

# Hearings Program

## South Fork American River – Reconsideration Hearing Decision D-1635 and Order WR 96-06

### Executive Office

901 P Street • Sacramento, California 95814 • (916) 657-0941

Mailing Address: P.O. Box 100 • Sacramento, California • 95812-0100

FAX (916) 657-0932 • Web Site Address: <http://www.swrcb.ca.gov>

Refer to:340:EM:5645

October 29, 1999

To: [Enclosed Mailing List](#)

### STATE WATER RESOURCES CONTROL BOARD DECISION 1635

The purpose of this letter is to advise the parties that the State Water Resources Control Board (SWRCB) received no timely objections to El Dorado County Water Agency's (EDCWA) request to introduce the final certified Environmental Impact Report (EIR) relating to the Federal Energy Regulatory Commission (FERC) Project 184 into the SWRCB Decision 1635 hearing record.

The Division of Water Rights (Division) advised the parties, in its September 15, 1999, letter responding to EDCWA's request, that the EIR would be admitted into evidence without holding a hearing, unless timely objections were received by September 30, 1999. Having received no timely objections, the EIR is hereby admitted into evidence. The SWRCB will proceed to consider appropriate amendments to Decision 1635 based on the existing augmented administrative record, the points and authorities in the petitions for reconsideration of Decision 1635, and the response to the petitions filed jointly by EDCWA and El Dorado Irrigation District.

The United States Bureau of Reclamation (USBR) and Pacific Gas and Electric Company (PG&E) submitted letters dated September 28, 1999, and September 30, 1999, which were received on October 1, 1999, and October 5, 1999, respectively. The USBR's and PG&E's letters were received after the September 30, 1990, deadline, and were not accompanied by a statement of reasons. Stephan C. Volker, presently with the law firm of Brecher & Volker, submitted an objection dated October 15, 1999, on

behalf of his clients, League to Save the Sierra Lakes, et al. [\(1\)](#)

None of the letters will be accepted as timely objections. The letters do, however, call for clarification concerning how the SWRCB will treat the EIR. In their letters, the USBR and PG&E stated that they did not object to admitting the EIR into evidence, provided that the fact that the USBR and PG&E did not object was not construed as an admission that the facts and legal conclusions contained in the EIR are true or accurate. The USBR also stated that it did not object to the admission of the EIR "solely to confirm the existence of that document."

As is the case with any evidence, the fact that the EIR has been admitted into the record without objection does not mean that the facts or legal conclusions contained in the EIR must be accepted as true, or entitled to any particular weight. Accordingly, the SWRCB will not consider the USBR or PG&E to have admitted that the facts and conclusions contained in the EIR are accurate. The SWRCB will, however, consider the USBR and PG&E (along with the other parties to this proceeding) to have waived their rights to cross-examine witnesses or introduce new evidence concerning the reliability of the EIR.

In addition, the USBR's implication that the SWRCB may consider the EIR only for the purpose of confirming the EIR's existence is not well taken. Contrary to the USBR's implication, the California Environmental Quality Act (CEQA) requires the SWRCB, as a responsible agency, to consider the EIR prior to taking final action in this proceeding. (Cal. Code Regs., tit. 14, § 15096, subd. (a).) The SWRCB must also consider any feasible alternative or mitigation measures within the scope of its responsibility that would lessen or avoid any significant adverse effect on the environment that is identified in the EIR, and, if necessary, make a statement of overriding considerations. (Cal. Code Regs., tit. 14, §§ 15093, 15096, subds. (g), (h).)

In its letter, the League to Save Sierra Lakes, et al., objected to the inclusion of the EIR in the record on the grounds, among others, that litigation is pending challenging the adequacy of the EIR for purposes of CEQA. This objection fails to take into account the fact that the SWRCB is required, as a responsible agency, to assume that the EIR is adequate notwithstanding a legal challenge. (Pub. Resources Code, § 21167.3, subdivision (b).) The SWRCB must approve or disapprove the project in accordance with statutory time lines. Project approval constitutes permission to proceed with the project at the applicant's risk pending the outcome of the litigation.

If you have any questions or wish to discuss this matter further, please telephone Dana Differding of the Office of Chief Counsel at (916) 657-2086, or Ernest Mona of the Division of Water Rights Hearing Unit at (916) 657-1947.

Sincerely,

/s/ by Walt Pettit for

*Jim Stubchaer*

*Hearing Officer*

*Enclosure (10/25/99 mailing list)*

*(1) Mr. Volker's clients are: League to Save Sierra Lakes, Forty-Niner Council of the Boy Scouts of America, Plasse Homestead Homeowners' Association, Kit Carson Lodge, Caples Lake Resort, Kirkwood Meadows Public Utilities District, Northern Sierra Summer Homeowners' Association, East Silver Lake Improvement Association, South Silver Lake Homeowners' Association, Lake Kirkwood Association, Plasse's Resort, Alpine County, California Sportfishing Protection Alliance, Friends of the River, and El Dorado County Taxpayers for Quality Growth.*

*Mr. Volker stated that he did not receive the Division's September 15 notice until October 15, 1999, because the notice was not forwarded to his new address. The Division's notice was sent to Earthjustice Legal Defense Fund (previously known as Sierra Club Legal Defense Fund). The environmental law firm represented the League to Save Sierra Lakes, et al., in this proceeding. A separate copy of the notice was also sent to every one of Mr. Volker's clients, with the exception of Caples Lake Resort. Mr. Volker did not advise the Division of his change of address until October 15, 1999. In addition, the Division was not formally advised that legal representation of the League to Save Sierra Lakes, et al., had changed to the law firm of Brecher & Volker, until receipt of Mr. Volker's October 15, 1999 letter.*