

July 29, 2016

**VIA E-MAIL AND**  
**FIRST CLASS MAIL**

California Water Commission  
Attn: Mr. Joseph Byrne, Chairman  
P.O. Box 942836  
Sacramento, CA 94236-0001  
joseph.byrne@cwcc.ca.gov

Re: Letter in Support of Department of Water Resources (“DWR”) Proposed Decision to Approve Boundary Change in San Luis Rey Valley Groundwater Basin, DWR Basin 9-7

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Dear Chairman Byrne:

I write on behalf of Pauma Valley Community Services District (“PVCSD”), the Rancho Pauma Mutual Water Company (“Rancho Pauma”), and the Rainbow Municipal Water District (“Rainbow”), in support of DWR’s proposed decision to approve (as modified) the scientific boundary change to the San Luis Rey Valley Groundwater Basin (“SLR Basin”) requested by the City of Oceanside (“Oceanside”) and the County of San Diego (“SD County”). This letter, in which Oceanside has indicated concurrence, responds to the several letters (and oral comments) submitted to the California Water Commission (“CWC”) by the Pala Band of Mission Indians’ (“Pala”) and the San Luis Rey Indian Water Authority (“SLRIWA”) (collectively the “Bands”) during July 2016.

**General Comments:**

PVCSD and Rancho Pauma—whose service areas overlies the SLR Basin in the Pauma Valley to the immediate east of the new boundary preliminarily approved by DWR—continue to work collaboratively with the County of San Diego, Yuima Municipal Water District, Mootemai Municipal Water District, Pauma Municipal Water District, and Valley Center Municipal Water District on Sustainable Groundwater Management Act (“SGMA”) compliance options for the Pauma Valley. It is PVCSD and Rancho Pauma’s understanding that all of the aforementioned Pauma Valley agencies wish to work collaboratively with the Bands in the implementation of SGMA, and both PVCSD and Rancho Pauma wish to encourage the Bands’ participation in sustainable management of waters subject to SGMA. There is no intent whatsoever to exclude the Tribes from being an active participant in all of the functions mandated by SGMA, whether the participating tribe overlies percolating groundwater or a subterranean stream. Nor is there any desire to, in any fashion, infringe on the federal reserved water rights (“FRWR”) that are at the

California Water Commission  
July 29, 2016  
Page 2

heart of most of the Bands' expressed concerns. My clients simply want to ensure that SGMA can be implemented in an orderly and non-duplicative manner that facilitates sustainable groundwater management.

### Boundary Change Simply Acknowledges Existing Law

The net result of DWR's preliminary approval of the SD County and Oceanside requested boundary change at Agua Tibia Narrows is to confirm what California law already requires. Waters previously determined by the State Water Resources Control Board ("SWRCB") to be a subterranean stream (Pala to the Pacific Ocean) in SWRCB Decision WR-1645 are already regulated by the SWRCB, and they will continue to be directly regulated by the SWRCB as a surface water under the SWRCB's broad regulatory authority after the boundary change is finalized. Percolating groundwater in the Pauma Valley, on the other hand, will be managed by a groundwater sustainability agency ("GSA") under SGMA. If one or more GSA(s) fail to sustainably manage the Pauma Valley groundwater basin, then the SWRCB will have the ability to step in and directly regulate. As explained below, and in the attached letter previously submitted by PVCSD in support of the Oceanside/SD County Boundary Change request (attached hereto as Exhibit 1), the change to the SLR Basin approved by DWR is compelled by the different statutory regimes for surface water and groundwater in California, neither of which conflict with federal law or in any manner infringe upon FRWR.

SGMA only applies to "groundwater," whereas subterranean streams flowing in "known and definite channels" are not groundwater. (*See* Water Code § 10721 (g).) SGMA does not authorize GSAs to regulate extractions from surface waters—such regulatory authority being within the province of the SWRCB. (*See* Water Code §§1250-66; 1375-1410.) Since the SLR Basin below the preliminarily approved boundary at Agua Tibia Narrows has been determined by the SWRCB to flow in "known and definite channels," it is a subterranean stream and is directly regulated by the SWRCB with all of the broad authorities the SWRCB possesses under the Water Code and the California Constitution.<sup>1</sup> Any attempted regulation by a GSA under SGMA to impose requirements below Agua Tibia Narrows would have significant potential to intrude upon the SWRCB's existing permits and regulatory activities. As the SWRCB explains in the Frequently Asked Questions section of the SWRCB website, available online at [http://www.waterboards.ca.gov/water\\_issues/programs/gmp/faqs.shtml](http://www.waterboards.ca.gov/water_issues/programs/gmp/faqs.shtml), "***[w]hen a body of groundwater has been designated a subterranean stream, access to that groundwater is subject to the same permitting requirements as diversions from surface streams.*** The State Water Board has adopted a number of decisions and orders identifying specific subterranean stream locations. *Subterranean streams are regulated by California's surface water rights system; SGMA does not apply to groundwater that has been designated a subterranean stream*" (emphasis added).

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<sup>1</sup> *See generally* Young v. State Water Resources Control Bd. (2013) 219 Cal.App.4th 397; Light v. State Water Resources Control Board (2014) 226 Cal.App.4th 1463.

California Water Commission  
July 29, 2016  
Page 3

Thus, DWR's action to approve the SD County and Oceanside boundary request simply acknowledges what California law already compels in light of SWRCB Decision WR-1645: (1) there is a hydrologic barrier at Agua Tibia Narrows that takes percolating water and channelizes it into known and definite channels; (2) percolating groundwater in the Pauma Valley to the east of the new boundary is subject to SGMA and must be managed accordingly; (3) the subterranean stream to the west of the boundary is not subject to SGMA and will continue to be regulated by the SWRCB.

#### No Conflict with Federal Law or Infringement of FRWR

To the extent that the Bands possess FRWR, the approved boundary change will be of no consequence. SGMA is about ensuring percolating groundwater is sustainably managed. It *does not authorize the regulation or subordination of water rights—whether arising under federal or state law*. (See Water Code § 10720.5 (a) [“Nothing in this part modifies rights or priorities to use or store groundwater consistent with Section 2 of Article X of the California Constitution”]; Water Code § 10720.5 (b) [“Nothing in this part, or in any groundwater management plan adopted pursuant to this part, determines or alters surface water rights or groundwater rights under common law or any provision of law that determines or grants surface water rights”].)

Thus, whether the Pauma Valley is regulated by one or more GSAs, or the SWRCB, the Bands have the same remedy in the event they perceive injury to their asserted senior water rights. They can go to court and seek redress for the alleged injury in state or federal court. (*Compare Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District* (March 20, 2015 C.D.CA) 2015 U.S. Dist. LEXIS 49998 [authorizing Agua Caliente Tribe federal lawsuit for alleged infringement of FRWR in percolating groundwater] *with United States v. Fallbrook Pub. Util. Dist.*, 2010 U.S. Dist. LEXIS 37003 (April 14, 2010, S.D. CA) [authorizing Cahuilla Tribe intervention and service of potentially affected parties in Anza Basin of Santa Margarita River to assert FRWR in a subterranean stream].) Thus, it is not apparent how approving the boundary change requested by Oceanside and SD County would have any impact upon FRWR or any other aspect of federal law. While the Bands might prefer to have one GSA over the entire SLR Basin as a matter of administrative convenience, this is not what SGMA provides,<sup>2</sup> nor does federal law otherwise compel such a result.

The Bands have provided no evidence that federally reserved water rights will not be “respected in full” if DWR's preliminarily approved boundary change is confirmed, and there is accordingly no basis for deviating from DWR's current course. Indeed, the Bands comments to the CWC are puzzling in that the scientific boundary change for the SLR Basin approved by DWR would seem to potentially result in *more water, not less*, arriving down the San Luis Rey River in

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<sup>2</sup> SGMA allows multiple GSAs to form in one groundwater basin, notwithstanding the objection of third parties that might prefer only one GSA, as long as the entire basin is ultimately managed in accordance with a coordination agreement. See Water Code §§ 10727 (b); 10733.4.

California Water Commission  
July 29, 2016  
Page 4

the vicinity of the Pala Indian Reservation. Any groundwater sustainability plan (“GSP”) implemented in the currently unregulated Pauma Valley will be required to prevent prolonged overdraft and prohibit groundwater extractions “that have significant and unreasonable adverse impacts on beneficial uses of [downgradient] surface water.” (Water Code § 10721 (w); *see also* Water Code § 10735 (d).) Thus, in addition to the unaffected ability of the Bands to assert FRWR in the future should the Bands perceive an injury to their water rights, any Pauma Valley GSP that allows harm to downstream uses of the subterranean San Luis Rey River in the Pala Basin can potentially be challenged by the Bands as a violation of state law.

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My clients are optimistic that they—and other local agencies/public water systems that overlie the SLR Basin—can collaboratively work with the Bands to resolve their concerns while ensuring all aspects of SGMA are fully met. DWR’s approval of the boundary change at Agua Tibia Narrows requested by Oceanside and SD County will facilitate sustainable groundwater management in those portions of the SLR Basin subject to SGMA while fully respecting tribal water rights.

Thank you for your consideration of this matter. Please do not hesitate to contact me with any questions or comments.

Respectfully submitted,

RUTAN & TUCKER, LLP

A handwritten signature in black ink, appearing to read 'J. Jungreis', enclosed within a hand-drawn oval.

Jeremy Jungreis

Enclosures

# PAUMA VALLEY COMMUNITY SERVICES DISTRICT

P.O. Box 434 ♦ Pauma Valley, California 92061

Telephone (760) 742-1909 ♦ Fax (760) 742-1588

May 6, 2016

California Department of Water Resources (DWR)  
Attn: Boundary Change Regulatory Staff  
PO Box 942836  
Sacramento, CA 94236

**Charles Mathews**  
*President/Treasurer*

**Dick Nolan**  
*Vice President*

**Heidi Person**  
*Director*

**Sam Logan**  
*Director*

**Bill Winn**  
*Director*

**Mindy Houser**  
*Administrator*

Re: Letter of Support Regarding City of Oceanside Boundary Change Request for Basin No. 9-7

Dear Sir or Madam:

I write on behalf of the Pauma Valley Community Services District (“PVCSD”), the Rancho Pauma Mutual Water Company (“RPMWC”), the Rainbow Municipal Water District (“Rainbow”) and Yuima Municipal Water District (“Yuima”) to formally express the support of all four agencies for the joint requests by the City of Oceanside (“Oceanside” or “City”) and County of San Diego (“County”) to modify the boundaries of the San Luis Rey Valley Groundwater Basin, Basin No. 9-7, or “SLR Basin.” With this letter of support, all of the major water purveyors in the SLR Basin are on record as supporting the requested boundary change.

The requested scientific revision submitted by the County, and joined by Oceanside, is fully supported by the scientific evidence regarding the presence of a hydrologic barrier at the Agua Tibia Narrows wherein percolating groundwater with no defined bed and banks in the Pauma Valley is channelized at the Agua Tibia Narrows and thereafter flows as a subterranean stream until it reaches the Pacific Ocean. We know this to be true because the State Water Resources Control Board (“SWRCB”), which historically has been the arbiter of whether a water is, or is not, a subterranean stream, has told us so—after years of hearings and evidentiary findings. Specifically, SWRCB Decision WR-1645 determined that waters of the SLR Basin in the Pauma Valley (above the Agua Tibia Narrows at Frey Creek) were percolating groundwater, and all waters in the SLR Basin below the Agua Tibia Narrows were surface water subject to Board permitting jurisdiction. *See* Board Decision WR-1645 at pp. 2-4, 23-26.

As the SWRCB Noted in Decision 1645 at p.23, “the SWRCB previously determined that the groundwater in the Bonsall and Mission Basins is flowing in a subterranean stream with known and definite channels.” The SWRCB further explained in Decision 1645, page 2, “groundwater in the alluvial aquifer in the

EXHIBIT 1

Bonsall Basin downstream of the Monserate Narrows was previously determined to be a subterranean stream flowing through known and definite channels (Decision 432 (D-432) (1938) of the Division of Water Resources of the State Department of Public Works (predecessor to the SWRCB), reaffirmed in Order of the State Water Rights Board dated June 26, 1962).” Decision 1645 then clarified the status of the remainder of the SLR Basin—all waters below Frey Creek were to be considered a subterranean stream, and all waters above were to be considered percolating groundwater. The County/Oceanside joint request for scientific modification at Agua Tibia Narrows simply asks DWR to memorialize in Bulletin 118 what the SWRCB already determined (and reconfirmed) over ten years ago.

The one letter of opposition pertaining to the Oceanside and County boundary change request—submitted by the Carlsbad Municipal Water District (“CMWD”)—conspicuously cites no legal support for the proposition that a court, and not the SWRCB, must be the entity which determines in the first instance whether a particular water body is percolating groundwater or a subterranean stream. The SWRCB has traditionally made such determinations as a matter of course as the regulatory agency with the technical and scientific wherewithal to understand the movement and character of water traveling beneath the ground.

Approving the Oceanside and County boundary change requests will do what SGMA intended, allow percolating groundwater to be managed sustainably in the Pauma Basin, and allow the SWRCB to continue permitting (or denying) diversions from the subterranean San Luis Rey River below Agua Tibia Narrows in accordance with the SWRCB’s statutory and public trust authority. CMWD does not allege otherwise, nor does it make any kind of showing that granting the requests will in some fashion frustrate or prevent sustainable groundwater management. If CMWD wanted to challenge the determination of the Mission Basin as surface water, it could have done so in 1938, 1962, or in 2002. It did not do so. It is unfair for it to ask that the entirety of the SLR Basin remain in legal limbo, potentially for many years, while CMWD and Oceanside have their day in court. Such a result *would* be likely to frustrate sustainable groundwater management given the uncertainty created by such a “stay” requested by CMWD. Moreover, it is unclear how CMWD would be prejudiced by DWR’s acceptance of the proposed boundary changes. Should a court at a later date determine that the Mission Basin is in fact percolating groundwater, as CMWD implies, and if at that time the Mission Basin still meets DWR criteria for being classified as a medium or high priority basin under the Sustainable Groundwater Management Act (“SGMA”), then either Oceanside or the County would need to develop a

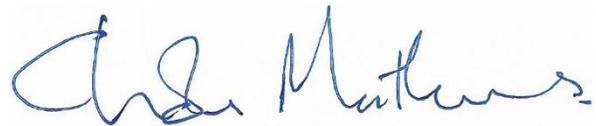
groundwater sustainability plan (“GSP”) or Alternative Plan that ensures the Mission Basin meets all requirements of SGMA. Thus, granting the requested change would seem to put CMWD in no worse a position than it currently occupies, and more importantly, would not frustrate any ongoing judicial proceedings.

The County and City boundary change requests meet all regulatory criteria contained in 23 Cal. Code of Regulations §§340 et seq. for granting both the scientific and jurisdictional boundary changes requested. No evidence before DWR indicates otherwise, and all of the major stakeholders in the SLR Basin are supportive of the requested change. Accordingly, DWR should grant the requested boundary changes so water suppliers in the Pauma Valley can get on with creating a groundwater sustainability agency (“GSA”) and a GSP that will facilitate sustainable groundwater management in those parts of the SLR Basin that are properly subject to the requirements of SGMA.

Thank you again for the opportunity to comment. Should you have questions or comments about this letter, please do not hesitate to contact me.

Respectfully,

**Pauma Valley Community Services  
District**

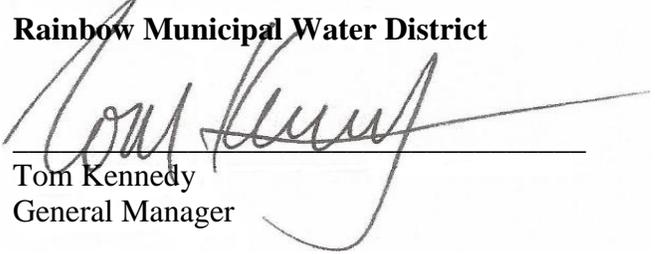


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Charles A. Mathews  
President

CONCURRING AGENCIES AND  
PUBLIC WATER SYSTEMS:

**Rainbow Municipal Water District**



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Tom Kennedy  
General Manager

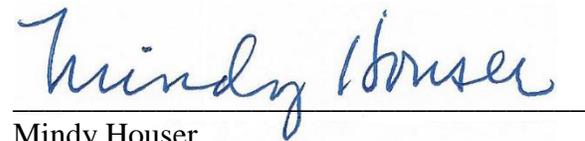
**Yuima Municipal Water District**



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Lori A. Johnson  
General Manager

**Rancho Pauma Mutual Water Company**



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Mindy Houser  
Administrator

cc: Jeremy Jungreis, Rutan & Tucker LLP  
James Bennett, County of San Diego  
Cari Dale, City of Oceanside