

**YUBA COUNTY WATER AGENCY'S
REPLY BRIEF
FOR STATE WATER RESOURCES CONTROL BOARD'S
DECEMBER 5-6, 2007 HEARING ON
YUBA COUNTY WATER AGENCY'S CHANGE PETITIONS FOR
LOWER YUBA RIVER ACCORD**

1. Introduction

This reply brief responds to the arguments made in the closing briefs that the Cordua Irrigation District ("Cordua") and the Anglers Committee filed for this hearing. For the reasons discussed in this brief: (a) the SWRCB's order approving the petitions of the Yuba County Water Agency ("YCWA") should not include Cordua's proposed additional conditions; and (b) the Anglers Committee's arguments in opposition YCWA's petitions should be rejected.

2. Responses to Cordua Irrigation District Arguments

In its closing brief, Cordua's first argument is that the SWRCB's order on YCWA's Yuba Accord petitions should include the language regarding pages 110-111 of Revised Decision 1644 ("RD-1644") that is in the November 7, 2007 letter from Hearing Officer Baggett to Cordua's attorney. This language confirmed that nothing in RD-1644 establishes any limit on uses of water for waterfowl habitat or rice straw decomposition or mandates any reduction in these uses.

YCWA does not object to Cordua's request to have this confirming language included in the SWRCB's order. However, YCWA disagrees with Cordua's argument that this confirming language "must be included" in this order (Cordua Brief, p. 3, line 10). Cordua never has demonstrated that the issue of the amounts of water that are needed for waterfowl habitat or rice straw decomposition is relevant to any of the issues specified in the notices for the present hearing.

Cordua's second argument is that the SWRCB's order approving YCWA's Yuba Accord petitions should contain conditions: (1) suspending YCWA's water transfers if groundwater levels in the North Yuba Subbasin decline to the levels that occurred in this subbasin during the fall of

1991; and (2) suspending YCWA's water transfers if an ordinance is adopted that applies to the pumping of groundwater in Yuba County for transfers. Cordua argues that these conditions are necessary because: (a) "there is nothing in the Water Purchase Agreements, nor any mechanisms to require good judgment and discipline on the part of the YCWA, DWR and the State and Federal Contractors desirous of water," (b) "[w]ithout a firm 'do not exceed' figure . . . , the inevitable damage to local users seen in other basins will occur," and (c) "[w]ithout SWRCB oversight, the SWRCB will sentence Yuba County to the same regulatory purgatory" that allegedly has occurred in counties north and south of Yuba County. (Cordua Closing Brief, p. 4, lines 14-28.)

Cordua's arguments are incorrect. Exhibit 3 to the Water Purchase Agreement (exhs. YCWA-11 and YCWA-11a) contains a detailed groundwater monitoring plan, a detailed groundwater pumping operations plan, and a detailed third party impacts action plan. This exhibit 3 provides that, if the total amount of groundwater pumping that is determined to be acceptable under this plan is less than the amounts of groundwater-substitution water that otherwise would be provided for under the agreement, then YCWA will not pump the additional groundwater and instead either will use additional surface water to provide the remainder of the water or will defer its delivery of the remainder of the water to a subsequent year. (Exhs. YCWA-11, exh. 3, pp. 3-4; exh. YCWA-11a, pp. 59-60.) Section 11.C of the Water Purchase Agreement provides that YCWA will comply with this exhibit 3 when it delivers any groundwater-substitution water under the agreement, and sections 5.A.1, 6.A.1, 7.A.1 and 8.A.1 of the agreement all provide that YCWA's obligations to provide water to DWR under the Water Purchase Agreement are subject to section 11. YCWA and DWR therefore already have agreed to detailed measures to prevent the Water Purchase Agreement from having any unreasonable impacts on Yuba Basin groundwater.

Moreover, Mitigation Measures 6-1 and 6-2 on pages 6-8 to 6-13 of the Yuba Accord Final EIR/EIS (exh. YCWA-2) contain similar requirements, and YCWA's proposed order on its Yuba

Accord transfer petition contains a term that explicitly would require YCWA to comply with these measures. (See YCWA's Dec. 3, 2007 Written Opening Statement and YCWA's Dec. 31, 2007 Closing Brief, exh. E, p. 3, ¶ 8.)

Although the Water Purchase Agreement and the Final EIR were entered into evidence during the December 5 hearing, and although YCWA's filed its written opening statement (with this proposed order) before the December 5 hearing, Cordua's closing brief does not discuss these exhibits or this proposed order, and Cordua's closing brief does not demonstrate that these plans and measures are in any way inadequate.

Cordua also offers absolutely no support for its argument that SWRCB oversight is necessary to prevent "regulatory purgatory" in Yuba County, or for its argument that its proposed Condition 2 somehow would prevent this. Like Cordua's other arguments, these arguments are based solely on speculation and not on any substantial evidence.

As discussed on pages 2-10 through 2-12 of the Yuba Accord Draft EIR/EIS (exh. YCWA-1), YCWA adopted a Groundwater Management Plan in 2005 that includes provisions to protect the safe yield of the Yuba Groundwater Basin. Under this plan, DWR and YCWA monitor 15 existing and at least 8 new dedicated monitoring wells and approximately 50 production wells. (Exh. YCWA-1, p. 2-11.) Cordua has not submitted any evidence demonstrating that there are any deficiencies in YCWA's Groundwater Management Plan that would require Cordua's proposed terms.

Cordua's references to 1991 groundwater levels for the North Yuba Subbasin also are incorrect. As shown in Figure 6-13 on page 6-38 of the Yuba Accord Draft EIR/EIS (exh. YCWA-1), cumulative groundwater storage in the South Yuba Subbasin declined dramatically between 1961 and 1982 (because of substantial groundwater pumping), and then recovered by 1991 to the 1961 level and since then increased substantially more (because of surface-water deliveries and

corresponding reductions in groundwater pumping in this area). These historical storage amounts demonstrate that, if groundwater levels in the South Yuba Subbasin remain at or above 1991 levels, then no unreasonable impacts are likely to occur in this subbasin, so the use of 1991 levels in this subbasin as a trigger point for further actions by YCWA is appropriate.

As shown in Figure 6-16 on page 6-41 of the Draft EIR/EIS, the historical situation in the North Yuba Subbasin is very different. Relatively little groundwater pumping has occurred in this subbasin, and cumulative groundwater storage therefore has changed very little. Accordingly, there is no evidence that any unreasonable impacts will occur if groundwater levels in this subbasin drop to 1991 levels, and Cordua's proposed term that would suspend transfers whenever North Yuba Subbasin levels dropped to 1991 levels therefore is not appropriate.

For these reasons, the SWRCB should not include Cordua's proposed conditions in the SWRCB's order approving YCWA's Yuba Accord petitions. Cordua has not provided any substantial evidence demonstrating that these conditions are necessary or appropriate, Cordua has completely ignored the relevant evidence in the hearing record demonstrating that the Yuba Accord will not have any unreasonable groundwater impacts, and Cordua has ignored the terms in the Water Purchase Agreement and the mitigation measures in the Final EIR/EIS that YCWA already has committed to implement to monitor and protect Yuba Basin groundwater. All of the evidence in the hearing record demonstrates that these terms and measures will be sufficient to prevent any unreasonable impacts to groundwater and that additional terms are not necessary or appropriate.¹

¹Although Cordua's closing brief states that it will "restrict this Brief to the conditions in the North Subbasin" (Cordua Closing Brief, p. 4, line 13), its proposed conditions, as drafted, would apply to all YCWA water transfers, including surface-water transfers and groundwater-substitution transfers based on groundwater pumping from the South Yuba Subbasin. Because Cordua has not even made any arguments regarding surface-water transfers or groundwater-substitution transfers based on groundwater pumping from the South Yuba Subbasin, its proposed conditions are unreasonably overbroad and therefore should be rejected.

3. Responses to Anglers Committee Arguments

The following paragraphs respond to the primary arguments in the Anglers Committee's closing brief:

a. No amendment to YCWA's Federal Power Act ("FPA") license is necessary for the Yuba Accord water transfers. YCWA will continue to comply with all of the terms of its FPA license while implementing the Yuba Accord water transfers, and nothing in this license prohibits these transfers. As discussed in my November 1, 2007 letter for the Hearing Officer, section 27 of the FPA (16 U.S.C., § 821) prohibits the Federal Energy Regulatory Commission ("FERC") from directly regulating YCWA's transfers of Yuba Project water to the State Water Project ("SWP") and Central Valley Project ("CVP") for irrigation, municipal and other uses, and section 27 preserves the State's authority to regulate these transfers.

b. Because no amendment of YCWA's FPA license is needed for the Yuba Accord water transfers, Clean Water Act section 401 does not apply here. (See Clean Water Act, § 401(a)(1), 33 U.S.C., § 1341(a)(1).)

c. The potential effects of the Yuba Accord on fish in New Bullards Bar Reservoir, the lower Yuba River, the Feather River, the Sacramento River and the Delta are analyzed in detail in Chapter 10 of the Yuba Accord Draft EIR/EIS (exh. YCWA-1) and in Chapters 3 through 5 of the Final EIR/EIS (exh. YCWA-2). These analyses determined that, relative to the No Project, the Yuba Accord will not have any unreasonable effects on any of these fish. No contrary evidence was submitted during the SWRCB's December 5 hearing.

d. Compliance by YCWA, DWR and Reclamation with the federal Endangered Species Act ("ESA") has been, is being and will continue to be addressed in the ESA consultations by these agencies with the National Marine Fisheries Service and the Fish and Wildlife Service and in court orders regarding these consultations. Term 4 of YCWA's proposed order on the Yuba Accord water

transfer will explicitly provide that any re-diversions of Yuba Accord transfer water by the SWP or CVP will be subject to all biological opinions and court orders that have been or will be issued during or in connection with these consultations. (See YCWA's Written Opening Statement and YCWA Closing Brief, exh. E, p. 2.) Term 11 of this proposed order will explicitly provide that the order does not authorize any act that would result in the taking of any threatened or endangered species under the federal ESA, and that YCWA shall be responsible for meeting all requirements of the federal ESA. (*Id.*, pp. 3-4.) The SWRCB's order should not contain any additional terms regarding the federal ESA.

e. The potential effects of the Yuba Accord on recreation in New Bullards Bar Reservoir are analyzed in detail in Chapter 12 of the Yuba Accord Draft EIR/EIS (exh. YCWA-1). This analysis determined that, relative to the No Project, the Yuba Accord will not have any unreasonable effects on this recreation. No contrary evidence was submitted during the SWRCB's December 5 hearing.

f. The potential effects of the Yuba Accord on growth and related parameters in SVP and CVP export service areas are analyzed in detail in Chapter 18 of the Yuba Accord Draft EIR/EIS (exh. YCWA-1). This analysis determined that, relative to the No Project, the Yuba Accord will not have any unreasonable effects related to growth in these areas. No contrary evidence was submitted during the SWRCB's December 5 hearing.

g. The cumulative effects of the Yuba Accord and other projects in each resource category are discussed in Chapters 5 through 21 of the Draft EIR/EIS (exh. YCWA-1). No contrary evidence was submitted during the SWRCB's December 5 hearing.

For these reasons, the arguments in the Anglers Committee's closing brief are without merit and should be rejected.

4. Conclusion

For the reasons discussed in YCWA's written opening statement and closing brief and in this reply brief, the Yuba County Water Agency asks the State Water Resources Control Board to approve YCWA's petitions, and to issue an order that contains the provisions in the exhibits C, D and E that were attached to YCWA's written opening statement and to YCWA's closing brief, and YCWA asks the SWRCB not to include any additional terms or conditions in this order.

The SWRCB's order should not include Cordua Irrigation District's proposed conditions because Cordua has not demonstrated that its proposed conditions are necessary or appropriate. The Anglers Committee's arguments in opposition to YCWA's petitions should be rejected because they are not supported by the applicable laws or any substantial evidence.

Because the RD-1644 long-term instream-flow requirements are scheduled to go into effect on April 1, 2008, the SWRCB needs to adopt its final order approving these petitions with an effective date before the end of March 2008. To give interested parties sufficient time to review and comment on the SWRCB's draft order, we request that the draft order be circulated in early February, and that, if necessary, the SWRCB consider the draft order during its February 6 or February 20 workshop.

Dated: January 10, 2008

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