

July 1, 2003 SWRCB Workshop Item 12

Proposed Changes in Response to Comments on Draft Order Denying Petition to
Revise the Declaration of Fully Appropriated Streams to Allow Processing of
Applications to Appropriate Treated Groundwater Discharged into the Lower
American River

Proposed changes are noted in **bold** text.

Page 2, Third paragraph should be revised as follows:

“Based on the evidence in the record and as discussed below, the SWRCB finds that the Declaration should not be revised to allow for processing the water right application submitted by SCWC. This conclusion is based on a finding that the water at issue would not have been available for a new appropriation if the water had been discharged **and abandoned** into the American River at the time the decisions were issued that provide the basis for listing the River on the Declaration. Rather, the water would ~~be allocated in order of priority to serve to meet demands on the flow of the River and cure deficiencies of~~ surface water right holders in the Basin **that existed** at that time. ~~Thus, e~~Even though the petitioner established that a portion of the discharged water is water that was not tributary to the River during the relevant time period, SCWC did not demonstrate that this "new water" would have been **sufficient to satisfy existing demands and make surplus water** available for appropriation at that time. **Thus, petitioner has not shown that circumstances have changed to justify revising the fully appropriated status of the American River to allow processing new water right applications. In this Order, we do not grant or allocate any new water to any particular party. We simply apply the law pertaining to surface water rights to the factual situation before us to determine whether or not to revise the Declaration.** If SCWC amends the season of diversion in its application to exclude the period of July 1 through October 31, the SWRCB could accept SCWC's application for processing in accordance with the normally applicable procedures and requirements under the Water Code and applicable regulations. This order makes no finding regarding the relative priority of any rights that may be acquired under any amended SCWC application or other rights or applications for water rights associated with the treated groundwater discharged into the American River Basin.”

Page 5, Last paragraph should be revised as follows:

The findings required for this hearing on whether to revise the Fully Appropriated Streams Declaration focus on whether there are changed circumstances from when the stream was listed in the Declaration. Even though the SWRCB adopted the first Declaration in 1989, the relevant time period for our inquiry is 1958 through 1964, when the decisions were issued that provide the basis for the Declaration (hereinafter referred to as "the relevant time period" or "decisions supporting the Declaration"). Therefore, appropriate testimony for this hearing included limitations, including environmental terms and conditions, on water right holders that existed during the relevant time period. This type of testimony should be distinguished from testimony

regarding environmental limitations on existing water right holders imposed after the issuance of orders supporting the Declaration. **The purpose of allowing testimony on demands during the relevant time period is to include the information relevant in analyzing whether any new water adequately changes circumstances to justify a revision to the Declaration. Demands or limitations imposed after the relevant time period would be considered in a later proceeding if the Declaration were revised.**

Page 16, First paragraph (beginning on Page 15) under section 7.0 should be revised as follows:

“A major key issue for this hearing was, “Has adequate information been provided to demonstrate that there is a change in circumstances since the American River system was included in the FAS Declaration?” The “change in circumstances” refers to a change in circumstances from those considered in previous water right decisions determining that no water remains available for appropriation. (Cal. Code Regs., tit. 23, § 871 (b).) This consists of two elements. First, the petitioner must show whether the water at issue is “new water” -- water that would not have reached the stream at the time the orders were made that support the declaration that the American River is fully appropriated. This includes not only showing that there is a new discharge to the River, but also requires evidence that the pumped groundwater being discharged would not have been tributary to the River during the relevant time period. Second, the petitioner must show that if the water is new water, circumstances have changed so that it would have been available for appropriation by new users during the relevant time period. ~~Thus,~~ **appropriate** testimony for the hearing included limitations, including environmental terms and conditions, on water right holders that existed at the time the decisions were issued that support the Declaration. **This should be distinguished from the water availability analysis that would occur if the Declaration was revised and the application was accepted and processed. In processing water right applications, the SWRCB would analyze water availability under current limitations on existing water right holders. Equitable considerations and allocation of priority might be relevant in this later determination. The analysis conducted here simply reviews the data relied upon in the past orders to find whether any new water would change the determination that no water remains available for appropriation in the stream.**”