

**MINASIAN,  
SPRUANCE, BABER,  
MEITH, SOARES &  
SEXTON, LLP**

A T T O R N E Y S  
A Partnership Including Professional Corporations

1681 Bird Street  
P.O. Box 1679  
Oroville, CA 95965-1679

Writer's E-MAIL: [jmeith@minasianlaw.com](mailto:jmeith@minasianlaw.com)

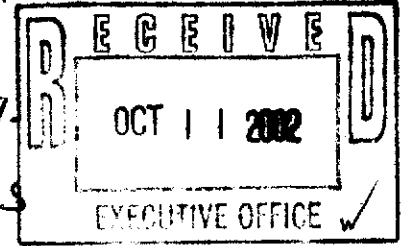
File Copy App 11051 etal #049

PAUL R. MINASIAN, INC.  
WILLIAM H. SPRUANCE, INC.  
WILLIAM H. BABER, III, INC.  
JEFFREY A. MEITH  
M. ANTHONY SOARES  
MICHAEL V. SEXTON

TELEPHONE:  
(530) 533-2885  
FACSIMILE:  
(530) 533-0197

LISA A. GRIGG

Item # 14  
Oct. 17 Bd Mtg.  
cys: Board  
Members  
mm



October 10, 2002

via email to: CC, HMS,  
CMW, EMLOCO, DWR-(DEB,  
VAN, KONA)

**VIA CALIFORNIA OVERNIGHT**

Arthur G. Baggett, Jr., Chairman  
State Water Resources Control Board  
1001 I Street  
Sacramento, California 95814

Dear Chairman Baggett:

In accordance with your letter of October 9, 2002, and my secretary's telephone conversation with Maureen Marche, Oroville-Wyandotte Irrigation District herewith submits its written comments in response to the Draft Order dated September 23, 2002 issued in the matter of the "Petitions to Change Water Right Permits Held by Oroville-Wyandotte Irrigation District and Jointly of Permits Held by Oroville-Wyandotte Irrigation District and Yuba County Water District. Copies of these comments are also being mailed this date to the parties on the Board's Hearing Mailing List.

Very truly yours,

MINASIAN, SPRUANCE, BABER,  
MEITH, SOARES & SEXTON, LLP

By   
JEFFREY A. MEITH

JAM/jg

Enclosure

cc: Board's Hearing Mailing List

1  
2 **STATE OF CALIFORNIA**  
3 **STATE WATER RESOURCES CONTROL BOARD**  
4

5 **In the Matter of:**

6 **Petition to Change Place of Use**  
7 **and Purpose of Use For Water Right** )  
8 **Permits 1267, 1268, 1271, 2492 of** )  
9 **Oroville-Wyandotte Irrigation District** )  
10 **(OWID) And Joint Water Right** )  
11 **Permits 11516 and 11518 of OWID and** )  
12 **Yuba County Water District (YCWD)** )  
13 **And Petitions for Extension of Time** )  
14 **For Water Right Permits 11516 and 11518** )  
15 **of OWID and YCWD** )

**OROVILLE-WYANDOTTE**  
**IRRIGATION DISTRICT'S**  
**WRITTEN COMMENTS ON**  
**DRAFT ORDER DATED**  
**SEPTEMBER 23, 2002**

16  
17  
18  
19  
20  
21  
22 **MINASIAN, SPRUANCE, BABER,**  
23 **MEITH, SOARES & SEXTON, LLP**  
24 **ATTORNEYS AT LAW**  
25 **JEFFREY A. MEITH**  
26 **1681 Bird Street**  
27 **Post Office Box 1679**  
28 **Oroville, California 95965**  
**(530) 533-2885**

**Attorneys for:**  
**OROVILLE-WYANDOTTE**  
**IRRIGATION DISTRICT**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12

**WRITTEN COMMENTS OF  
OROVILLE-WYANDOTTE IRRIGATION DISTRICT  
ON DRAFT ORDER REGARDING PETITIONS FOR CHANGE  
AND EXTENSION OF TIME FILED BY  
OROVILLE-WYANDOTTE IRRIGATION DISTRICT (OWID)  
AND YUBA COUNTY WATER DISTRICT (YCWD) ON  
PERMITS 1267, 1268, AND 1271**

13  
14  
15  
16  
17  
18  
19  
20

Oroville-Wyandotte Irrigation District, petitioner and protestant in these proceedings, herewith submits its written comments on the Draft Order scheduled for consideration by the Water Resources Control Board on October 17, 2002. Because it is not clear if earlier comments and a letter requesting additional time are part of the record of these proceedings, they are being resubmitted herewith.

21  
22  
23  
24

**REQUEST FOR ADDITIONAL TIME FOR CONFERENCE**

25  
26  
27  
28

By letter dated October 8, 2002 (Exhibit "A" hereto), Oroville-Wyandotte Irrigation District submitted, with the concurrence of all parties who participated in these proceedings, a request for further time in order to convene a staff conference to attempt to clarify and resolve certain questions and issues raised by the Draft Order. OWID has been advised by the Chairman that said request must be renewed at the oral hearing scheduled for October 17, 2002. Oroville-Wyandotte, therefore, reiterates its request for a postponement of the matter and the convening of a conference for the reasons set forth in Exhibit "A."

29  
30  
31  
32

**WORKSHOP COMMENTS**

33  
34  
35  
36

OWID is also submitting as Exhibit "B" the written comments submitted at the last Workshop. These comments remain pertinent.

37  
38  
39  
40

**SPECIFICATION OF ERRORS IN PROPOSED DECISION**

41  
42  
43  
44

In the event the Board chooses not to grant additional time for a convening of all interested parties to resolve these issues, OWID herewith submits its specification of errors of the proposed decision:

- 45  
46  
47  
48
1. The Order purports to grant the Board authority to modify and restrict the 1959

1 OWID/YCWD Agreement without appropriate notice and opportunity to be heard and without  
2 substantial evidence of record in support of said conclusions.

3 2. The draft Order's denial of extension of the jointly owned Permits based on Petitioner's  
4 non compliance with CEQA is not required by law, nor the facts of the proceeding.

5 3. The Order prejudices the license quantity of the jointly held permits without notice and  
6 an opportunity to be heard.

7 4. The draft order abrogates a settlement, duly entered into by the YCWD and OWID in  
8 accordance with D 907, which settlement is the basis of the joint water rights in these proceedings.  
9 Said action is taken without notice, without appropriate evidentiary support and without proper  
10 findings of fact.

### 11 SUMMARY OF ARGUMENT

12 Any order issued in this proceeding must be based on the facts of record. The procedure  
13 employed, and the draft Order of the Board, is adjudicatory in nature, in that it substantially  
14 effects, and in some cases modifies and restricts, the water rights of Petitioner and Protestant  
15 OWID.

16 Section 11425.10 of the Government Code of the State of California provides as follows:

17 "The agency shall give the person to which the agency action is  
18 directed notice and an opportunity to be heard, including the  
opportunity to present and rebut evidence."

19 In this proceeding, no evidence was introduced in the record by any party, including Staff which  
20 supports a determination that the 1959 OWID/YCWD Settlement Agreement approved by this  
21 Board's predecessor, and to which the permits issued in this proceeding were subordinated, should  
22 be restricted and/or otherwise limited by giving this Board adjudicative authority, via the permits,  
23 over the Agreement. That is what Ordering Paragraph 6 purports to do.

24 The Notice of Hearing in this proceeding asked, in one line, whether the "water supply  
25 agreement between OWID and YCWD should be deleted from the Permits 11516 and 11518. No  
26 party submitted any evidence, recommendation, nor support for such a remarkable proposition, nor  
27 could they, given Decision 907's order making the permits subject to the agreement. No party in  
28 this proceeding is suggesting it should be otherwise and indeed no party is recommending that the

1 contract be terminated. The Board, nevertheless, purports to make an order (Ordering Paragraph  
2 6) finding that the terms and provisions of the permits will be subject to further consideration  
3 and/or modification by the Board as necessary to resolve contractual conflicts. The potential  
4 scope of that paragraph is unlimited. Said Order, without benefit of evidence, is arbitrary and  
5 capricious, and not justified by the record in this proceeding.

#### 6 **THE DENIAL OF THE EXTENSIONS UNDER CEQA**

7 The draft Order attempts to impose upon OWID and YCWD an obligation to prepare  
8 CEQA documentation as lead agencies on the applications for an extension of permit. The Order  
9 notes, correctly, that CEQA documentation was supplied to address the expansion of the permitted  
10 area for Yuba City. The only other issue for the Board was the determination of the extension of  
11 the existing permits for the existing project, which was constructed and built prior to the  
12 commencement of CEQA.

13 It is possible that issues could arise where routine extension of an existing permit for an  
14 existing project may raise environmental issues that should be evaluated. Nevertheless, no such  
15 environmental issue was ever raised in this case. No party suggested that a routine extension to  
16 permit use of appropriate water under historic permits raises any environmental issues. OWID's  
17 comments submitted prior to the Workshop on this particular matter, dated July 11, 2002, argued  
18 that this extension, as with the Board's action in D-1642, was exempt. Without response or  
19 comment, the draft Order rejects that argument. Fundamental fairness entitles the parties to a  
20 response, why the facts in this case, far simpler to those which occurred in D-1642, require a  
21 determination that an extension requires review under CEQA, when just the opposite conclusion  
22 was approved at that time.

#### 23 **NO EVIDENCE OR POLICY SUPPORTS PREJUDGMENT OF THE AMOUNT** 24 **OF WATER TO BE DIVERTED UNDER THE JOINT PERMITS**

25 The extension of the jointly held permits until 2004 was requested by all parties and the  
26 Board's authorization of such extension is accepted. Nevertheless, the Board predetermines the  
27 outcome of future proceedings, and orders that the permits must go to license at that time, and that  
28 no further expansion or additional use of those permits will be allowed. The Hearing notice in

1 these proceedings gave no reasonable notice to the parties that the Board was considering the  
2 adoption of an order adjudicating their future beneficial use under these permits.

3 There is no finding that the District has violated the permits in any way nor any reason to  
4 rule, on the most meager of evidence, that future diversions under these permits cannot be  
5 expected.

6 There was no prior notification that issues of future demand, and load growth, in  
7 connection with these permits would be an issue in the proceedings. The Order makes conclusory  
8 statements about the gross quantities of water available under the permits far exceeding what could  
9 ever be used. We agree. Indeed, it far exceeds what is even available in the South Fork of the  
10 Feather River, including Slate Creek, but, that is beside the point. The point is what is the  
11 reasonable anticipated use, and on that issue the order is silent. It assumes no growth will occur.

12 This Order represents a departure from past policy, and from statute. The Board has long  
13 recognized that the primary function of the project during its initial term was power generation,  
14 with consumption to occur as development occurred and in connection with future prospect that  
15 continued power generation would pay off the capital facilities of the project. The Board gave no  
16 notification that it would reconsider that policy. The Board demanded no evidence with respect to  
17 it, and the Board has not provided any opportunity to address realistic projections of growth and  
18 demand for additional water within the combined service areas. We submit that if the Board is  
19 now adopting the policy that all permits will be denied above the amount which is actually used  
20 during the permitted terms, then the Board owes all the parties to this proceeding, and all  
21 permitted water users in the state, an opportunity to present evidence on such a fundamental issue.

22 If the Board is concerned about the excess amounts of gross supply that could be available  
23 under the permits, then that is an issue that could be addressed, again through a properly noticed  
24 proceeding. In fact, it could be addressed in the petitions for extension in 2004. However, this  
25 Decision goes farther. This Decision now purports to essentially say that permits will be capped,  
26 and no further diversions will be allowed thereunder, even if the facts regarding estimated growth  
27 justifying further quantities under those permits were to occur. The Order prejudices the  
28 proceedings in 2004, without notice and an opportunity to be heard.

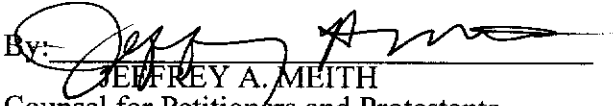
1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CONCLUSION**

Attached as Exhibit "B" are Oroville-Wyandotte Irrigation District's comments that were delivered in the last Workshop to two members of the Board as well as to members of the Staff who were present at that time. OWID submits that the draft Order should contain some response to what it considered substantive and meritorious arguments that were raised at that time. However, the Draft Order is devoid of any response. Surely the Board, guided as it is by the Administrative Procedure Act, must recognize that parties should have an opportunity to present evidence, to rebut evidence, and to cross examine evidence, addressed to specific points for which notice is given. In this case, with respect to the reservation of authority to effectively modify the 1959 Agreement; to the departure from the provisions of Decision 907; to the capping of the existing jointly held water right permits; and to the applicability of CEQA to routine extensions of pre-CEQA project water permits, the parties were not noticed, nor was any evidence submitted by any party to support the conclusions reached by the Board. OWID has requested previously that this matter be subject to further conference with all parties, to try to address these points. Perhaps the issues are less substantive than they appear, and reasonable agreement can be reached.

We respectfully reiterate that request. However, should the Board not choose to do so, we submit that the Order is without substantial support in the record, and it is made in a manner which adversely affects the rights of OWID without proper notice and an opportunity to be heard. Moreover, the Order reflects findings and conclusions which are not supported by evidence of record of any party to this proceeding and, in this regard.

Dated: October 10, 2002

Respectfully submitted,  
  
MINASIAN, SPRUANCE, BABER,  
MEITH, SOARES & SEXTON, LLP  
  
By:   
JEFFREY A. MEITH  
Counsel for Petitioners and Protestants  
OROVILLE-WYANDOTTE IRRIGATION DISTRICT

**DECLARATION OF SERVICE**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

I, Judith A. Gallagher, declare:

I am employed by the law firm of MINASIAN, SPRUANCE, BABER, MEITH, SOARES & SEXTON, LLP. My business address is 1681 Bird Street, Post Office Box 1679, Oroville, California 95965-1679. I am over the age of 18 years and not a party to this action.

On October 10, 2002, I served the following document(s) set forth below in the manner indicated:

( ) **Service By Mail (Deposit)**: By enclosing a copy in an envelope addressed as shown below and depositing the sealed envelope with the United States Postal Service with the postage fully prepaid.

(X) **Service By Mail (Collection)**: By enclosing a copy in an envelope addressed as shown below and placing the envelope for collection and mailing on October 10, 2002, at Oroville, California, following our ordinary business practices. I am readily familiar with this firm's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

( ) **Other**: By enclosing a copy in an envelope addressed as shown below and placing the envelope for collection with the nearest **FEDERAL EXPRESS** depository on \_\_\_\_\_ at Oroville, California.

**Document(s) Served**: Oroville-Wyandotte Irrigation District's Written Comments On Draft Order Dated September 23, 2002.

**Person(s) Served**:

Yuba County Water District  
c/o Mr. Alan B. Lilly  
Bartkiewicz, Kronick & Shanahan  
1011 22nd Street, Suite 100  
Sacramento, California 95816

Mr. Dale Storey  
P. O. Box 425  
Oregon House, California 95692

Yuba City  
c/o Mr. Daniel F. Gallery  
926 J Street, Suite 505  
Sacramento, California 95814

Cora Peterson  
Dobbins/Oregon House Fire Protection Dist.  
P. O. Box 164  
Oregon House, California 95962

California Sportfishing Protection Alliance  
Mr. Jerry Mensch  
2553 Stonehaven Drive  
Sacramento, California 95827

Greg Compton, Chairman  
Dobbins/Oregon House Action Committee  
P. O. Box 703  
Oregon House, California 95962

I, DECLARE under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this Declaration of Service was executed on October 10, 2002 at Oroville, California.

  
JUDITH A. GALLAGHER



MINASIAN,  
SPRUANCE, BABER,  
MEITH, SOARES &  
SEXTON, LLP

PAUL R. MINASIAN, INC.  
WILLIAM H. SPRUANCE, INC.  
WILLIAM H. BABER, III, INC.  
JEFFREY A. MEITH  
M. ANTHONY SOARES  
MICHAEL V. SEXTON

TELEPHONE:  
(530) 533-2885

FACSIMILE:  
(530) 533-0197

LISA A. GRIGG

A T T O R N E Y S  
A Partnership Including Professional Corporations

1681 Bird Street  
P.O. Box 1679  
Oroville, CA 95965-1679

Writer's E-MAIL: jmeith@minasianlaw.com

October 8, 2002

**VIA FACSIMILE and CALIFORNIA OVERNIGHT**

Arthur G. Baggett, Chairman  
State Water Resources Control Board  
1001 I Street  
Sacramento, California 95814

Re: Request for Additional Time and for Order Convening of Conference of Parties and Staff Regarding Clarification of Draft Order WRO 2002 - . . . . In the Matter of Petition to Change Place and Use et seq., Oroville-Wyandotte Irrigation District and Yuba County Water District.

Dear Chairman Baggett:

This letter is being written on behalf of Oroville-Wyandotte Irrigation District (OWID) and with the concurrence of Yuba County Water District (YCWD) and the City of Yuba City (Yuba City). I am authorized to state those parties support this request and letters of concurrence will follow.

Regarding the foregoing described draft order, which is scheduled for Board consideration on the 17<sup>th</sup> of October, we respectfully request the Board direct that the proposed order be held in abeyance until the first meeting in December or sixty (60) days, and that the Board direct its staff to convene a conference of the parties, including Staff and the Hearing Officer, to discuss the order and to clarify important questions about its implementation.

Arthur G. Baggett, Chairman

October 8, 2002

Page 2

This matter has been pending for over 20 years, and we suggest that 2 months will not prejudice any party. Indeed, the conference we request will assist all parties, including Staff, in minimizing the present questions and ambiguities within the draft order that are significant and could potentially lead to further litigation. Our mutual goal is to eliminate questions, reduce ambiguity, and hopefully, reduce the risk of litigation.

The order imposes requirements that are unique to this proceeding because of the manner in which the contract between OWID and YCWD is woven into the fabric of the water rights. Unless clarified, the questions will only force the parties to protect their interests by contesting the Board's final order in order to avoid future contentions that they have waived their rights. We submit that further litigation is not the optimal way to answer questions and to resolve disputes. We respect the fact that the draft order has chosen not to adopt most of the recommended actions by the parties suggested at the previous workshop. At this point, however, a conference may, potentially, eliminate the prospect of having to litigate issues that could be resolved by agreement, and still maintain consistency with the order as drafted. Since those issues are unprecedented in other proceedings, we believe a meeting to discuss them will benefit all parties, and the Board.

The issues that we would like to discuss are as follows:

1. What will be the criteria for the operating plan for transfer of water to Yuba City? The order is not clear in this regard. The nature of the operating plan will determine whether an additional agreement between OWID and YCWD is necessary or feasible. Clarification is needed on the elements of the plan discussed, but not defined, in the order. Of particular concern, is the question of whether the operating plan can show that the Project water going through Kelly Ridge for power generation is water that can be re-diverted by Yuba City for consumptive use under Permit 11518. If the order means that the water re-diverted by Yuba City must be available, under the Permit, over and above or distinct from the water being used to generate power under the hydro licenses, a very difficult and perhaps impossible situation is presented.

2. The parties need to discuss the CEQA documentation related to the extension of the permits until 2004. We understand that OWID and YCWD will be the lead agencies under the draft order, but we would like some clarification of what study elements the Board, in its order, deems to be necessary.

Arthur G. Baggett, Chairman

October 8, 2002

Page 3

3. We would like to discuss the relationship of the draft order to any petitions to extend the joint permits, and/or the OWID separate permits, in 2004. The draft order raises issues regarding growth in demand for domestic and municipal purveyors to be addressed in those proceedings that should be clarified now.

4. We would like to discuss the draft order's determination regarding the existing contract between the Districts, which is an element of the water rights, because the import of Ordering Paragraph No. 6, and its impact on the 1959 OWID/YCWD Agreement, is not clear.

5. We would like to review with the staff the accurate quantification of the rights held by the parties. Such quantification was not part of the hearing record (the only discussion was of maximum diversions at maximum rates, a number all agree is not attainable). It is important to ensure the parties are talking about the same quantities in order to determine the potential impact of the order.

6. YCWD and OWID have initiated serious discussions to merge themselves into a single entity. The future of those negotiations cannot be predicted, but the impact of the order on the reconstituted entity needs to be discussed.

7. The Parties desire to meet with Staff to discuss the Water Conservation Plan required by Paragraph 3, and its relationship to existing water conservation measures undertaken by OWID.

8. Although not as substantively crucial as the foregoing points, the undersigned will be out of the country on October 17, 2002, returning on the 23<sup>rd</sup>, and therefore is unable to attend the Board meeting on this matter in any event.

It is possible these issues are clear to the Board, but they are not clear to the parties and the draft order raises many questions of implementation. Unfortunately, the timing rules for challenges of Board decisions do not allow adequate time nor processes to resolve these issues before appeals must be filed. If we can mutually agree on these points, it may well be that the draft order can be adopted without the need for further proceedings, including reconsideration, and litigation. We do not believe such judicial proceedings are the best way to solve issues of interpretation and clarification.

Arthur G. Baggett, Chairman

October 8, 2002

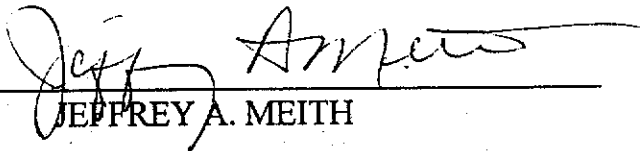
Page 4

A noticed meeting, at the Board's offices with Staff, the Hearing Officer, and representatives of all parties who have appeared in the hearings, will not raise any problems regarding the Ex Parte Rules, and is fully in accord with your goals of expediting proceedings and avoiding needless litigation.

Thank you for your consideration.

Very truly yours,

MINASIAN, SPRUANCE, BABER,  
MEITH, SOARES & SEXTON, LLP

By   
JEFFREY A. MEITH

JAM/jg

cc: Oroville-Wyandotte Irrigation District (via facsimile and surface mail)  
Yuba County Water District (via facsimile and surface mail)  
Craig Wilson, Chief Counsel (SWRCB) (via facsimile and California Overnight)

**STATE OF CALIFORNIA**  
**STATE WATER RESOURCES CONTROL BOARD**  
**PETITION FOR CHANGE OF USE AND PURPOSE OF USE**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

In the Matter of: )  
 )  
 )  
 )  
 )  
 )  
 )  
 )  
 )  
 )

Petition to Change Place of Use and  
 Purpose of Use For Water Right  
 Permits 1267, 1268, 1271, 2492 of  
 Oroville-Wyandotte Irrigation District  
 (OWID) and Joint Water Right Permits  
 11516 and 11518 of OWID and  
 Yuba County Water District (YCWD)  
 and Petitions for Extension of Time  
 For Water Right Permits 11516 and  
 11518 of OWID and YCWD

PETITIONER AND PROTESTANT  
 OROVILLE-WYANDOTTE  
 IRRIGATION DISTRICT'S  
 COMMENTS AND PROPOSED  
 CHANGES TO THE SWRCB  
 DRAFT ORDER OF MAY 6, 2002.

MINASIAN, SPRUANCE, BABER,  
 MEITH, SOARES & SEXTON, LLP  
 ATTORNEYS AT LAW  
 JEFFREY A. MEITH  
 1681 Bird Street  
 Post Office Box 1679  
 Oroville, California 95965  
 (530) 533-2885

Attorneys for:  
 OROVILLE-WYANDOTTE  
 IRRIGATION DISTRICT

1 born out of a bitter competitive contest for the development of the resources for the South Fork Power  
2 Project between YCWD, in conjunction with Yuba County, and OWID.

3       Regardless, such disagreements and disputes do not empower this Board to establish itself as  
4 in interpreter of the agreement, nor does it establish in the Board the authority to modify the permit  
5 terms as its way of interpreting disputes that may arise under the agreement. Decision 907 made the  
6 permits issued subject to the agreement. The Draft Decision attempts to stand that conclusion on its  
7 head and make the agreement subject to the permits. Such administrative rewriting of the 1959  
8 Agreement is unlawful. It is also unnecessary to the proper administration by the Board of the water  
9 rights.

10       There is no opposition to the extension of the permits, so why deny the extension request?  
11 The permits themselves are key components of and are subject to the 1959 Agreement (see D-907).  
12 The Draft Decision suggests imposing a draconian and unjustified revocation of all or a portion of  
13 the permits of OWID, and YCWD, based on the quantity of permitted water used by 1975, and the  
14 "indicated" lack of due diligence to use all the permitted supply consumptively.

15       The Draft Decision ignores the reasons the joint permits were created in the first place. The  
16 Draft Decision forgets the underlying factual premise that brought about Decision 858 and Decision  
17 907 in approving the South Fork Project. Additionally, the Draft Decision seeks to cap the Districts'  
18 combined use of water under the permits as of 1975, a punitive action not justified by the record in  
19 these proceedings. The Draft Decision makes such a determination, and reaches such conclusions,  
20 without the benefit of proper notice to the parties, and without a shred of evidence supporting such  
21 conclusion and without any balancing of needs of the appropriators with the public interest.

22       Finally, the Draft Decision ignores substantial evidence of due diligence. The South Fork  
23 Project has been fully built by OWID for purposes of the diversion, storage and use of water. The  
24 permits required for the operation of the project for power purposes have already been licensed. The  
25 same water which has been developed, and which is being diverted to the full level of those licenses,  
26 will continue to be diverted and transported through the system. OWID has made substantial  
27 improvements to its system, as has YCWD, and more are being considered. The only thing the draft  
28 has done is limit the ability of OWID and YCWD to use a portion of the developed water supply for

1 consumptive water needs that the Project was intended to serve.

2 We submit that it is premature and inappropriate for the Board to make such a major decision  
3 modifying the original conclusions for the development of the South Fork Project, without benefit  
4 of notice, evaluation and facts.

5  
6 **ARGUMENT**

7 **THE DRAFT DECISION ERRS IN ATTEMPTING TO ESTABLISH IN THE BOARD THE**  
8 **ABILITY TO ADJUDICATE DIFFERENCES BETWEEN THE PARTIES REGARDING**  
9 **THE 1959 AGREEMENT.**

10 This project has its genesis in a contest between OWID and YCWD over the development of  
11 mutually exclusive projects. D-858 found such mutual exclusivity, and also found that it was not in  
12 the public interest to permit one or the other district to develop a project which by necessity would  
13 deprive the other of benefits of their own individually planned project. D-858 found the project  
14 beneficial, and outlined to the parties how it should be built. That decision ordered the parties to meet  
15 and negotiate a resolution or face denial of all requested permits. The Agreement of 1959 took  
16 approximately two years to negotiate. It was incorporated into the permits for the project. Indeed,  
17 the permits were made "subject to" such agreement. (See D-907.) Bonds were sold, and the South  
18 Fork Project was built, in full compliance with the permits.

19 It is not surprising that parties to such a complex agreement, which controls their individual  
20 water supplies and operations, will have disagreements. Evidence of that is in this record.  
21 Regardless, those disagreements have not adversely affected the public's interest protected by the  
22 Board, nor the water resources which have been developed by the Project. Nor has there been harm  
23 to any water right holder as a result of said disagreements. No other appropriators have been harmed  
24 as a result of the 1959 Agreement, nor as a result of the conflicts between OWID and YCWD.

25 There has been no evidence submitted that the inclusion of the 1959 Agreement as a  
26 governing criteria of the respective water rights in the Project is contrary to the interests protected by  
27 this Board, or to its jurisdiction. There is not a shred of evidence, nor is there any precedent, that  
28 allows the Board to assume to itself power to revise an agreement which it ordered the parties to  
negotiate in 1956. Squabbles over the contract can be resolved in negotiations, or in court. This

1 Board can simply deny any unilateral request to modify the agreement and effectively force the  
2 parties to negotiate changes. It should not reserve to itself the power to make changes.

3 The mere existence of disagreements, without any evidence that they in any way effect the  
4 subject matter jurisdiction of this Board or its authority in connection with the permits, or its authority  
5 in connection with making decisions to protect the public interest in the permits, does not justify the  
6 remarkable attempt now being made to permit the Board to modify the contract and/or rewrite it.

### 7 **THE JOINT PERMITS SHOULD NOT BE RESTRICTED TO 1975**

8 The initial period of time to place the permitted supplies to consumptive beneficial use expired  
9 in 1975. This was the original term authorized in D-907. A request was made to extend these permits  
10 in 1980. As noted, there may be a number of reasons why processing of the extension request, routine  
11 at that time, did not continue and perhaps one were the ongoing Fish and Game investigations.  
12 Regardless, formal approval of the extension was not necessarily something that was pursued by the  
13 petitioners, nor for that matter was it actively pursued by the staff of the Board. The original permits,  
14 of course, remained in full force and effect. The delay occurred and all parties could reasonably  
15 expect that such delay would not be harmful to them in terms of developing the water resources of  
16 the project.

17 The Draft Decision, therefore, wrongly and without benefit of any evidence, attempts to  
18 retroactively restrict the parties water rights and retroactively reduce the permitted amounts below  
19 what has been used in the intervening period between 1975 and the date of issuance of the Draft  
20 Decision. The decision in this regard is precedent setting and without support in the record and  
21 should be denied. At a minimum, any licensing determinations must be made from the status quo  
22 position of the project as it exists today, not from a retrospective look back to 1975.

### 23 **THE DENIAL OF THE EXTENSION IS WRONG**

24 The Board has discretion to deny a petition for extension. We do not argue otherwise. OWID  
25 does argue that denial of the extension in this case is wrong, is an abuse of that discretion and is  
26 improperly ordered for the following reasons:  
27

- 28 1. Permit Nos. 11516 and 11518 are a key element of the 1959 Settlement Agreement for the



1 South Fork Project and the resolution of that dispute between YCWD and OWID. The Project, and  
2 that Agreement, contemplate jointly held permits for consumptive water use in order to permit full  
3 development of the project. They also contemplate the development of those consumptive uses over  
4 time, well beyond 1975. The record supporting D-858 and D-907 did not assume full consumptive  
5 use by 1975. It reflected the ultimate build out for both Districts. The jointly held permits were the  
6 bargained for exchange of the parties and a crucial element to ensure water supply security for both  
7 OWID and YCWD. The record reflects that OWID's solely held permits were at that time under  
8 challenge as to whether they had been diligently pursued.

9 For the Board to deny an extension, and to retroactively cap, as of 1975, the right of the parties  
10 to use the permitted supplies for consumptive use is in derogation of the underlying findings  
11 supporting the project- the development of a water supply to serve consumptive needs over the long  
12 term. The Draft Decision apparently assumes, without evidence, that the development of the water  
13 would be placed to full use by 1975; not a realistic notion under any scenario. Furthermore, the  
14 Board did not request evidence in this issue and no evidence was submitted in this case or in the  
15 original proceedings.

16 The Board may not deny an extension, which denial is a partial revocation of these permits,  
17 without a finding that such action is compelled by the public interest and without balancing the public  
18 interest with those of the permittees. As the Supreme Court has stated: "Hearing procedures and  
19 judicial review are established to assure that Board actions under these sections properly balance the  
20 right of the appropriator with the needs of the public." (*Environmental Defense Fund, Inc. v. East*  
21 *Bay Municipal Utility District* (1980) 26 Cal.3d 183-198)

22 In this case, no party submitted any testimony or exhibits which support partial revocation of  
23 the permits. No issue of public interest was raised in the notice. There is no evidence that revocation  
24 is necessary to protect the public interest and/or other appropriators. The parties, forced to go to  
25 license on these jointly held permits, with usage capped in 1975, are entitled to some notice, and  
26 evidence, and analysis, of why such action is necessary and appropriate in the public interest. In  
27 virtually every case where a denial or revocation has been authorized, the key factor is non  
28 construction of diversion facilities. That factor is not present here. The only issue is development

1 of demand.

2 Interestingly enough, the Board's own policy statements suggest the action here is not the  
3 norm. The Board's own water right instructional document, currently on the Board's web site, states  
4 as follows:

5 "The Permittee may petition for an extension. Unlike riparian rights,  
6 appropriative rights are quantified as the maximum amount that would  
7 ultimately be needed by the proposed project (or beneficial uses) for as long  
8 in time as the project is deemed reasonable and diligently pursued."

9 Admittedly, the development within OWID and YCWD has not occurred at a pace which was  
10 anticipated. However, that does not mean that the water rights which have been dedicated for the  
11 project, developed for the project, diverted and stored for the project, and set apart not only in the  
12 decisions of the Board, but in the 1959 Agreement, should suddenly, and retroactively, be capped  
13 when neither the Draft Decision nor the evidence points to a single reason why such a determination  
14 is required.

15 The Draft Decision ignores all the development work that has been done. All physical steps  
16 have reasonably, feasibly and diligently been taken for the use of the permitted supplies. The  
17 diversion and storage system is in place. The power plants which provide, ultimately, the financial  
18 tool which can drive the development are in place. Canals, reservoirs, and distribution systems for  
19 irrigation and domestic water have been installed and improved.

20 The slower than anticipated demand for water is not news. OWID has, routinely, advised the  
21 Board of the actual use of the project and noted that consumptive use of the water to be developed  
22 has been delayed by slow growth and also by the preeminent need of the project to generate power  
23 to pay off its bonds. In addition, the District has, routinely, submitted its annual statements of  
24 Permittee based on a cumulative application of all water used to all of the existing permits for the  
25 project, both solely held by OWID as well as those held jointly with YCWD.

26 OWID has diligently constructed the facilities required for the project. It continues to own,  
27 operate and maintain the hydroelectric system which not only produces the revenues necessary to  
28 satisfy the financial obligations of the project, but it also ensures the maintenance of existing facilities  
which bring the water down to the communities to be served. OWID, and YCWD, have also  
constructed state-of-the-art treatment plants, and OWID is continually engaged in improvements in

1 its distribution system. OWID has, recently, financed and completed construction of a \$6.5 million  
2 improvement and rehab project on its domestic water system, reducing leaks and lost water by  
3 approximately 98 percent.

4       Regarding the ditch system, it is by its nature a hillside ditch system operated in an area of  
5 subsurface fractured rock. Nevertheless, the District did not neglect to make improvements to the  
6 system. Since 1990, OWID has expended approximately \$2,000,000 on upgrades and improvements  
7 in its ditch system and has budgeted an annual average of \$150,000 for improvements. Many of the  
8 leaks and losses, referenced in the Draft Decision, occur at locations and/or in circumstances where  
9 the water is immediately being returned to the river course from whence it came and, therefore, there  
10 is no loss to other diverters.

11       The Draft Decision fails to acknowledge not only the history of the South Fork Project, as  
12 noted above, but also the Project's physical attributes. The Draft Decision purports to retroactively  
13 stop growth in consumptive use of any water which has already been developed by the project. Will  
14 such a decision stop diversion of those supplies? Answer: No. The hydro system will continue to  
15 divert, store and operate with the water rights in place.

16       Will the Draft Decision result in any change in water supplies and water flows? Answer: No.  
17 As noted above, those operations will continue.

18       Will the Draft Decision increase supplies available to other appropriators? Answer: No.  
19 Water not needed for consumptive use continues in the system into the Feather River and is available  
20 for diversion by lower priority users today.

21       The Draft Decision will certainly affect both Districts' ability to use the water under these  
22 rights for consumptive purposes. It will require expenditure of enormous sums of money for  
23 consultants and hearing time, which neither District has, to attempt to re-quantify the rights from the  
24 collective basis under which they have been quantified and reported to this Board for approximately  
25 forty (40) years.

26       The Draft Decision attempts to use the strawman of excessive water supply, measured in acre  
27 feet, to justify its conclusions. We all agree the calculated acre feet under the permits are not realistic.  
28 The water rights are properly expressed in terms of cfs, not acre feet. D-907, in authorizing the

1 permits, applied those diversion rates to both the consumptive as well as the nonconsumptive  
2 hydroelectric permits, but ensured that on a collective basis, all the diversions to storage as well as  
3 direct diversions, could not exceed the authorized flow for any individual use.

4 OWID will readily concede that the quantities of water, computed in acre feet, that might be  
5 computed exceeds the water supplies developed by the project and indeed exceed the water supplies  
6 available in the South Fork. However, such a fact is not significant in connection with any decision  
7 as to whether or not the permits must be revoked and licenses issued.

8 The decision also lumps in OWID's Palermo Canal water supply, ignoring the fact that such  
9 water is not available to most of the District's land.

10 **THE CONSUMPTIVE PERMITS SHOULD BE EXTENDED**  
11 **TO PRESERVE THE 1959 AGREEMENT**

12 The Draft Opinion loses sight of the circumstances that existed at the time D-907 was issued.  
13 D-907 represented a compromise, approving an agreement between YCWD and OWID. The dispute  
14 between the two districts divided the Districts and blocked the development of the project, clearly  
15 needed, for a period in excess of ten (10) years. The individual permits that the Districts sought for  
16 development of the project were under challenge, including OWID's historic permits (see D-858).  
17 New permits were acquired in order to facilitate the development of the Project, to allow the  
18 implementation of the settlement agreement, and to provide the necessary assurances for financing  
19 purposes. This was necessary so that bonds approved by the voters and issued for the project would  
20 be properly supported by current water rights.

21 Build-up of consumptive demand was the basis of the original authorization of the project.  
22 That fact was never of great concern to anyone, including the Board. It recognized that the primary  
23 early flows of the project were hydroelectric, and the development of the consumptive use of the  
24 project would take time and certainly far more than the ten (10) years which the Draft Decision now  
25 purports to give us.

26 Because of the longstanding nature of the dispute, and the recognition that the project was a  
27 beneficial project and should be developed, and the need to resolve the existing controversy, the  
28 Water Board (State Engineer) ordered the development of the project under these circumstances and

1 provided, through the approval of the 1959 Agreement and its incorporation into the water rights, this  
2 Board's resolution of a long and bitter dispute, which afforded this badly needed project to proceed.

3 This Draft Decision attempts to take what was decided to be a collective project with mutually  
4 held water rights and to tear it apart once again. It takes us back, again, to 1956. No evidence  
5 supports the need to do that. It purports to take water rights which are closely and fervently held by  
6 both parties on a joint basis, and tear them apart without support in the record. The 1959 Agreement  
7 has worked and can continue to work. The Draft Decision takes the very foundations of that  
8 agreement, as approved in D-907, and disaggregates the water rights in a way which may result in  
9 injury to all parties. Evidently, the Draft intends to have OWID fall back on its solely held rights.  
10 That is one thing that started this fight.

11 This does not constitute a project where water rights are placed in "cold storage" and held for  
12 future use without any realistic expectation this project will be developed. (See *California Trout, Inc.*  
13 *v. State Water Resources Control Board* (1989) 207 Cal.App.3d, 585-619.) Clearly, the project has  
14 been built, and the facilities necessary to ensure that the water can be placed to its fullest and highest  
15 beneficial consumptive use, await the demand. There has been no shirking of responsibility nor  
16 noncompliance with the authorized construction dates.

### 17 DENIAL OF THE EXTENSION BASED ON CEQA IS IMPROPER

18 Finally, OWID objects to denial of the Extension Permit based on the Draft Decision's  
19 interpretation of CEQA. The project, constructed prior to the establishment of the California  
20 Environmental Quality Act, was not subject to CEQA and there was no question that the Permittees  
21 were proceeding in accordance with the permits. Extension of the permits issued at that time was a  
22 mere maintenance of the status quo and merits a determination that there was no impact under CEQA.  
23 In fact, the extension is exempt from CEQA under both the statutory interpretation as well as under  
24 Categorical Exemption No. 1. A finding of no impact under CEQA would be appropriate under the  
25 Board's Nacimiento Decision (D-1642) (finding certain operations that had occurred prior to the  
26 implementation of CEQA justified such exemptions).

27 In any event, it is improper for the Draft Decision, even assuming there was some CEQA  
28 studies required, to deny an extension and partially revoke the permits on that basis. CEQA is a

1 procedural, not substantive statute. Appropriate action in that circumstance would have simply been  
2 to note that the record on CEQA was not correct, and to return the matter to the Petitioners for further  
3 review and determinations as to what was required under CEQA, and by whom. Therefore, any  
4 actions related to CEQA would have justified appropriate action by the Board in deferring the  
5 proceedings until completed, not denial of the substantive aspect of the permit.

6

### CONCLUSION

7

8 The Draft Decision errors in denial of the extension of the permits and in the assumption by  
9 the Board of the jurisdiction to modify the 1959 Agreement.

10

11 In 1956, this Board's predecessor told YCWD and OWID, in no uncertain terms, to meet and  
12 resolve the differences to develop this project in a way which meets the needs of both (D-858). It was  
13 not easy. It took two years, but it was done. This Board should now respect that decision and the  
14 efforts that went into it and not take action to decimate the agreement and/or to frustrate the  
15 underlying purpose of the development of this project, which was the development of a water supply  
16 utilizing the resources of hydroelectric generation and the financial support that would give, to  
17 provide the system. It would essentially take that system, which was intended to finance a  
18 consumptive water system, and strip it away so that the consumptive water system will be capped,  
19 retroactively. Such a result is precedent setting. It is also unfair and not supported by any evidence  
20 in this case nor the Notice issued in connection with this case.

21

22 With respect to CEQA, we submit that the "project," the extension of the permits, is clearly  
23 exempt. In any event, the proper action would be to remand for further CEQA documentation if  
24 appropriate.

25

26 OWID requests that the Decision be amended consistent herewith. The appropriate period  
27 for extension of the permits is until 2004, when OWID solely held permits are also due for renewal.  
28 This will allow the Board's Staff to focus on the Project water rights in total, and allow all parties and

///

///

///

///

///

///

///


///

1 Staff to negotiate or otherwise develop conditions consistent with the public interest, and consistent  
2 with Decisions 858 and 907.

3  
4 Dated: July 11, 2002

5 Respectfully submitted,

6 MINASIAN, SPRUANCE, BABER,  
7 MEITH, SOARES & SEXTON, LLP

8 By:   
9 JEFFREY A. MEITH  
10 Counsel for Petitioners and Protestants  
11 OROVILLE-WYANDOTTE IRRIGATION DISTRICT  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 DECLARATION OF SERVICE

2 I, Judith A. Gallagher, declare:

3 I am employed by the law firm of MINASIAN, SPRUANCE, BABER, MEITH, SOARES  
4 & SEXTON, LLP. My business address is 1681 Bird Street, Post Office Box 1679, Oroville,  
5 California 95965-1679. I am over the age of 18 years and not a party to this action.

6 On July 11, 2002, I served the following document(s) set forth below in the manner  
7 indicated:

- 8 ( ) Service By Mail (Deposit): By enclosing a copy in an envelope addressed as shown  
9 below and depositing the sealed envelope with the United States Postal Service with the  
10 postage fully prepaid.
- 11 (X) Service By Mail (Collection): By enclosing a copy in an envelope addressed as shown  
12 below and placing the envelope for collection and mailing on July 11, 2002, at Oroville,  
13 California, following our ordinary business practices. I am readily familiar with this firm's  
14 practice for collecting and processing correspondence for mailing. On the same day that  
15 correspondence is placed for collection and mailing, it is deposited in the ordinary course  
16 of business with the United States Postal Service in a sealed envelope with postage fully  
17 prepaid.
- 18 ( ) Other: By enclosing a copy in an envelope addressed as shown below and placing the  
19 envelope for collection with the nearest **FEDERAL EXPRESS** depository  
20 on \_\_\_\_\_ at Oroville, California.

21 Document(s) Served: PETITIONER AND PROTESTANT OROVILLE-WYANDOTTE  
22 IRRIGATION DISTRICT'S COMMENTS AND PROPOSED CHANGES  
23 TO THE SWRCB DRAFT ORDER OF MAY 6, 2002.

24 Person(s) Served:

25 Yuba County Water District  
26 c/o Mr. Alan B. Lilly  
27 Bartkiewicz, Kronick & Shanahan  
28 1011 22nd Street, Suite 100  
Sacramento, California 95816

Yuba County Water District  
Mr. Dennis Parker  
P. O. Box 299  
Brownsville, California 95919

Yuba City  
c/o Mr. Daniel F. Gallery  
926 J Street, Suite 505  
Sacramento, California 95814

Interested Person:  
Mr. Dale Storey  
P. O. Box 425  
Oregon House, California 95692

California Sportfishing Protection Alliance  
Mr. Jerry Mensch  
2553 Stonehaven Drive  
Sacramento, California 95827

I, DECLARE under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this Declaration of Service was executed on July 11, 2002 at Oroville, California.

  
JUDITH A. GALLAGHER



1                   **COMMENTS OF OROVILLE-WYANDOTTE IRRIGATION DISTRICT**  
2                   **ON DRAFT DECISION**

3                   Oroville-Wyandotte Irrigation District (OWID), petitioner herein, submits these written  
4 comments in response to the Draft Decision dated May 6, 2002.

5                   **CHANGES REQUESTED**

6                   OWID requests that the Draft Decision denial of permit extension be changed to a grant of  
7 said extension until 2004. OWID requests that the Draft assumption of authority to modify the 1959  
8 Agreement be removed.

9                   **SUMMARY OF POSITION – OWID**

10                   1. OWID objects strongly to Ordering Paragraph Number 1, which denies the extension of  
11 Permits No. 11516 and 11518 based on lack of due diligence and on our failure to comply with  
12 CEQA.

13                   2. OWID accepts Ordering Paragraph Number 2.

14                   3. OWID accepts Ordering Paragraph Number 3. However, OWID objects to the apparent  
15 conclusion that its use of water for consumptive purposes must be allocated to its permits  
16 individually, and to the apparent conclusion of the decision that its conveyance system losses  
17 constitute waste and unreasonable use of water.

18                   4. OWID accepts Ordering Paragraph Number 4.

19                   5. OWID objects to Ordering Paragraph Number 6, as it constitutes an unlawful reservation  
20 to the Water Resources Control Board of the power to interpret the terms and conditions of the 1959  
21 Agreement between Yuba County Water District and OWID.

22                   6. OWID accepts Ordering Paragraph Number 7.

23                   **SUMMARY OF ARGUMENTS**

24                   There is not doubt that disagreements and disputes, sometimes complex and sometimes  
25 rancourous, have occurred between OWID and Yuba County Water District (YCWD) in the 43 years  
26 that the 1959 Agreement has been in force and effect. Those proceedings, and the agreement, was  
27  
28