "water right" (*id.* subd. (ab)). Proposition 1 also provides precise definitions for seemingly ordinary terms, including "rainwater" (*id.* subd. (t)), "long-term" (*id.* subd. (o)), and "acquisition" (*id.* subd. (a)). Where the Legislature intended a non-standard meaning for statutory language, it appears to have taken great pains to communicate the meaning it intended. "Rainwater," for example, means "precipitation on any public or private parcel that has not entered an offsite storm drain system or channel, a flood control channel, or any other stream channel, and has not previously been put to beneficial use." (*Id.* subd. (t); see also Wat. Code, § 10573, subd. (c).) Rainwater is not merely "[w]ater precipitated as rain with little dissolved mineral matter." (American Heritage Dict. (2d college ed. 1982) p. 1024). Rainwater, for the purposes of Proposition 1, does not just fall from the sky.

In contrast, the Legislature did not see fit to define the term “public trust resources.” This could be an oversight, but evidence of such oversight is not forthcoming. It is most likely that the Legislature intended an ordinary meaning associated with the well-known Public Trust Doctrine.

D. Interpreting “public trust resources” to refer to resources protected by the Public Trust Doctrine is consistent with other provisions of the Water Code.

Water Code section 85023 provides: “The longstanding constitutional principle of reasonable use and the public trust doctrine shall be the foundation of state water management policy and are particularly important and applicable in the Delta.” This directive reinforces the conclusion that the reference to “public trust resources” in Section 79753 is intended to refer to uses protected by the Public Trust Doctrine. Section 79753 and related provisions are focused on the Delta and its tributaries, and seek to protect ecological uses per the Public Trust Doctrine. (See Wat. Code, § 79753, subd. (a)(2) [“[w]ater quality improvements in the Delta, or other river systems”]; see also *id.* § 79755, subd. (a)(5)(B) [the Commission cannot approve funding unless it finds the project will advance the objectives of “restoring ecological health and improving water management for beneficial uses of the Delta.”]) The reference to water quality in section 79753, subdivision (a)(2) is consistent with cases recognizing that the State Water Board’s public trust authority includes authority to apply water quality standards for the protection of fish and other instream beneficial uses. (*State Water Resources Control Board v. United States (Racanelli)* (1986) 182 Cal.App.3d 82, 149–150; see also *Audubon, supra*, 33 Cal.3d at p. 437.)

Where other provisions of the Water Code refer to the public trust, they clearly are intended to recognize and incorporate the Public Trust Doctrine. (See Wat. Code, §§ 1120 [State Water Board decisions or orders based on the “public trust doctrine”], 1335, subd. (d) [adverse effects on “public trust uses”], 85086, subd. (c)(1) [directing the State Water Board to take action “pursuant to its public trust obligations”].) Nothing in any of these sections suggests that in making reference to the “public trust” the Legislature intended to alter the scope of the Public Trust Doctrine or redefine terms or principles established by the case law applying and interpreting the doctrine. In other words, when the Water Code references the “public trust,” the Legislature has sought to incorporate the common law, not to modify it or use the term “public trust” in a manner inconsistent with its use in the cases applying the common law Public Trust Doctrine.

2. The Public Trust Doctrine, as developed by California courts, does not include water supply for human consumption as a protected use.

A. In California, courts have articulated the Public Trust Doctrine’s scope and requirements at length, but have nowhere identified water for human consumption, cooking, or sanitary purposes as being within the public trust.

The Public Trust Doctrine protects many uses of navigable waterways, and is flexible to encompass changing public needs. (*Marks v. Whitney* (1971) 6 Cal. 3d 251, 259.) In administering the trust, the state is not burdened with an outmoded classification favoring one mode of utilization over another. (*Colberg, Inc. v. State* (1961) 67 Cal.2d 408, 422.) Traditionally, protected uses have included the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the state, and to use the bottom of the navigable waters for anchoring, standing, or other purposes. (Marks, at p. 259 [internal citations omitted].) More recent cases have extended the Public Trust Doctrine to the preservation of tidelands waterways “in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.” (*Id.* at 259–260.) The Public Trust Doctrine also provides authority to apply water quality standards to protect fish and wildlife. (*State Water Resources Control Board v. United States (Racanelli)*, *supra*, 182 Cal.App.3d 82, 149–150.) All of these involve instream beneficial uses: uses that occur while the water is in the waterway, as opposed to being diverted out of the waterway.

In *Audubon*, the California Supreme Court was asked to clarify the relationship between California’s system of water rights and the Public Trust Doctrine as part of the long-running controversy over Mono Lake. The court held that California has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible. (*Audubon, supra*, 33 Cal.3d 419, 446). After approving an appropriation of water, the Public Trust Doctrine imposes a duty of continuing supervision over the taking and use of the appropriated water. (*Id.* at 447.) The state has the power to reconsider water allocation decisions even though those decisions were made after due consideration of their effect on the public trust. (*Ibid.*) The case for reconsideration is even stronger when a water allocation decision failed to weigh and consider public trust uses. (*Ibid.*)

B. *Audubon* held that the Public Trust Doctrine does not encompass all publicly important uses, only public trust uses.

Audubon explicitly rejects the argument that all uses of a waterway by the public are encompassed within the Public Trust Doctrine. While litigating *Audubon*, the California Attorney General argued for a broad concept of trust uses. “In his view, ‘trust uses’ encompass all public uses, so that in practical effect the doctrine would impose no restrictions on the state’s ability to allocate trust property.” (*Audubon, supra*, at p. 440.) The California Supreme Court made clear that this view is not supported by law. “[T]he public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people’s common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.” (*Id.* at 441.) This statement is unambiguous. It follows that, if uses pursuant to the human right to water are not judicially recognized as a public trust use, they are not a resource protected under the Public Trust Doctrine.

C. In *Audubon*, the California Supreme Court rejected the argument that domestic water supply automatically trumps the Public Trust Doctrine in water allocation decisions.

In *Audubon*, the California Supreme Court was asked to clarify the relationship between California's system of water rights and the Public Trust Doctrine. In doing so, it considered and rejected an argument that the primacy of domestic water supply under California law automatically trumps the Public Trust Doctrine's requirements.

The question arose as part of a long-running controversy over the loss of inflow into Mono Lake and resultant decline in water quality and waterfowl habitat. The Supreme Court acknowledged Los Angeles' water rights to Mono Lake's tributaries and the city's expectations under those rights. (*Audubon, supra*, at 427.) It recognized that, under statutes then in effect "[s]ince [LA]DWP sought water for domestic use, the board concluded that it had to grant the application notwithstanding the harm to public trust uses of Mono Lake." (*Ibid.*) It recognized statutory law declaring it to be "the established policy of this state that the use of water for domestic purposes is the highest use of water." (*Ibid.* [quoting Stats. 1921, ch. 329, § 1, p. 443, now amended and codified as Water Code section 1254].) Los Angeles argued that "the public trust doctrine as to stream waters has been 'subsumed' into the appropriative water rights system and, absorbed by that body of law, quietly disappeared." (*Id.* at p. 445.) Thus, per the city, "the recipient of a board license enjoys a vested right in perpetuity to take water without concern for the consequences to the trust." (*Ibid.*) For their part, the environmental plaintiffs argued that "the public trust is antecedent to and thus limits all appropriative water rights," with the consequence that most appropriative water rights in California were acquired and are being used unlawfully. (*Ibid.*)

The court rejected both positions. "To embrace one system of thought and reject the other would lead to an unbalanced structure, one which would either decry as a breach of trust appropriations essential to the economic development of this state, or deny any duty to protect or even consider the values promoted by the public trust." (*Audubon, supra* at p. 446.) Neither domestic and municipal uses nor in-stream uses can claim an absolute priority. (*Id.* at 447, fn. 30.) Instead, the court held that California has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible. (*Id.* at 446.) After approving an appropriation of water, the Public Trust Doctrine imposes a duty of continuing supervision over the taking and use of the appropriated water. (*Id.* at 447.) The state has the power to reconsider water allocation decisions even though those decisions were made after due consideration of their effect on the public trust. (*Ibid.*) The case for reconsideration is even stronger when a water allocation decision failed to weigh and consider public trust uses. (*Ibid.*) While concerns such as a city's "need for water" its reliance upon vested rights, and "the cost both in terms of money and environmental impact of obtaining water elsewhere" must enter into any water allocation decision, "they do not preclude a reconsideration and reallocation which also takes into account the impact of water diversion" on the environment. (*Id.* at 448.)

The *Audubon* court's analysis necessarily assumes that municipal water use is not a public trust use. Policy declarations prioritizing the use of domestic water for irrigation purposes must be read in conjunction with later enactments requiring consideration of in-stream uses and with judicial decisions explaining the Public Trust Doctrine. (*Audubon*, supra at 447, fn. 30.) Had *Audubon* held otherwise, its decision to reevaluate the allocation of Mono Lake's tributaries would not make sense. The state is free to choose between public trust uses. (*Citizens for East Shore Parks v. California State Lands Commission* (2011) 202 Cal.App.4th 549, 477; *Carstens v California Coastal Commission* (1986) 182 Cal.App.3d 277, 289; see also *Colberg, Inc. v. California*, supra, 67 Cal.2d 408, 419; *Boone v. Kingsbury* (1928) 206 Cal. 148, 192–93). Selecting one trust use "in preference to ... [an]other cannot reasonably be said to be an abuse of discretion." (*Higgins v. City of Santa Monica* (1964) 62 Cal.2d 24, 30.) Ordinarily, a decision that public trust land shall be used for a specific public trust use stands until the state decides to reallocate the land to some other public trust use. (*Citizens for East Shore Parks*, supra, at p. 576; *Zack's, Inc. v. City of Sausalito* (2008) 165 Cal.App.4th 1163, 1182–83.) If municipal water use were itself a public trust use, there would be no reason for the *Audubon* court to proceed with its analysis. Reevaluating the harm to public trust uses compared to the public interest in the diversion of Mono Lake's tributaries would count human consumption of water on both sides of the ledger.

Audubon did not expressly consider the human right to water: it sought to reconcile the Public Trust Doctrine with appropriative water rights. But the court's reasoning strongly suggests that questions of water supply allocation, whether for irrigation, domestic supply, or other uses requiring diversion for use outside of the water body belong to the doctrine of appropriative rights, not the Public Trust Doctrine. The alternative, counting human consumption on both sides of the ledger, would be a significant departure from precedent.

3. The human right to water legislation does not require or authorize the interpretation of "public trust resources" to include the uses protected by the human right to water.

Water Code section 106.3 requires state agencies to consider the human right to water when adopting regulations or grant criteria that are "pertinent" to the uses of water described by section 106.3. If the regulations or grant criteria are not pertinent, for example regulations or grant criteria governing funds available for recreational boating or salmonid conservation, section 106.3 does not apply, except to the extent that grant eligible activities might have an adverse effect on drinking, cooking, and sanitary purposes. Thus, if a provision does not authorize funding for projects related to supplying water for basic human needs, i.e. drinking, cooking, and sanitary purposes, then section 106.3 does not have the effect of modifying the statute to make those projects eligible.

Nor is there anything in Water Code section 106.3 to suggest that it is intended to modify the Public Trust Doctrine or redefine public trust resources. Section 106.3 of the Water Code establishes the human right to water as the policy of California. Specifically, the legislation

states that “every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes.” (Wat. Code, § 106.3, subd. (a).) The statute does not expand “any obligation of the state to provide water or to require the expenditure of additional resources to develop water resources.” (*Id.* subd. (c).) The statute does not mention the Public Trust Doctrine at all. No version of the bill which became Water Code section 106.3 mentions the Public Trust Doctrine. (See Assem. Bill No. 685 (2011–2012 Reg. Sess.) [AB 685].) No committee report prepared for AB 685 mentions the Public Trust Doctrine.

Water Code, section 106.3 establishes important public policy, and the Commission, the State Water Board and other state agencies must consider this policy wherever it is pertinent. For example in determining whether the public interest in a diversion outweighs the harm to public trust resources, state agencies should give greater weight to diversions necessary to support the human right to water than diversions for other uses such as irrigation, industrial use, or hydropower. But establishing important public policy, alone, does not modify the Public Trust Doctrine or redefine public trust uses.

4. The interests protected by the human right to water are addressed through other provisions of Proposition 1.

Proposition 1 is intended to provide a comprehensive approach for addressing the varied challenges facing California’s water resources. (Wat. Code, § 79101, subd. (j).) Funding is not limited to “public trust resources.” Even the \$2.7 billion made available for public benefits from water storage projects may be spent on other benefits outside the public trust, including flood control benefits and emergency response. (*Id.* § 79753, subd. (a).) Most relevant to the human right to water, water quality improvements in the Delta or other river systems “that clean up and restore groundwater resources” are fundable public benefits associated with water storage projects. (*Id.* § 79753, subd. (a)(2).) This certainly includes aquifers that provide water for human consumption, cooking, and sanitary purposes. Fundable public benefits also include “[e]mergency response, including securing emergency water supplies” (*id.* subd. (a)(4)), which could reasonably be interpreted to include emergency response to assure availability of water needed for drinking, cooking, and sanitary purposes.

More broadly, the water storage program is only one chapter of Proposition 1. Proposition 1 makes \$520 million available for expenditures, grants, and loans for “projects that improve water quality or help provide clean, safe, and reliable drinking water to all Californians.” (Wat. Code, § 79720.) This program serves to address “the critical and immediate needs of disadvantaged, rural, or small communities that suffer from contaminated drinking water supplies” (*id.* § 79721, subd. (c)), and to ensure “access to clean, safe, reliable, and affordable drinking water for California’s communities” (*id.* subd. (g)). These provisions more clearly invoke the language of the human right to water, for example by seeking to “provide clean, safe, and reliable drinking water to all Californians.” (*Id.* § 79720.)

Other provisions of Proposition 1 also bear on the interests protected by the human right to water. Proposition 1 includes \$900 million to fund the prevention and cleanup of the contamination of groundwater that serves as a source of drinking water. (Wat. Code, § 79771, subd. (a).) Funding for recycled water (*id.* § 79765 [\$725 million]) and for regional water security and drought preparedness (*id.* § 79740 [\$810 million]) touch on the availability of water for basic human needs. Clearly, the Legislature knew how to craft policy to advance the human right to water: It did so through other provisions of Proposition 1. It would be contrary to legislative intent to read similar meaning into the term “public trust resources.”

cc: Members of the Water Storage Investment Program Stakeholder Advisory Committee