

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

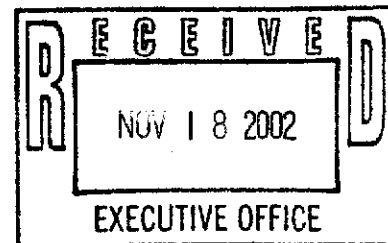
TELEPHONE:
(530) 533-2885
FACSIMILE:
(530) 533-0197

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

LISA A. GRIGG



November 15, 2002

VIA FACSIMILE

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

Re: Oroville-Wyandotte Irrigation District's Written Comments On Draft Order

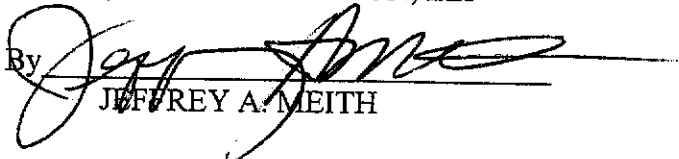
Dear Mr. Baggett:

The order in this proceeding is scheduled for consideration and potential adoption on November 19, 2002. The Agenda notes that no further comments will be considered, however, the indulgence of the Board is respectfully requested to consider the attached comments of Oroville-Wyandotte Irrigation District. We respectfully suggest these comments are necessary to assure a complete record before the Board.

Research of Board (State Engineer) records has revealed that the priority of the South Fork Project for power generation was an attribute of the project that was acknowledged when the State Department of Finance permits were assigned in accordance with the Area of Origin protections for the project. The Board is requested to consider this fact in its determination of this matter.

Very truly yours,

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

By 
JEFFREY A. MEITH

JAM/jg

Enclosure

cc: Service List
Oroville-Wyandotte Irrigation District

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

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**
Post Office Box 1679
Oroville, California 95965
(530) 533-2885

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

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

**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**

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 November 19, 2002.

**THE DRAFT DECISION DEPARTS FROM PRECEDENT
AND CONFLICT WITH OWID'S AREA OF ORIGIN PROTECTION**

The Draft Decision's determination that the jointly-held permits for consumptive use from the South Fork Project should be capped (regardless of whether the cap occurs in 1975 or 2004) is contrary to and in conflict with the order of this Board's predecessor releasing the State's priority in its 1927 Department of Finance filings on the Feather River and on the Yuba River, and conflicts with the Board's duty to protect supplies for the Area of Origin.

The Release From Priority was made generally in conformance with Division 6, Part II of the Water Code of the State of California, and specifically in accordance with Section 10504 of the Water Code. A copy is attached.

The Board now purports to void the determination of its predecessor and restrict OWID's right under the Area of Origin statute. The Release from Priority concurred that the irrigation and domestic uses of the project were not going to immediately occur. They would occur "at some future date."

The power development rights were to be enumerated and subordinated to the ultimate development of the project for domestic and irrigation uses, noting that those uses have a higher priority. Moreover, that order stated that relegation of power use for the higher domestic and irrigation use would occur ". . . after full repayment of bonds . . .," referring to those bonds used to finance the South Fork Project, and any refunding series thereof. (Emphasis added.)

1 Our request for extensions to place the consumptive water to full use reflects that domestic
2 and irrigation use clearly has to await the financial feasibility of the project, which is dependent on
3 the power purchase agreement with PG&E. That, in turn, is dependent upon the use of the project,
4 to the maximum degree possible, for power generation. What evidence supports the Board's
5 reversal of such prior decisions, and the protection they granted? It does not exist on this record.

6
7 **PROPERLY CONSIDERED EVIDENCE DEMONSTRATES
THE PUBLIC INTEREST IN EXTENSION**

8 There is no evidence before the Board that OWID has not been diligent in developing use
9 under these permits. The Board is authorized to deny an extension only when it is in the public
10 interest to deny a valid permit. No evidence has been presented to support a conclusion that partial
11 revocation is in the public interest.

12 Denial of an extension is appropriate only when it is in the public interest to do so and a
13 permit holder cannot meet a three-prong test that demonstrates that the public interest is served by
14 granting the extension. No evidence or finding supports the "public interest" in denial of the
15 extension.

16 Even assuming the order could find a public interest need to deny extension, OWID has
17 satisfied the test. The three elements are: 1) the permit holder has failed to exercise due diligence;
18 2) a failure to comply with time requirements "... has been occasioned by obstacles which could
19 not reasonably be avoided;" and 3) whether satisfactory progress will be made if the extension is
20 granted. (23 Cal. Code of Reg. §844).

21 The Evidence demonstrated that OWID has exercised due diligence in complying with the
22 terms of its permit. The facilities necessary to divert and convey the amount of permitted water
23 were completed in a timely manner. The facilities constructed in the 1960s were funded and
24 constructed with the expectation of handling the full amount of water under the permit.

25 Furthermore, OWID has continued to put the water to beneficial use as the demand has
26 grown. It has diligently kept up with the needs of the growing population. The Draft Decision
27 does not consider that OWID has been using the water beneficially for power generating purposes,
28 a function necessary to pay off the facilities needed to use the water consumptively.

1 The Draft Decision fails to address the second part of the test for permit extension –
 2 obstacles which OWID could not reasonably avoid. Obstacles to use that are beyond the control
 3 and avoidance of the District constitutes good cause for granting the extensions. A primary reason
 4 that OWID has not put the water to full beneficial use is slower than anticipated population growth
 5 and irrigation demand within the District's boundaries. This factor is, completely unavoidable and
 6 not within OWID's control. It weighs in favor of granting OWID the extension, not denying it.
 7 OWID has kept its beneficial use for consumptive purposes in step with the population growth. It
 8 is not the unacceptable excuse of "lack of finances and other conditions incident to the person and
 9 not the enterprise" that have caused a delay. (Draft Decision, Page 21 *citing* 23 Cal. Code Regs.
 10 §844). The need for an extension, and the cause of lower consumption, is due to slower than
 11 anticipated demand and population growth.

12 The final part of the test requires that there will be satisfactory progress if the extension is
 13 granted. The Draft Decision concludes that OWID will not make satisfactory progress toward
 14 complete beneficial use if the extension is granted. No evidence supports the bald conclusion that
 15 OWID simply cannot use the water developed by the project. There is no dispute that OWID will
 16 be unable to put the full amount of water to beneficial consumptive use by 2004, but that should
 17 not be the standard for satisfactory progress. The permitting process takes into account the need
 18 for continued extensions. What the Board's conclusion ignores is the findings and intentions of
 19 the Board's predecessor when the permits were granted that domestic and irrigation use would not
 20 be at in complete beneficial use until sometime after the power project was financed.

CONCLUSION

21
 22 This Board cannot, on the basis of this record, find that OWID, or Yuba County Water
 23 District, have not acted diligently in placing the consumptive rights to beneficial use due to slow
 24 growth (an obstacle which cannot reasonably be avoided), when all the facilities necessary for the
 25 use of the water have been diligently installed, and when prior orders of the Board's predecessor
 26 acknowledge that the project's primary function, in order to ensure financial feasibility in the
 27 initial term, is power generation. Moreover, the Draft Decision directly restrict rights reserved to
 28 OWID and YCWD under their Area of Origin rights.

1 The water is not going to waste nor are there others to put the water to a more beneficial
2 use. Denial of the extension will not serve the public interest. The water is being utilized to
3 generate power under OWID's FERC permit as part of the project permitted by the SWRCB. As
4 the water is run through the system to generate power it is then allowed to flow downstream to the
5 State Water Project. As consumptive demand grows, the system is there to divert, treat it, and
6 distribute it.

7 There is no evidence in this record that reflects or supports a change from the Board's
8 policy as earlier enunciated, nor were the parties given any advice or notice that such issue in fact
9 was before the Board at this time.

10 We urge once again that the Board act consistent with the original authorizations for the
11 project that it continue these permits in force and effect at least until 2004 (without a
12 predetermined cap on the rights that can actually be licensed). At that time, all the Project permits
13 will be subject to extension, or licensed. We reiterate that the intention of the project, as identified
14 by this Board as well as by prior authorizations, is that the project will be operated primarily for
15 power generation during the initial term and our request for extension of these permits is
16 consistent with that order.

17 Moreover, we wish the record to reflect our objection to the restriction of consumptive
18 rights for the project as being in direct contradiction of the Area of Origin rights protected by prior
19 Board order.

20 Dated: *11-15-02*

21
22 Respectfully submitted,

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

25 By: 

26 JEFFREY A. MEITH
27 Counsel for Petitioners and Protestants
28 OROVILLE-WYANDOTTE IRRIGATION DISTRICT

DECLARATION OF SERVICE

1 I, Judith A. Gallagher, declare:
2

3 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,
4 California 95965-1679. I am over the age of 18 years and not a party to this action.

5 On November 15, 2002, I served the following document(s) set forth below in the manner
indicated:

6 () **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
7 postage fully prepaid.

8 () **Service By Mail (Collection)**: By enclosing a copy in an envelope addressed as shown
below and placing the envelope for collection and mailing on November 15, 2002, at
9 Oroville, California, following our ordinary business practices. I am readily familiar with
10 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
11 course of business with the United States Postal Service in a sealed envelope with postage
fully prepaid.

12 (X) **Other**: By enclosing a copy in an envelope addressed as shown below and placing the
envelope for collection with the nearest **CALIFORNIA OVERNIGHT and/or EXPRESS**
13 **MAIL** on November 15, 2002 at Oroville, California.

14 **Document(s) Served**: Oroville-Wyandotte Irrigation District's Written Comments On Draft
15 Order.

16 **Person(s) Served**:

17 Yuba County Water District	Mr. Dale Storey
c/o Mr. Alan B. Lilly	P. O. Box 425
18 Bartkiewicz, Kronick & Shanahan	Oregon House, California 95962
1011 22nd Street, Suite 100	
19 Sacramento, California 95816	
	Cora Peterson
20 Yuba City	Dobbins/Oregon House Fire Protection Dist.
c/o Mr. Daniel F. Gallery	P. O. Box 164
21 926 J Street, Suite 505	Oregon House, California 95962
Sacramento, California 95814	
	Greg Compton, Chairman
22 California Sportfishing Protection Alliance	Dobbins/Oregon House Action Committee
23 Mr. Jerry Mensch	P. O. Box 703
2553 Stonehaven Drive	Oregon House, California 95962
24 Sacramento, California 95827	

25
26
27 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 November 15,
2002 at Oroville, California.
28


JUDITH A. GALLAGHER

RELEASE FROM PRIORITY

By the Department of Water Resources
Jointly to the Oroville-Wyandotte Irrigation District
and the Yuba County Water District of Applications
Nos. 5629, 5630, 5631, and 5632 in Favor of Applica-
tions Nos. 13676, 13956, 13957, 14112, and 14113

WHEREAS, Under Division 6, Part 2, of the Water Code of the State of California, the State is directed and authorized to make and file applications for any water which in its judgment is required in the development and completion of the whole or any part of a general or coordinated plan looking toward the development, utilization, or conservation of the water resources of the State of California, and the authority and the powers of the State under this part are now in the Department of Water Resources; and

WHEREAS, Pursuant to such authorization the State filed on July 30, 1927, the applications for permits to appropriate unappropriated water of the Feather River and its tributaries in Butte County designated in the records of the State Water Rights Board as Applications Nos. 5629 and 5630, and the applications to appropriate unappropriated water of the Yuba River and its tributaries in Placer and Yuba Counties designated in the records of the State Water Rights Board as Applications Nos. 5631 and 5632, the pertinent provisions of which are summarized as follows:

Applica- tion	Source	Point of diversion	Amounts		Purpose of use
			Direct diversion (cfs)	Storage (afa)	
5629	Feather River	Oroville Dam	7,600	380,000	Power
5630	Feather River	Oroville Dam	1,400	380,000	Irr., Dom. Saline Control & Navigation
5631	Yuba River	Narrows Dam	1,800	490,000	Power
5632	Yuba River	Narrows Dam	1,700	490,000	Irr., Dom., Saline Control Flood Control & Navigation

; and

WHEREAS, Section 10504 of the Water Code authorizes the Department of Water Resources to release from priority any portion of any appropriation filed under Division 6, Part 2, of the Water Code when the release from priority is for the purpose of development not in conflict with such general or coordinated plan, and Section 10505 of the Water Code prohibits any release from priority that will, in the judgment of the Department of Water Resources, deprive the county in which the appropriated water originates of any such water necessary for the development of the county; and

WHEREAS, The Oroville-Wyandotte Irrigation District and the Yuba County Water District now hold Applications Nos. 13676, 13956, 13957, 14112, and 14113, on which joint permits have been issued for the appropriation of unappropriated water of the South Fork of the Feather River and Lost Creek within the Feather River watershed, and Slate Creek within the Yuba River watershed, the pertinent features of which are summarized as follows:

Applica- tion	Date Filed	Permit No.	Source	Amounts		Purpose of Use
				Direct diversion (cfs)	Storage (afa)	
13676	4-7-50	11514	S.F. of the Feather River	200	77,300	Power
			Lost Creek	100	40,000	
13956	9-20-50	11515	Slate Creek	300	35,000	Power
13957	9-20-50	11516	Slate Creek	300	35,000	Irr. & Dom.
14112	12-28-50	11517	S.F. of the Feather River	150		Power
			Lost Creek	250		
14113	12-28-50	11518	S.F. of the Feather River	350	77,300	Irr. & Dom.
			Lost Creek	350	40,000	

; and

WHEREAS, On March 21, 1958, the Oroville-Wyandotte Irrigation District and the Yuba County Water District entered into an agreement for the construction of a joint project for the conservation of the water of the South Fork of the Feather River and tributaries of the Yuba River which provided that both parties agree and consent to the issuance of joint permits on Applications Nos. 13676, 13956, 13957, 14112, and 14113; and

WHEREAS, Complete utilization of the water resources to be made available by the joint project for conservation purposes will require operation of said project primarily for irrigation and domestic purposes at some future date; and

WHEREAS, The Oroville-Wyandotte Irrigation District and the Yuba County Water District jointly requested the release from priority of Applications Nos. 5629, 5630, 5631, and 5632 in favor of their Applications Nos. 13676, 13956, 13957, 14112, and 14113; and

WHEREAS, The Director of Water Resources requested the California Water Commission to make recommendations concerning requests for releases from priority of Applications Nos. 5629, 5630, 5631, and 5632; and

WHEREAS, Pursuant to a notice dated July 16, 1958, a joint hearing by the California Water Commission and the Department of Water Resources was held on August 15, 1958, at which all interested parties were afforded an opportunity to present their views with respect to the disposition of Applications Nos. 5629, 5630, 5631, and 5632; and

WHEREAS, The evidence received at this hearing and other evidence available to the Commission and the Department indicate that the joint project of the Oroville-Wyandotte Irrigation District and the Yuba County Water District is feasible and a reasonable plan for financing has been proposed; that it is primarily for the purpose of furnishing water to areas within the counties in which the water originates; that it is not in conflict with the coordinated plan of development of the water resources of the State, but is in furtherance thereof; that a release from priority of Applications Nos. 5629, 5630, 5631, and 5632, will not deprive the counties in which the appropriated

water originates of any such water necessary for the development of the counties provided it contains a reservation for domestic use in the portion of the watershed of the South Fork of the Feather River located in Plumas County; and

WHEREAS, The California Water Commission on October 3, 1958, adopted Resolution No. 45 recommending the release from priority herein contained:

NOW, THEREFORE, it is determined by the Department of Water Resources, in exercise of the discretion and judgment vested in the Department by Division 6, Part 2, of the Water Code of California and upon the recommendation of the California Water Commission that:

(a) The release from priority jointly to the Oroville-Wyandotte Irrigation District and the Yuba County Water District of Applications Nos. 5629, 5630, 5631, and 5632 in favor of their Applications Nos. 13676, 13956, 13957, 14112, and 14113 is for a purpose of development not in conflict with a general or coordinated plan looking toward the development, utilization, or conservation of the water resources of the State, but is in furtherance thereof; and

(b) The release from priority herein contained will not in the judgment of the Department of Water Resources deprive any county in which such appropriated water originates of any such water necessary for the development of such county; and

(c) A release from priority of Applications Nos. 5629, 5630, 5631, and 5632 in favor of Applications Nos. 13676, 13956, 13957, 14112, and 14113, as herein provided, is in the best interest of the people of the State of California.

WITNESSETH, THAT: The Department of Water Resources under the authority of Section 10504 of the Water Code and in consideration of the general benefits to accrue to the State of California does hereby release from priority jointly to the Oroville-Wyandotte Irrigation District and the Yuba County Water District all prior rights under Applications Nos. 5629, 5630, 5631, and 5632 on file in the records of the State Water Rights Board in favor of Applications Nos. 13676, 13956, 13957, 14112, and 14113, held jointly by the districts; SUBJECT, HOWEVER, TO the prior rights for reasonable domestic use for that portion of the watershed of the South Fork of the Feather River located in Plumas County; and FURTHER SUBJECT TO the condition that after full repayment of bonds (including any refunding bonds issued to refinance the same) issued to finance the capital costs of the South Fork Project to be constructed to utilize the water applied for under Applications Nos. 13676, 13956, 13957, 14112 and 14113, insofar as Applications Nos. 5629, 5630, 5631, and 5632 include rights to make use of water that have a higher priority under the laws of California than the uses provided for in Applications Nos. 13676, 13956, and 14112 held jointly by the Oroville-Wyandotte

Irrigation District and the Yuba County Water District, such higher uses shall have priority over Applications Nos. 13676, 13956, and 14112; and FURTHER SUBJECT TO the condition that if the Oroville-Wyandotte Irrigation District and the Yuba County Water District do not commence the construction of the project contemplated under Applications Nos. 13676, 13956, 13957, 14112, and 14113, within five years from the date of this release from priority or upon further extensions of time as may be authorized by the Director of Water Resources, the rights under such applications shall no longer have the benefit of the release from priority herein contained; and FURTHER SUBJECT TO the terms of the agreement between the Oroville-Wyandotte Irrigation District and the Yuba County Water District, dated March 21, 1958, and such amendments as they may mutually agree upon; provided that any such amendment which will substantially alter the plan of development as set forth in the report entitled, "Report on Proposed Oroville-Wyandotte Irrigation District Water and Power Development on South Fork of Feather River, California" prepared by the Department of Water Resources for the California Districts Securities Commission, dated September, 1958, shall be submitted to the Department of Water Resources for its prior approval.

IN WITNESS WHEREOF, the Department of Water Resources of the State of California, acting through the Director of Water Resources, has caused this release from priority to be executed in quadruplicate this 12th day of December, 1958.

State of California
Department of Water Resources

/s/ HARVEY O. BANKS

HARVEY O. BANKS
DIRECTOR