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February 7, 2022

Via email
Board of Directors
Salinas Valley Basin Groundwater Sustainability Agency
P.O. Box 1350
Carmel Valley, CA 93924

Re: Proposed administrative fee for Corral de Tierra area of Monterey Subbasin

Dear Members of the Board:

LandWatch Monterey County offers the following comments on the proposed administrative fee for the Corral de Tierra portion of the Monterey Subbasin, based on the staff report to the Budget and Finance Committee and the discussion at this morning's meeting. We understand that the Board will take up this issue at its next meeting.

Staff have outlined two bases for allocating the administrative fee as between urban users, paying per connection, and agricultural users, paying per irrigated acre.

The first basis would use the traditional 90%/10% split between agricultural users and urban users derived from basin-wide pumping data. This would result in a fee of $101.78 per acre for agricultural users and $10.03 per connection for urban users.

The second basis would use an estimate derived from reported agricultural and urban pumping for the Corral de Tierra from an historical period that apparently covers approximately the past ten years, which apparently determined that about 19% of pumping was for agricultural use and 81% was for urban use. This would result in a fee of $29.62 per acre for agriculture and $29.62 for urban users.

LandWatch is concerned that the second method may inequitably impose higher fees on urban users for several reasons. Accordingly, LandWatch asks that the Board consider adjusting the fee under the second method as proposed below should it decide to depart from the past practice of allocating fees on a 90/10 basis.

First, the use of a ten-year average to determine the comparative pumping by agriculture and urban users fails to reflect the fact that the agricultural uses have substantially increased in the Corral de Tierra in the past few years. Agricultural pumping has been 30% to 35% of Corral de Tierra in these recent years, and there is no reason to expect abandonment of this investment in irrigated agriculture. Use of a 19% agricultural pumping figure that weights the pre-agriculture pumping years makes no sense.

Second, a significant portion of the tiered administrative fee apportioned to the Corral de Tierra is the $200,000 for the demand management study, which is apportioned only to Corral de Tierra and the 180/400. This study has been identified as a pilot program that would inform demand management studies that will eventually be undertaken in other subbasins. Fairness suggests that some portion of this cost be treated as a Tier 1 cost allocable across all subbasins. Even if not allocated to all subbasins, it is not equitable to allocate half the $200,000 to Corral de Tierra because it pumps so much less than the 180/400 and because the GSP acknowledges that the Corral de Tierra's overdraft situation cannot be cured unless the adjacent 180/400 subbasin is balanced. At minimum, the $200,000 should be allocated between Corral de Tierra and the 180/400 in proportion to their total pumping, not simply split in half.

Third, urban supplier who are appropriators in the Corral de Tierra (e.g., the small water systems that pump from a well and then distribute to homeowners who are not overliers) and who have pumped in this overdrafted basin for five years have a prescriptive right that takes priority over pumping by agricultural overliers in an adjudication.[1] In an adjudication, the amount of that right would be reduced by so-called "self-help" pumping by overlying landowners, and it would also likely be ramped down to reflect the "safe yield" of the aquifer (similar to SGMA's "sustainable yield").[2] Typically, the urban supplier would have the prescriptive right to pump the same percentage of the safe yield as the percentage of total pumping it pumped during the prescription period.[3] Since the urban users have a priority claim to at least some portion of their existing pumping, it is inequitable to require them to pay a fee based on that portion of their pumping. To account for urban users' higher priority water rights, the fee should be apportioned only on the basis of non-prescriptive pumping.

Fourth, the priority of urban and domestic supply, including pumping for small water systems and from individual domestic wells, may not be limited to prescriptive rights because the constitutional mandate for reasonable and beneficial use makes domestic water use a higher priority even without prescription.[4] Water Code sections 106 declares as state policy that domestic use is a higher priority than agricultural use, and one court

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[1] Garner et al., The Sustainable Groundwater Management Act and the Common Law of Groundwater Rights—Finding a Consistent Path Forward for Groundwater Allocation, Journal of Environmental Law V38:2, 2020, pp. 187, 207, available at https://www.edf.org/sites/default/files/documents/01JELP38-2_Garner_etal.pdf.

[2] Id. at 189-190, 207. "Safe yield" is functionally equivalent to SGMA's "sustainable yield." (Id. at 206 n 189.)

[3] Id. at 187, 207.

[4] Id. at 177-178, 196-198.

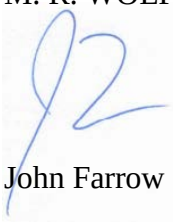
interpreted this to require urban use in an appropriation context even without prescription.[5]

We appreciate that making the calculations required to apportion the administrative fee on the basis of prescription and statutory priority may be burdensome. We suggest that a reasonable approach would be to apportion the fee only to (1) agricultural use and (2) that portion of domestic use that would represents overdraft even if there were no agricultural use.

Thank you for your consideration of these comments.

Yours sincerely,

M. R. WOLFE & ASSOCIATES, P.C.



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[5] Id. at 197.