

DEPARTMENT OF WATER RESOURCES

1416 NINTH STREET, P.O. BOX 942836
SACRAMENTO, CA 94236-0001
(916) 653-5791



December 31, 2007

Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000
Attn: Ernest Mona
Via U.S. mail and electronic mail (emona@waterboards.ca.gov)

Subject: Yuba River Accord and Hearing on YCWA Change Petition

Dear Mr. Mona:

Please find enclosed 5 copies of the Department of Water Resources' Closing Brief for the Hearing on the Yuba County Water Agency Petitions for the Yuba River Accord. The Closing Brief has also been served via electronic mail on all the parties to the hearing as indicated on the attached Declaration of Service.

If you have any questions, please contact me at (916) 653-5613 or crothers@water.ca.gov.

Sincerely,

A handwritten signature in cursive script that reads "Cathy Crothers".

Cathy Crothers
Assistant Chief Staff Counsel

Enclosure

CALIFORNIA DEPARTMENT OF WATER RESOURCES
CLOSING BRIEF
FOR STATE WATER RESOURCES CONTROL BOARD
WATER RIGHTS HEARING
REGARDING YUBA COUNTY WATER AGENCY PETITIONS
TO REVISE WATER RIGHT DECISION 1644

1. Introduction

At the December 5, 2007, State Water Resources Control Board (SWRCB) water rights hearing on the Yuba County Water Agency's (YCWA) petitions, the Department of Water Resources (DWR) presented evidence supporting proposed changes to YCWA's water rights and Revised Decision 1644 (RD 1644). These changes will enable implementation of the Yuba River Accord (Yuba Accord) and resolution of long-standing issues over fishery flows on the lower Yuba River.

The Yuba Accord is a comprehensive negotiated solution involving multiple parties and agreements that allow for long-term implementation of effective programs to maintain and monitor flows on the lower Yuba River, conjunctive use of surface and ground water, and the purchase of water to improve water reliability for the State. The Yuba Accord links these programs through requirements in several agreements. DWR has a key role in the Yuba Accord through implementation of the water purchase agreement between DWR and YCWA. The water purchase agreement helps in financing the Yuba Accord, such as contributing funds for fish monitoring required under the Lower Yuba River Fishery Agreement between YCWA and the Department of Fish and Game (DFG). (See Reporter's Transcript (RT) of Dec. 5, 2007 hearing, p. 12, p. 47; and Exh YCWA-9, p. 2.) In addition, the water purchase agreement will fund monitoring of, and mitigation related to, groundwater pumping under the conjunctive use program of the Yuba Accord. (See Exh YCWA-11, pp. 19-20.) YCWA submitted to the SWRCB proposed conditions for revising its water rights and D-1644 that will allow implementation of these agreements and the Yuba Accord. The parties to these agreements participated in the YCWA hearing in support of the petitions and the Yuba Accord.

2. YCWA Proposed Conditions for its Water Right Permits and D-1644

Based on the evidence presented at the YCWA water right hearing, the SWRCB must determine whether to: (1) approve the change in YCWA's permits and D-1641 as proposed by YCWA relating to instream flows in the lower Yuba River, and (2) approve the long-term transfer of water to DWR and U.S. Bureau of Reclamation. Both issues require YCWA to show that such changes will not result in substantial injury to any legal user of water, and would not unreasonably affect fish, wildlife, or other instream beneficial uses. In addition, YCWA must

show that implementing the YCWA's petitioned changes to RD-1644 and the proposed Yuba Accord Fisheries Agreement provide a level of protection for fisheries resources in the Lower Yuba River during the term of the Yuba Accord Fisheries Agreement, that is equivalent to, or better than, that which is provided by RD-1644. Finally, YCWA must show that the proposed transfer would not unreasonably affect the overall economy of the area from where the water is being transferred. (See SWRCB Public Notices of Hearing, dated September 6, 2007 and October 1, 2007.)

The testimony and exhibits submitted during the hearing support the proposed changes to the YCWA water right permits and provide responses to the above noted hearing issues. YCWA evidence showed that the effects on fish and wildlife from the proposed changes and implementation of the Yuba Accord were evaluated in the Final Environmental Impact Report/Environmental Impact Statement (See RT 56-63, 97-102; Exh YCWA-1, p. 10-106 to 10-150; and Exh YCWA-2, p. 3-1 to 3-9.). This analysis found that the Yuba Accord would provide equivalent or improved conditions for all life stages of the fish evaluated on the lower Feather River and would not unreasonably affect fish in the lower Yuba, Feather River, Sacramento River, or the Delta. (*Id.*) Other testimony by YCWA showed that other water users would not be injured and that the funding from the Accord would provide economic benefits to farmers and the local economy. (RT p. 47, 51-56, 72-79; Exh YCWA-12, pp. 1,2,4, and 5; Exh YCWA-14.) DWR testimony showed that the transfer of water would be subject to existing regulatory and legal requirements protecting fish, the environment, and water users. (Exh DWR- 3 and Exh DWR-4.)

If the SWRCB approves YCWA's petitions, the YCWA has proposed terms that the SWRCB could adopt in a water right order for implementing the Yuba Accord. These proposed terms (or conditions) have been agreed to by the signatories of the Fisheries Agreement and are included in the Agreement (See YCWA Exh-9, pp. 6-7 and Exhibits 7, 8, and 9; and YCWA Opening Statement Exhibits C, D, and E.) The SWRCB has a duty of continuing supervision over the taking and use of appropriated water and an affirmative duty to protect public trust uses whenever feasible. (SWRCB Decision -1644, p. 21 (March 1, 2001, citing (National Audubon Society v. Superior Court, supra, 33 Cal.3d at 445-448 [189 Cal.Rptr. at 363-366].) In furtherance of the SWRCB continuing supervision over public trust uses, YCWA has proposed terms that the SWRCB may adopt that would require the transfer of water be subject to the Fishery Agreement with DFG and the continuing supervision by the SWRCB. (Exh YCWA-9, p. 6-7; and YCWA Opening Statement Exhibit E.)

YCWA has proposed in the order allowing the transfer of water to DWR a condition that the transfer is in accordance with the flow schedules contained in the Fisheries Agreement. (*Id.*) In addition, YCWA proposed, as a revision of D-1644, that if at any time the Fisheries Agreement terminates before a new long-term FERC license, then the instream flows of the Fisheries Agreement will be in

effect pursuant to RD-1644. (Exh YCWA-9, p. 7; YCWA opening statement Exhibit C, condition 3.c.) Thus, the proposed conditions enable the Yuba Accord to be implemented and assure continued maintenance of instream fish flows agreed to by DFG and is subject to continuing jurisdiction of the SWRCB.

In the past, the SWRCB has issued conditions in DWR water rights for diversions from the Feather River and its tributaries that require DWR to maintain instream flows required by agreements with DFG. In DWR's water right permits for diversions from the Feather River, the SWRCB has a condition that makes such diversions subject to the "Agreement and Stipulation concerning the Operation of the Oroville Division of the State Water Project." (See DWR permits number 16478, 16479, and 16480 on file with the SWRCB).¹ The agreement with DFG establishes flows for fishery purposes in the Feather River below the Thermalito Diversion Dam and Thermalito Afterbay in accordance with a specified schedule. (Id.) In DWR water right permit for diversions from Big Grizzly Creek, a tributary of the Middle Fork Feather River, the SWRCB requires that DWR provide minimum releases from the Grizzly Valley Reservoir for fish enhancement and recreation on Big Grizzly Creek as set forth in an agreement between DWR and Department of Fish and Game. (See DWR water right Permits 15254 and 15255 on file with the SWRCB).² The proposed conditions in by YCWA provides similar

¹ DWR water right Permits Number 16478, 16479, 16480 (Applications Number 5630, 14443 and 14444, respectively), conditions number 28 and 22 state: "This permit shall be subject to the 'Agreement and Stipulation concerning the Operation of the Oroville Division of the State Water Project' dated July 19, 1967, filed of Record as DWR Exhibit 120 in the Hearing on Reconsideration of Decision-1275 in the matter of applications 5629, etc., of the California Department of Water Resources. The State Water Resources Control Board Reserves Continuing jurisdiction over this permit for the purpose of formulating terms and conditions relative to flows to be maintained in the Delta for the protection of fish and wildlife." The 1967 agreement was superseded by the Agreement between DWR and DFG dated August 26, 1983 for updating the management for fish and wildlife in the Feather River, and which was filed with the SWRCB as required by the Agreement

² DWR water right Permits Number 15254 and 15255 (Application numbers 16950 and Application 21443) condition number 15 states: "Minimum downstream release in Big Grizzly Creek for recreation and fishery enhancement shall be made at the flow rates set forth in the agreement dated December 7, 1965, between the Department of Water Resources and the Department of Fish and Game. These releases shall be in addition to quantities of water released for diversion from Big Grizzly Creek pursuant to agreements between the Department of Water Resources and the water users. Any changes in the minimum downstream releases agreed to by the Department of Water Resources and the Department of Fish and Game shall not become effective until and unless approved by the State Water Rights Board."

terms by requiring the transfer of water be subject to flows required under the DFG Fisheries Agreement and if the agreement terminates, then the flows become a condition of RD-1644. (See Exh YCWA-9, p. 7; YCWA Opening Statement Exhibits C and E.)

The SWRCB has often encouraged parties to offer negotiated solutions to water right issues.³ In this case, as in prior hearings, the SWRCB should approve the YCWA petitions and the conditions proposed by YCWA that will resolve water right issues through implementation of the Yuba Accord agreements. These agreements have received support from multiple interests and they will provide the necessary protection of beneficial uses that are subject to SWRCB continuing jurisdiction.

3. Water Purchase Agreement between YCWA and DWR

The water purchase agreements between DWR and YCWA and between DWR and state and federal water agencies are necessary for implementing the Yuba Accord. On December 4, 2007, the DWR and the YCWA signed the "Agreement for the Long-Term Purchase of Water from Yuba County Water Agency by the Department of Water Resources" (Yuba Water Purchase Agreement) satisfying one of the requirements for implementing the Yuba Accord. On December 21, 2007, DWR executed agreements with two of its State Water Project water contractors and the San Luis & Delta-Mendota Water Authority in satisfaction of Section 3(6) of the Yuba Water Purchase Agreement, a requirement for enabling the Yuba Water Purchase Agreement and the Fishery Agreement to become effective. (See Exh YCWA-11, p. 8.)

The Yuba Water Purchase Agreement defines types of water as Components 1, 2, 3, and 4 Water. (See Exh YCWA-11, pp. 3-4.) The Components 2, 3, and 4 water that is purchased by DWR will supplement dry year water needs. Payment for this water will be by water agencies of the State Water Project and water users of the Central Valley Project who are members of the San Luis and Delta Mendota Water Authority that agree to participate in the dry year water program. The water will be moved though the Delta at times that are protective of at-risk fish species as we have done over the past 7 years for water transfers for the EWA and past dry year programs. (Exh DWR-3, and Exh DWR-4.)

The Water Purchase Agreement requires that Component 1 Water be used for the EWA. (Exh YCWA-11, p. 9.) If EWA terminates prior to termination of the Yuba Accord Water Purchase Agreement, the Water Purchase Agreement section 23.D. requires that the water will be used as follows:

³ For example, in 1998-1999, during Decision 1641 hearings for the Sacramento/San Joaquin Bay-Delta, the SWRCB heard evidence and accepted agreements among parties regarding flows and water quality issues as means to resolve complicated water right issues on the Mokelumne River, the Sacramento River, and San Joaquin River. (See SWRCB D-1641, pp. 12-48, 56-65.)

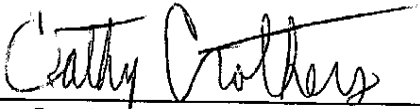
Component 1 Water remaining to be delivered under this Agreement will be managed annually, as follows: (a) Component 1 Water in any year will be used to enhance water supply reliability of the Delta export facilities by off-setting new mandatory restrictions imposed on the CVP and SWP, including those imposed by the federal court order in *NRDC v. Kempthorne*, or through a subsequent biological opinion for conservation or protection of fish, and (b) if any Component 1 Water remains after off-setting the restrictions set forth in subsection (a) above, then the remaining Component 1 Water will be used as determined by DWR in close coordination with the California Department of Fish and Game and consistent with the water supply reliability project requirements of the funding source from which this water was purchased (Chapter 7(d) of Proposition 50, California Water Code Section 79550(d)).

Therefore, DWR will continue to use the Component 1 Water pursuant to this Agreement and as described by the YCWA EIR/EIS (Exh YCWA-1, pp. 1-7, 1-8, 1-11; and Exh YCWA-2, pp. 3-1 to 3-8.)

4. Conclusion

The YCWA has worked diligently with all parties including State and federal fishery agencies and environmental groups to develop a set of fishery flows and monitoring programs that will protect beneficial uses and water users. (See RT pp. 48-49.) YCWA's EIR/EIS for the Accord and evidence submitted at the SWRCB hearing support the SWRCB approval of the YCWA petitions and the conditions proposed by YCWA for revising D-1644 and its water rights. The Yuba Accord provides for an effective use of surface and ground water and promotes good water management. For these reasons, the SWRCB should accept the petitions and conditions proposed by YCWA to enable the implementation of the Yuba Accord.

Respectfully submitted by



Cathy Crothers
Assistant Chief Counsel

12/31/07

Date

DECLARATION OF SERVICE BY MAIL

Pursuant to Title 8 CCR Section 355, I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my place of employment and business address is 1416 Ninth Street, Room 1118, Sacramento, California 95814.

On December 31, 2007 I served a true copy of the attached "Department of Water Resources Closing Brief for the State Water Resources Control Board Water Rights Hearing Regarding Yuba County Water Agency Petitions to Revise Water Right Decision 1644" to the attached list of Hearing Participants by electronic mail to the E-mail addresses shown therein. In addition, 5 copies were mailed to the SWRCB Division of Water Rights, P.O. Box 2000, Sacramento, California 95812-2000. There is delivery by the United States Mail at each of the places so addressed, or there is regular communication by mail between the place of mailing and each of the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 31, 2007 at Sacramento, California.



Lisa Carter

**PROPOSED LOWER YUBA RIVER ACCORD
(2007 PETITION FOR MODIFICATION AND LONG-TERM TRANSFER PETITION)
DECEMBER 5-6, 2007 HEARING
SERVICE LIST OF PARTICIPANTS
(October 12, 2007)**

**(PARTICIPANTS TO BE SERVED WITH WRITTEN TESTIMONY, EXHIBITS
AND OTHER DOCUMENTS.)**

**(Note: The participants whose E-mail addresses are listed below agreed to accept
electronic service, pursuant to the rules specified in the hearing notice.)**

Yuba County Water Agency
Alan B. Lilly
Bartkiewicz, Kronick & Shanahan
1011 22nd Street
Sacramento, CA 95816-4907
abl@bkslawfirm.com

Cordua Irrigation District
Paul Minasian
Minasian, Spruance, Meith, Soares and Sexton, LLP
P.O. Box 1679
Oroville, CA 95965
pminasian@minasianlaw.com

United States Bureau of Reclamation
Ray Sahlberg
2800 Cottage Way
Sacramento, CA 95825
rsahlberg@mp.usbr.gov
rcolella@mp.usbr.gov

California Department of Water Resources
Cathy Crothers
1416 Ninth Street, Room 1118-25
Sacramento, CA 95814
crothers@water.ca.gov
Westlands Water District

Jon D. Rubin
Diepenbrock Harrison
400 Capitol Mall, Suite 1800
Sacramento, CA 95814
jrubin@diepenbrock.com
The San Luis & Delta-Mendota
Water Authority

Jon D. Rubin
Diepenbrock Harrison
400 Capitol Mall, Suite 1800
Sacramento, CA 95814
jrubin@diepenbrock.com

State Water Contractors and
Kern County Water Agency
Clifford W. Schulz
Kronick, Moskovitz, Tiedemann & Girard
400 Capitol Mall, Suite 2700
Sacramento, CA 95814
cschulz@kmtg.com

Anglers Committee
Bob Baiocchi
P.O. Box 1790
Graeagle, CA 96103
rbaiocchi@gotsky.com