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7

8 STATE WATER RESOURCES CONTROL BOARD
9 STATE OF CALIFORNIA
10

11 In the Matter of:) Applications Nos. 5644X02 and 5645X12
12 WATER RIGHT APPLICATIONS 5644X02)
AND 5645X12 AND PETITIONS FOR) EL DORADO WATER & POWER
13 PARTIAL ASSIGNMENT AND CHANGE OF) AUTHORITY'S ANSWER TO PROTESTS
STATE-FILED APPLICATIONS 5644 AND) TO APPLICATIONS 5644X02 AND
14 5645 OF EL DORADO WATER AND) 5645X12 AND PETITIONS FOR PARTIAL
POWER AUTHORITY TO APPROPRIATE) ASSIGNMENT AND CHANGE OF STATE-
15 WATER FROM RUBICON AND SOUTH) FILED APPLICATIONS 5644 AND 5645
FORK AMERICAN RIVER SYSTEMS IN EL)
16 DORADO COUNTY)
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27 APPLICANT'S ANSWER TO PROTESTS
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TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. THE PARTIES.....	2
A. Applicant El Dorado Water & Power Authority.....	2
B. The Protestants.....	3
III. STATEMENT OF FACTS	3
A. Physical Setting.....	3
B. Project Description.....	4
1. El Dorado County’s Projected Water Supply Needs	4
2. The Cooperation Agreement.....	5
3. The Applications.....	6
4. Future Expansion of Water Delivery and Transmission Facilities	8
C. Project Status	8
D. Project Clarifications	9
1. EDWPA’s Appropriations Will be Self-Limited to Demonstrated Needs.....	9
2. The Applications’ Place of Use Includes GDPUD’s Service Territory.....	10
3. EDWPA is Not Presently Seeking State Board Approval of an Exchange with PCWA	11
4. Additional Points of Rediversion would Require State Water Board Approval	12
5. EDWPA is Not Requesting Any Change to Sacramento’s Rights	12
6. The Applications Cannot Conflict with the UARP-Chili Bar Settlement Agreement.....	13
7. EID is Installing a Temperature Control Device on its Folsom Diversion.....	14
IV. PROCEDURAL HISTORY.....	15
A. The Applications.....	15
B. The Protests.....	15
C. Exclusion of Issues from Further Consideration	16
V. LEGAL RESPONSES	18
A. State-Filed Applications.....	18
1. EDWPA Seeks Assignment of Portions of Applications Nos. 5644 and 5645.....	18
2. Petitions for Assignment of State-Filed Applications are Exempt from Fully Appropriated Streams Limitations	18
3. The Applications’ Proposed Changes are Permissible Modifications.....	19

TABLE OF CONTENTS
(continued)

	Page
B. Request for Exclusion from Further Consideration	21
1. Requirements for Protests	21
2. Protestants Do Not Adequately Allege or Provide Evidence of Any Injury to Complainants' Water Rights	22
a. DWR Has Not Alleged Facts Sufficient to Show Any Injury to Prior Rights	22
b. Sacramento Cannot Claim an Injury to its Water Rights.....	23
c. Reclamation Contractors Cannot Claim an Injury to any Rights under Contracts with Reclamation.....	25
d. PCWA Cannot Claim an Injury to its Rights Under the Terms of its Permits	26
e. Sac Suburban Cannot Claim an Injury to any Rights under Contracts with Sacramento or PCWA	27
3. The Granting of the Applications is not Precluded by the Wild & Scenic Rivers Act.....	28
VI. FACTUAL RESPONSES	29
A. EDWPA Will Evaluate Flow-Related Water Right Impacts	29
B. EDWPA Will Evaluate Flow-Related Environmental Impacts of its Project.....	29
C. EDWPA Will Evaluate Potential Impacts to Species	33
VII. POSSIBLE RESOLUTION OF THE PROTESTS	34
VIII. CONCLUSION.....	34

1 **I. INTRODUCTION**

2 Applicant El Dorado Water & Power Authority (“EDWPA”) hereby files its consolidated
3 answer to the protests to EDWPA’s Applications Nos. 5644X02 and 5645X12 and its Petitions for
4 Partial Assignment and Change of State-Filed Applications 5644 and 5645 (collectively, the
5 “Applications”). Because many of the protests raise similar issues, EDWPA submits this
6 Applicant’s Answer to Protests as its consolidated answer to all protests.

7 EDWPA’s Applications seek to appropriate water for reasonable and beneficial public uses
8 within El Dorado County in a manner consistent with an approved County General Plan and without
9 the construction of new on-stream storage facilities, having negotiated a widely lauded facilities
10 agreement with the Sacramento Municipal Utility District (“SMUD”) for the use of Upper American
11 River Project (“UARP”) facilities. EDWPA will appropriate this water in accordance with past
12 decisions of the State Water Resources Control Board (“SWRCB” or the “State Water Board”) and
13 in fulfillment of past promises by those that have for decades enjoyed the benefits of the waters of
14 the Upper American River watershed and originating in El Dorado County and who previously
15 agreed to subordinate their rights to those of EDWPA.

16 Not only do EDWPA’s Applications make use of existing facilities to acquire water for
17 planned growth, but EDWPA has also chosen to be “self-limiting” in terms of its schedule for
18 appropriation. That is, EDWPA has imposed on itself as a component of the Applications an
19 obligation to return to the SWRCB as a precondition to applying quantities of water to beneficial use
20 beyond those quantities identified in the approved County General Plan. In this way, EDWPA has
21 balanced its obligation to acquire sufficient water for its long-term water demands without
22 overstating its present need.

23 Despite prior decisions and orders of the SWRCB and specific agreements between some of
24 the Protestants and El Dorado County, these very same Protestants now contest EDWPA’s

1 Applications on vested rights grounds. As this Answer demonstrates, the merits of the Applications,
2 the reasonable and beneficial needs of El Dorado County, and the existence of prior agreements,
3 SWRCB decisions under which hundreds of millions in economic and water supply benefits have
4 already been distributed to the Protestants, equity, and fairness all require that the SWRCB reject
5 these Protests and approve the Applications.

6 Insofar as the protests allege impacts on the environment, EDWPA is undergoing a
7 customary environmental review process and it will subsequently amend this Answer as prudent to
8 account for the expected impact analysis. However, the SWRCB should not allow junior and
9 subordinate interests to cloak and obfuscate their vested rights arguments in environmental
10 nomenclature.

11 **II. THE PARTIES**

12 **A. Applicant El Dorado Water & Power Authority**

13 EDWPA is a Joint Powers Authority, organized under the Joint Exercise of Powers Act
14 (Gov. Code, § 6500 *et seq.*), whose members include the County of El Dorado (the “County”), the El
15 Dorado County Water Agency (“EDCWA”) and the El Dorado Irrigation District (“EID”). In 2004,
16 the County, EDCWA and EID, along with the Georgetown Divide Public Utility District¹
17 (“GDPUD”), formed EDWPA in order to enable its member agencies to jointly negotiate for storage
18 and water delivery considerations from SMUD’s Upper American River Project (“UARP”), and to
19 jointly represent its member agencies with regard to SMUD’s applications for UARP relicensing
20 with the Federal Energy Regulatory Commission (“FERC”).

21 The County of El Dorado is a subdivision of the State of California whose jurisdiction is El
22 Dorado County.

23 EDCWA is a district created by Chapter 96 of the California Water Code Appendices.
24 EDCWA’s jurisdictional area consists of all territory lying within the boundaries of El Dorado

25 _____
26 ¹ As described in Section II.D.2, *infra*, GDPUD has withdrawn from participation in EDWPA.

1 County. It is the mission of EDCWA to ensure that present and future water demands within the
2 County are met.

3 EID is an irrigation district organized and existing under the Irrigation District Law,
4 California Water Code Division 11.

5 **B. The Protestants**

6 The Applications have been protested by the California Department of Fish and Game
7 (“CDFG”), the California Sportfishing Protection Alliance (“CalSPA”), the El Dorado Chapter of
8 the California Native Plant Society (“Native Plant Society”), the Center for Sierra Nevada
9 Conservation (“CSNC”), the City of Folsom (“Folsom”), the City of Roseville (“Roseville”), the
10 City of Sacramento (“Sacramento”), California Department of Water Resources (“DWR”), Friends
11 of the River, et al. (“Friends of River” or “FOR”),² Pacific Gas & Electric (“PG&E”), the Placer
12 County Water Agency (“PCWA”), Sacramento Suburban Water District (“Sac Suburban”), San Juan
13 Water District (“San Juan”), the United States Bureau of Reclamation (“Reclamation”), and the
14 United States Department of Agriculture Forest Service (“Forest Service”) (collectively, the
15 “Protestants”). Generally, the Protestants include various state agencies, downstream water right
16 holders and environmental interest groups.

17 **III. STATEMENT OF FACTS**

18 **A. Physical Setting**

19 El Dorado County is situated between Lake Tahoe and the Nevada border on the east, and
20 Folsom Reservoir and Sacramento County on the west. The County is predominantly situated on the
21 western slope of the Sierra Nevada Mountains and is bounded by the Rubicon and Middle Fork
22 American Rivers on the north, the South Fork of the Cosumnes River on the south, and is bisected

23 _____
24 ² Friends of the River, Mother Lode Chapter Sierra Club, Save the American River Association,
25 American Whitewater, California Outdoors and the Environmental Council of Sacramento protested
26 jointly. The Division’s September 1, 2009 letter accepting the protests of Friends of the River, et al.,
the Division of Water Rights was not addressed to California Outdoors and the Environmental
Council of Sacramento.

1 by the South Fork American River and its tributaries.

2 Among the natural resources within the County are the water resources of the Middle and
3 South Forks of the American River (“Upper American River”). The Upper American River and its
4 tributaries – regional water resources sustained by local run-off – travel through El Dorado County.
5 A substantial water supply source, the watershed theoretically could meet all of the County’s
6 projected west slope water supply demands.

7 The UARP, a hydroelectric power project built by SMUD in the late 1950s, collects vast
8 quantities of local run-off and Upper American River flows. In its current configuration, the UARP
9 consists of eleven reservoirs and eight powerhouses, all of which are located within the boundaries
10 of El Dorado County on the tributaries of the South Fork and Middle Fork American Rivers. The
11 UARP collects the waters of the Upper American River for the purpose of generating power, and
12 ultimately releases the diverted water downstream. The power produced by the UARP is utilized by
13 SMUD customers in Sacramento County and small portions of Placer and Yolo Counties, while the
14 waters which generate that power are currently put to use downstream.

15 **B. Project Description**

16 1. *El Dorado County’s Projected Water Supply Needs*

17 Through the Applications, EDWPA is seeking water rights in order to meet future water
18 supply needs, in accordance with the County’s 2004 General Plan (generally, the “Project”). This
19 need is identified in EDCWA’s Water Resources Development and Management Plan (“Water
20 Plan”). The Water Plan assumes that in certain areas in close proximity to the EID and GDPUD
21 boundaries, where facilities exist or where the planned land use allows for higher density,
22 development may eventually be provided water service (“Favorable Areas”). Consistent with the
23 planned urban and agricultural land uses identified in the General Plan, the Water Plan projects
24 additional consumptive water needs within the EID and GDPUD service areas and the Favorable
25 Areas, resulting in a total additional water need of 31,500 AFA by the year 2025. The General Plan

1 additionally anticipates that the population will continue to grow after year 2025. Build-out under
2 the General Plan would result in a future additional water need within the areas to be served under
3 this application of approximately 86,500 AFA.³

4 2. ***The Cooperation Agreement***

5 Based on the water supply needs described above, and recognizing that there are limited
6 opportunities for the construction of new water storage locations within the County, as well as the
7 environmental concerns associated with such construction, EDWPA's members elected to pursue
8 another arrangement: they secured diversion and storage rights in the SMUD's UARP facilities.
9 These rights are more fully described in the El Dorado – SMUD Cooperation Agreement
10 (“Cooperation Agreement”), which was approved in November 2005.⁴ In brief, the Cooperation
11 Agreement enables EDWPA's members to avoid the costs and permitting issues associated with the
12 construction of new water diversion and storage facilities by securing use of existing physical
13 facilities. EDWPA relies upon the Cooperation Agreement for the purpose of demonstrating their
14 legal right to use of the physical facilities that may be required to divert and store the waters of the
15 Upper American River that are the subject of this application.

16 The Cooperation Agreement requires SMUD to operate the UARP to divert and store water
17 pursuant to the water rights EDWPA will obtain. SMUD, in turn, will deliver the directly diverted

18 _____
19 ³ This application is limited to 40,000 AFA as the maximum use of UARP facilities permitted under
20 the El Dorado – SMUD Cooperation Agreement. Moreover, consistent with California's doctrine of
21 gradual development (see, e.g., Wat. Code, §§ 106.5, 1264; WR Order 95-17, *In the Matter of*
22 *Fishery Protection and Water Right Issues of Lagunitas Creek* (1995), at 12; see also WR Order
23 2000-13, *In the Matter of the Petition for Extension of Time of the City of San Luis Obispo Permit*
24 *5882 (Application 10216)* (2000)), EDWPA would condition its diversion of quantities greater than
25 30,000 AFA under an approved permit upon a showing of increased demand and the existence of a
26 valid General Plan.

27 ⁴ The vast UARP has occupied virtually all the premier sites for diversion and storage of water from
28 the American River. However, as a condition of withdrawing its objection to SMUD's operation of
the UARP, El Dorado County executed agreements with SMUD in 1957 and again in 1961 that
permitted El Dorado County to divert water from specified UARP facilities when the need arose.
Subsequently, the EDWPA members and SMUD entered into the Cooperation Agreement, which
largely supersedes the 1957 and 1961 agreements and specifies the terms and conditions under
which SMUD will operate the UARP to capture, store and deliver water for the benefit of EDWPA.

1 and stored water for EDWPA's benefit, including water that SMUD will carry-over in storage to aid
2 EDWPA in combating drought and other emergencies. SMUD will deliver the water to the White
3 Rock Penstock or the point in the South Fork of the American River immediately below the
4 discharge point from the White Rock Powerhouse,⁵ which water EDWPA proposes to remove from
5 the American River system at Folsom Reservoir.

6 **3. The Applications**

7 EDWPA's preferred option for securing water supplies consistent with the Cooperation
8 Agreement was, and continues to be, through a conservation-based transfer from Sacramento.
9 (Cooperation Agreement, § 6.1.) Under such an arrangement, the City would engage in qualifying
10 conservation within the meaning of Water Code Section 1011 and transfer the water to EDPWA in
11 accordance with California Law. (Revised WR Order 2002-0013, *Imperial Irrigation District's and*
12 *San Diego County Water Authority's Amended Joint Petition for Approval of a Long-Term Transfer*
13 *of Conserved Water From IID to SDCWA and to Change the Point of Diversion, Place of Use, and*
14 *Purpose of Use* ("Revised WR Order 2002-0013") (2002), at 18-20, 81.)

15 Sacramento holds water rights allowing diversion and storage through and in the UARP and
16 Sacramento is presently under a statutory mandate to meter its water deliveries and implement
17 volume-based water service charges. (Wat. Code, § 527, *et seq.*) EDWPA is willing to contribute to
18 Sacramento's costs of these, and other, water efficiency improvements, in exchange for the ability to
19 use the water conserved. As Sacramento already holds water rights that allow diversion and storage
20 within the UARP at the locations EDWPA may divert and store under the Cooperation Agreement,
21 the transfer itself would be routine. As the water EDWPA would divert would be that conserved
22 through Sacramento's efficiency improvements, the impacts of EDWPA's diversions on other
23

24 ⁵ These points of redirection should be considered points of "delivery" to distinguish them from the
25 described points of diversion and redirection in these Applications, although in some cases they are
26 the same points. The points of delivery represent the last point from which water is taken from
either an existing conveyance or from the river system by redirection directly into EID or GDPUD
facilities for conveyance, storage, treatment and distribution for consumptive use.

1 American River right holders would be minimal. Pursuant to *California v. United States* (1978) 438
2 U.S. 645, the federal government would be required to respect the transfer authorized under
3 California Law. (See, e.g., Revised WR Order 2002-0013, at 2-3, 18-20, 84-86.)

4 However, as EDWPA has been unable to consummate such a transfer with Sacramento, it
5 requests the State Water Board approve the assignment of portions of Applications 5644 and 5645,
6 each of which was filed by the State pursuant to Water Code sections 10500 *et seq.* EDWPA
7 additionally requests that the State Water Board approve its petitions for change to the assigned
8 portions of Applications 5644 and 5645 in order to allow diversion and storage in the UARP
9 facilities, consistent with EDWPA's rights under the Cooperation Agreement.

10 Because the water appropriated under the applications will be diverted through and stored in
11 SMUD's existing facilities, pursuant to the Cooperation Agreement, EDWPA proposes diversion
12 and storage of up to 30,000 AFA (40,000 AFA after year 2025), with diversions and rediversions at,
13 or below, the same rates allowed under SMUD's UARP licenses and permit and with storage at
14 Loon Lake, Ice House Reservoir and Union Valley Reservoir as allowed under SMUD's UARP
15 licenses and permit. EDWPA proposes that the water will be directly diverted and released from
16 storage for take at White Rock Penstock or Folsom Reservoir at the rates agreed to in the
17 Cooperation Agreement, as further described in EDWPA's Applications.

18 The water appropriated under the Applications will be put to use for municipal and irrigation
19 purposes within the EID and GDPUD service areas. Water taken from the UARP facilities via the
20 White Rock Penstock will be conveyed into EID's service area for treatment and distribution. EID
21 currently withdraws water from Folsom Reservoir pursuant to a Water Service contract and a
22 Warren Act contract with Reclamation. In order to take water from Folsom Reservoir pursuant to
23 the proposed appropriation, EID may increase its diversion capacity at Folsom Reservoir, likely
24 through the construction of an additional pumping plant and pipeline from its present point of
25 withdrawal from Folsom Reservoir to its El Dorado Hills water treatment plant or another plant that

1 may be constructed.

2 In order to allow GDPUD to utilize in its service area water appropriated pursuant to this
3 application, EDWPA or GDPUD may subsequently complete a water exchange with another water
4 right holder, such as PCWA. Such an exchange would allow GDPUD to divert at American River
5 Pump Station along the North Fork American River, and in turn allow PCWA to take water at
6 Folsom Reservoir. Such an exchange is not part of this application and depending upon its terms,
7 may require further State Water Board approvals. GDPUD has a contractual right to a portion of the
8 capacity of PCWA's recently constructed North Folsom Pumping Plant, but will need to install a
9 pump in the pumping plant and construct a pipeline for conveyance of water from the pumping plant
10 to its intended service area.

11 4. *Future Expansion of Water Delivery and Transmission Facilities*

12 The design of water delivery and transmission facilities that would be utilized by EID and
13 GDPUD to convey water appropriated under the Applications within their water systems has yet to
14 be finalized. CDFG, in its protests asks that EDWPA's environmental documentation analyze the
15 projected need to expand facility design at existing pumps or to construct new diversion and
16 transmission facilities associated with the Project. (CDFG's Memorandum of Protest of
17 Applications 5645X12 and 5644X02, filed July 13, 2009 ("CDFG Protest"), at 10-12.) Consistent
18 with the provisions of CEQA, EDWPA's Environmental Impact Report (EIR), described in more
19 detail below, will identify those facilities requiring possible expansion as well as the need for new
20 facilities in the future, and will provide "program-level" analysis of the same, to the extent that such
21 information is available. Any new or expanded facilities will be the subject of future environmental
22 review that will build on the program-level analysis included in the EIR.

23 C. Project Status

24 EDWPA is the Lead Agency for the EIR, pursuant to the requirements of the California
25 Environmental Quality Act (CEQA) and the State CEQA Guidelines, which will analyze the

1 environmental impacts of the Project.⁶ The EIR will consider a range of reasonable alternatives to
2 the project, a no project alternative, and potential impacts, mitigation measures, and monitoring
3 requirements, as applicable. EDWPA hopes to have completed the Draft EIR near the beginning of
4 2010. In conjunction with its environmental review of the project, EDWPA is developing water
5 availability analyses, as required by sections 1260(k), 1243, and 1375(d) of the Water Code.

6 **D. Project Clarifications**

7 EDWPA's review of the Protests evidences that many of the Protestants' concerns regarding
8 the Applications may be based on the Protestants' misunderstanding of EDWPA's Project.
9 Accordingly, in this section EDWPA attempts to clarify certain aspects of the Project and the
10 Applications. On the basis of these clarifications, EDWPA asks that the State Water Board exclude
11 these concerns from further consideration in this process.

12 1. ***EDWPA's Appropriations Will be Self-Limited to Demonstrated Needs***

13 Many of the Protestants have raised concerns regarding the demands identified by the
14 General Plan and the Water Plan.⁷ Whether EDWPA's demand projections are subject to challenge
15 in these proceedings is discussed below; however, EDWPA wishes to reiterate that the Applications
16 contain EDWPA's self-imposed limitation that it will not appropriate pursuant to the Applications
17 more water than is necessary to meet demonstrated General Plan demands. (Application 5644X02,
18 Attachment 1, at 3-4, 13-14; Application 5645X12, Attachment 1, at 3-4, 13-14.) In this regard,
19 EDWPA believes the Applications are consistent with the *County of Amador v. EDCWA* precedent
20 cited by Sacramento. Notably, nothing in that judicial opinion limits a water provider's ability to
21 seek sufficient water to serve full build-out of a General Plan, as opposed to a limited time horizon
22 such as 15 or 20 years. Moreover, as the SWRCB has previously opined (see, e.g., Order WR 2000-

23 _____
24 ⁶ The EIR will fully comply with California law, including the identification of mitigation funding
25 sources, to the extent the same is required. (Friends of River et al.'s Protest to Applications
26 5645X12 and 5644X02, filed July 13, 2009 ("FOR Protest"), Attachment 1, at 3, 9.)

⁷ See Sacramento's Protest of Applications 5645X12 and 5644X02, filed July 6, 2009 ("Sacramento
Protest"), Attachment A, at 2, 4.

1 0013, *In the Matter of the Petition for Extension of Time of the City of San Luis Obispo Permit 5882*
2 (*Application 10216*) (2000)) and Water Code Section 106.5 provides, municipal entities must be
3 given some latitude to acquire water for long-term projected demands. EDWPA's application fairly
4 balances the need to protect against speculation and the need to facilitate proper planning.

5 **2. *The Applications' Place of Use Includes GDPUD's Service Territory***

6 On or about April 10, 2009, GDPUD withdrew from membership within EDWPA.
7 GDPUD's withdrawal was based on its conclusion that it was, at that time, unable to access water
8 that might be diverted through and stored within the UARP due to the lack of a presently feasible
9 delivery point and that it would be inappropriate to continue to financially contribute to the cost of
10 obtaining water pursuant to the Applications through its affiliation with EDWPA. (See February 27,
11 2009 Press Release; Transition Agreement, at 2.)

12 Various Protestants have stated that, based on GDPUD's withdrawal from EDWPA, the
13 Applications' proposed place of use should be modified to exclude GDPUD's service territory.
14 (Reclamation's Protest of Applications 5645X12 and 5644X02, filed July 10, 2009 ("Reclamation
15 Protest"), at 3-4; Sacramento Protest, Attachment A, at 2-3; Roseville's Protest of Applications
16 5645X12 and 5644X02, filed July 9, 2009 ("Roseville Protest"), Attachment 1, at 1; Folsom's
17 Protest of Applications 5645X12 and 5644X02 ("Folsom Protest"), filed July 9, 2009, Attachment 1,
18 at 1; San Juan's Protest of Applications 5645X12 and 5644X02, filed July 9, 2009 ("San Juan
19 Protest"), Attachment 1, at 1; Sac Suburban's Protest of Applications 5645X12 and 5644X02, filed
20 July 9, 2009 ("Sac Suburban Protest"), Attachment 1, at 1; FOR Protest, at 9; DWR Protest, at 1-2.)
21 However, modification of the Applications' Place of Use is not necessary or appropriate. GDPUD
22 remains a party to the Cooperation Agreement, with associated rights to receive water deliveries
23 through the UARP. Additionally, GDPUD's service territory remains within EDCWA's area of
24 concern, and EDCWA's enabling legislation requires it to consider anticipated water demands
25 throughout El Dorado County. (Wat. Code Appendices, Ch. 96-11.) GDPUD's service territory is

1 within the County and the General Plan projects additional water demands within that portion of the
2 County, beyond existing supplies. Moreover, GDPUD may, in the future, be able to divert water
3 delivered through the UARP, pursuant to a change to a new Point of Rediversion (see II.D.4 below)
4 or an exchange with another water right holder (see II.D.3 below.).

5 Protestants have also stated that, based on GDPUD's withdrawal from EDWPA, the
6 maximum combined diversion and re-diversion rates in any permits issued pursuant to the
7 Applications should be reduced. (Roseville Protest, Attachment 1, at 1; Folsom Protest, Attachment
8 1, at 1; San Juan Protest, Attachment 1, at 1; Sac Suburban Protest, Attachment 1, at 1.) However,
9 for the same reasons that the Applications' Place of Use should not be modified based on GDPUD's
10 withdrawal from EDWPA, neither should the diversion rates and quantities requested.

11 3. ***EDWPA is Not Presently Seeking State Board Approval of an Exchange***
12 ***with PCWA***

13 In regard to one potential mechanism through which GDPUD might receive delivery of water
14 appropriated under the Applications, the Applications discuss a hypothetical exchange with the
15 PCWA, based on GDPUD's contractual right to a portion of the capacity of PCWA's recently
16 constructed American River Pump Station. Such an exchange would allow GDPUD to divert at the
17 American River Pump Station along the North Fork American River, and, in turn, allow PCWA to
18 take water at Folsom Reservoir.

19 Sacramento attempts to protest any such transfer based on alleged injury to prior rights.⁸
20 (Sacramento Protest, Attachment A, at 1-2.) However, as the Applications state, "such an exchange
21 is not part of this application and depending on its terms may require further State Water Board
22 approvals." (Application 5644X02, Attachment 1, at 6; Application 5645X12, Attachment 1, at 6.)
23 Accordingly, Sacramento's protest cannot be sustained on such grounds.

24
25 ⁸ As described in Section IV.B.2.b below, EDWPA believes that Sacramento is foreclosed entirely
26 from protesting the Applications based on any alleged injury to its water rights.

1 way affect or modify the relative priorities among other diverters, including [Sacramento] and
2 Reclamation, based on such other diverters' water rights and contractual entitlements." (Sacramento
3 Protest, Attachment A, at 1-2.)

4 EDWPA has not requested such actions and believes any such conditioning to be
5 unnecessary and unwarranted. The Applications seek assignment of portions of state-filed
6 applications, which have a priority superior to that of Sacramento's rights. While Sacramento's
7 ability to divert under its rights may be reduced – consistent with the terms of its water right permits
8 – in no way do the Applications seek modification of Sacramento's water rights.⁹ Any change in
9 water availability to users with rights junior to those EDWPA seeks will be borne on a priority basis,
10 as those priorities presently exist.

11 As noted above, EDWPA is willing to negotiate a consensual conservation based transfer
12 with the Sacramento in lieu of pursuing these Applications. EDWPA efforts to engage the City have
13 been rebuffed.

14 6. *The Applications Cannot Conflict with the UARP-Chili Bar Settlement*
15 *Agreement*

16 A group of the Protestants have raised concerns as to the Applications' potential to conflict
17 with the terms of the UARP-Chili Bar Project Settlement Agreement. (CalSPA Protest, at 1, 3;
18 Reclamation Protest, at 2; CDFG Protest, at 2-5, 13; FOR Protest, at 2, 9; USFS Protest, at 2.)
19 Leaving aside whether the Settlement Agreement is within the State Water Board's jurisdiction,
20 EDWPA believes that the Protestants' concerns in this regard are unfounded. EDWPA's
21 appropriations pursuant to the Applications *cannot* conflict with the terms of the Settlement
22 Agreement. Under section 5.9 of the Cooperation Agreement, EDWPA has subordinated its ability

23 _____
24 ⁹ EDWPA believes that a request to the State Water Board to reduce the quantities of Sacramento's
25 American River permits would be permitted, based on express conditions within Sacramento's
26 permits and Decision 893. However, EDWPA has not requested such modification at this time. As
described in section III.C, below, EDWPA does request that the State Water Board remove certain of
Sacramento's protest grounds from further consideration, based on these conditions.

1 to require deliveries from SMUD to SMUD’s responsibility to comply with the terms of its FERC
2 license for the UARP. (El Dorado-SMUD Cooperation Agreement, § 5.9 [“Nothing in this
3 Agreement will be construed to require SMUD to deliver El Dorado Water to, or store El Dorado
4 Water for, the El Dorado Parties in a manner that violates or that SMUD reasonably determines may
5 violate the FERC license then in effect for the UARP.”].) As the terms of the Settlement Agreement
6 for the UARP and Chili Bar will be implemented through SMUD’s FERC license, EDWPA’s ability
7 to request deliveries from SMUD is also subordinated to SMUD’s compliance with the terms of the
8 Settlement Agreement.¹⁰ Compliance with the terms of the Settlement Agreement further includes
9 compliance with SMUD’s agreement with PG&E for cooperative management of the UARP and
10 PG&E’s Chili Bar project.

11 **7. *EID is Installing a Temperature Control Device on its Folsom Diversion***

12 Many Protestants have indicated concern regarding EID’s Folsom Reservoir intake facilities.
13 (CalSPA Protest, at 2-3; FOR Protest, at 2-3, 9; CDFG Protest, at 10.) While EDWPA does not
14 concede that EID is presently under any obligation to modify those facilities, EDWPA, like other
15 Water Forum stakeholders, and as a member of the Water Forum through the EDCWA, supports the
16 construction and implementation of a new TCD on the EID intake on Folsom Reservoir. EID has an
17 existing contract with Reclamation to share the costs of designing and constructing the TCD; \$6.25
18 million of federal funding has been authorized, and nearly \$5 million has been appropriated, to fund
19 Reclamation’s cost share. Additionally, in July 2009, EID awarded a contract for the design of the
20 new Folsom Lake Intake and Pump Station (FLIPS), which includes the TCD. The FLIPS project is
21 part of EID’s five-year Capital Improvement Plan, and it is scheduled to be constructed and
22 operational by the fourth quarter of 2013.

23 _____
24 ¹⁰ CDFG’s protest appears to evidence a misunderstanding of the Applications in regard to the water
25 that EDWPA seeks to have delivered from the UARP. (CDFG Protest, at 5.) EDWPA does not seek
26 to have SMUD release an additional 40,000 AF from the UARP reservoirs each year, as alleged by
CDFG, but rather seeks to obtain rights to 40,000 AF of the water that SMUD would already be
releasing from the UARP reservoirs in each year.

1 **IV. PROCEDURAL HISTORY**

2 **A. The Applications**

3 On or about February 26, 2008, EDWPA filed its Application No. 31698, requesting that the
4 State Water Board assign it portions of Applications 5644 and 5645 allowing the appropriation of up
5 to 40,000 acre-feet per year from the Rubicon and South Fork American River systems in a form
6 substantially similar to the appropriations requested through Applications Nos. 5644X02 and
7 5645X12. After discussions with State Water Board staff, EDWPA agreed to re-file its requests for
8 assignment of portions of Applications Nos. 5644 and 5645 through separate applications and
9 change petitions. On or about October 29, 2008, EDWPA filed the Applications.

10 **B. The Protests**

11 On May 11, 2009, the State Water Board, Division of Water Rights (the "Division"), issued
12 public Notice of Applications 5645X12 and 5644X02, Petitions for Partial Assignment of State-
13 Filed Applications 5645 and 5644 and Petitions to Change State-Filed Applications 5645 and 5644.
14 the Division Notice was issued along with copies of EDWPA's Applications, including relevant
15 supporting documents. The Notice required that the Division receive Protests by 4:30 p.m. on July
16 10, 2009. Because July 10, 2009 was a designated furlough day for the Division, the Division
17 extended the protest period through 4:30 p.m. on July 13, 2009.

18 The Protestants filed the Protests on the dates here listed: July 6, 2009 – Sacramento; July 8,
19 2009, CalSPA; July 9, 2009, Folsom, Roseville, Sac Suburban, San Juan; July 10, 2009 -
20 Reclamation, Forest Service, Native Plant Society, PCWA; July 12, 2009 – CSNC; July 13, 2009,
21 Friends of the River, et al.; and July 13, 2009 – CDFG, DWR,¹¹ and PG&E. EDWPA was served
22 with each of the Protests, either directly or via service on its counsel.

23 On September 1, 2009, the Division sent a letter to each of the Protestants informing it that
24 the Division had reviewed its protest and found it to substantially comply with the protest filing

25 _____
26 ¹¹ CDFG and DWR protested via memoranda to the Division.

1 requirements specified in Water Code sections 1331 and 1703.2 and California Code of Regulations,
2 title 23, sections 745 *et seq.* On that date, the Division also sent two memoranda to DWR and
3 CDFG, informing them that the Division had reviewed the protests and found them to substantially
4 comply with the requirements for protest filing. In these letters and memoranda, the Division
5 excluded certain issues raised in the Protests from further consideration, discussed further in section
6 III.C., below.

7 The Division instructed EDWPA to respond to the Protestants by October 1, 2009. On
8 September 23, 2009, EDWPA sent letter responses to all Protestants indicating that it had received
9 and reviewed the protests, that it was working to respond to the Protestants' concerns, and that it
10 would provide its formal response shortly.

11 **C. Exclusion of Issues from Further Consideration**

12 As mentioned above, through its September 1, 2009 letters and memoranda, the Division
13 removed certain issued raised in the Protests from further consideration. Because CDFG did not
14 provide information to substantiate two issues mentioned in its protest, 1) "the use of
15 nonconsumptive water for consumptive use purposes"; and 2) CDFG's claim that a change in the
16 point of diversion between EDWPA's application and the original State-filed applications should
17 require that a new application be filed, the Division declined to further consider these issues.¹²
18 (Division's Memorandum to CDFG, *Water Right Applications 5644X02 and 5645X12 and Petitions*
19 *for Partial Assignment and Change of State-Filed Applications 5644 and 564 of El Dorado Water*
20 *and Power Authority to Appropriate Water From Rubicon and South Fork American River Systems*
21 *In El Dorado County* (Sep. 1, 2009) at 1-2.)

22 In its letter to CSNC, the Division also limited the further consideration of El Dorado
23 County's 2004 General Plan, stating that concerns regarding the General Plan and its implementation

24 _____
25 ¹² The Division stated that these two issues would not be addressed further in the protest proceedings
26 unless the Division received a statement of facts by October 1, 2009. EDWPA is not aware that
CDFG filed any such statement of facts.

1 by the County will be relevant only to the extent that EDWPA will rely on the General Plan's
2 Environmental Impact Report to address environmental impacts within EDWPA's proposed place of
3 use. (Division's letter to CSNC, *Water Right Applications 5644X02 and 5645X12 and Petitions for*
4 *Partial Assignment and Change of State-Filed Applications 5644 and 564 of El Dorado Water and*
5 *Power Authority to Appropriate Water From Rubicon and South Fork American River Systems In El*
6 *Dorado County* (Sep. 1, 2009) at 1.)

7 Based on the Division's limitation of the concerns that will be considered regarding the
8 County's 2004 General Plan, EDWPA requests confirmation that the State Water Board similarly
9 limit the consideration of the General Plan concerns raised by Friends of the River, et al., the Native
10 Plant Society and Sacramento solely to those related to EDWPA's reliance on the General Plan's
11 Environmental Impact Report to address environmental impacts within EDWPA's proposed place of
12 use. Specifically, EDWPA asks that the Division exclude from consideration the following:

- 13 • Friends of the River, et al. and the Native Plant Society raise concerns related to
14 the County's implementation of the General Plan and mitigation measures
15 required by its EIR. (FOR Protest, at 5-6; Native Plant Society's Protest of
16 Applications 5645X12 and 5644X02 ("Native Plant Society Protest"), at 2-5.).
- 17 • Sacramento claims that General Plan overestimates future growth. (Sacramento
18 Protest, Attachment A, at 3-4.)

19 Consistent with the Division's statement above, and as described in section X.X., below,
20 EDWPA's EIR will analyze the environmental impacts within EDWPA's proposed place of use. To
21 the extent the EIR relies on the County's General Plan EIR to address any impacts that might arise,
22 the General Plan EIR is relevant in these proceedings (though comments on EDWPA's Draft EIR
23 would be the more logical venue for addressing concerns in this regard). However, the County's
24 implementation of mitigation measures is not relevant to EDWPA's applications and, based on the
25 Division's statements regarding CSNC's protest, should be excluded from further consideration.

1 Further, the California Native Plant Society's allegations regarding EID's failure to comply with
2 terms included in its Permit 21112 are not relevant to the State Water Board's approval of EDWPA's
3 pending Applications. Sacramento's claims as to the General Plan itself are additionally irrelevant
4 to these proceedings and should be excluded from further consideration.

5 **V. LEGAL RESPONSES**

6 **A. State-Filed Applications**

7 1. ***EDWPA Seeks Assignment of Portions of Applications Nos. 5644 and 5645***

8 EDWPA seeks partial assignment of portions of Applications Nos. 5644 and 5645.
9 Applications Nos. 5644 and 5645 were filed by the California Department of Finance in 1927
10 pursuant to Water Code sections 10500, *et seq.* The waters of the American River system subject to
11 Applications 5644 and 5645 originate within El Dorado County, and, in its disposition of these
12 applications, the State Water Board is to ensure that El Dorado County has the water necessary for
13 its development. (Wat. Code, § 10505; see also State Water Board Decision 1635, *In the Matter of*
14 *Applications 29919, 29920, 29921, 29922 and Petition for Assignment of SFA 5645 of El Dorado*
15 *Irrigation District and El Dorado County Water Agency... to Appropriate Water from Silver Lake,*
16 *Caples Lake, Lake Aloha, South Fork American River in Alpine, Amador and El Dorado Counties.*
17 (1990), at 124-125 ["Fundamentally, Application 5645 was filed to assure a priority claim on the
18 right to divert and use water from the South Fork American River to supply the future needs of El
19 Dorado County and some adjoining areas."].)

20 2. ***Petitions for Assignment of State-Filed Applications are Exempt from Fully***
21 ***Appropriated Streams Limitations***

22 In its protest, CDFG asks that the EDWPA's proposed points of rediversion from the UARP
23 (White Rock Penstock and Folsom Reservoir) be evaluated in light of previous findings related to
24 declarations of fully appropriated streams. (CDFG Protest, at 2-4.) Any such findings do not
25 preclude the State Water Board's consideration of the Applications, as the State Water Board has

Application No.	Point of Diversion	Existing Diversion Amount	Portion Requested by EDWPA for Assignment	Amount Remaining After Assignment to EDWPA
5644	(1) Rubicon River (Sec. 35, T 13 N, R 13 E, M.D.B.& M.)	400 cfs direct diversion	225 cfs direct diversion	175 cfs direct diversion
	(3) Gerle Creek (NW 1/4 Sec. 4, T 13 N, R 15 E, M.D.B.& M.)	24,000 AFA to storage	10,000 AFA to storage	14,000 AFA to storage
	(4) Unnamed tributary to Rubicon River (SE 1/4 Sec. 6, T 13 N, R 16 E, M.D.B.& M.)	6,000 AFA to storage		6,000 AFA to storage
5645	(2) North Fork Cosumnes River (NE 1/4 Sec. 10, T 9 N, R 14 E, M.D.B.& M.)	10,000 AFA to storage		10,000 AFA to storage
	(3) North Fork Cosumnes River (Sec. 7, T 9 N, R 13 E, M.D.B.& M.)	50 cfs direct diversion		50 cfs direct diversion
	(6) North Fork Cosumnes River (NW 1/4 Sec. 7, T 9 N, R 12 E, M.D.B.& M.)	200 cfs direct		200 cfs direct diversion, 30,000 AFA to storage
	(7) Cosumnes River (NW 1/4 Sec. 14, T 8 N, R 10 E, M.D.B.& M.)	600 cfs direct diversion, 60,00 AFA to storage		600 cfs direct diversion, 60,00 AFA to storage
	(8) South Fork American River (Sec. 15, T 11 N, R 9 E, M.D.B.& M.)	544 cfs direct diversion, 37,069 AFA to storage	450 cfs direct diversion, 37,069 AFA to storage	94 cfs direct diversion
	(9) South Fork American River (Sec 28, T 11 N, R 15 E, M.D.B.& M.)	60 cfs direct diversion		60 cfs direct diversion

In this regard, Friends of the River, *et al.* additionally are concerned as to changes requested by the Petitions, stating that EDWPA requests to change points of diversion under Application No. 5645 from sources within the Cosumnes River watershed to sources in the South Fork American River watershed. (FOR Protest, at 3-4, 8.) As demonstrated by the table above, this is not the case.

EDWPA has requested that the State Water Board assign it portions of applications 5644 and 5645, which were filed by the State in 1927 and are not subject to the ordinary diligence

1 requirements. (Wat. Code, § 10500.) Upon their assignment, EDWPA must seek permitting of the
2 assigned portions of the application pursuant to the State Water Board's permitting criteria. (Wat.
3 Code, § 1375.) The State Water Board will consider EDWPA's applications, subject to the same
4 permitting criteria as other applications before it. This includes the requirement that there be
5 unappropriated water available to supply EDWPA.¹³

6 Upon the showing of the satisfaction of the permitting criteria, EDWPA will be issued
7 permits allowing its appropriation pursuant to a 1927 priority date. EDWPA has not requested, and
8 the permitting of its applications would not require, the modification of any other party's water
9 rights.¹⁴ EDWPA's appropriation would occur pursuant to the State's water right priority system.
10 EDWPA would be entitled to appropriate subject to paramount water rights being met, and prior to
11 appropriation by junior right holders.

12 Whether any junior appropriators would be precluded from diverting to the full extent of
13 their rights will be dependent on water availability in the particular year. Accordingly, as EDWPA
14 would hold water rights with a 1927 priority date, it would be entitled to appropriate its water prior
15 to those holding junior rights. This does not necessitate a change in the water rights of these junior
16 appropriators, nor is EDWPA requesting to appropriate pursuant to those rights.

17 **B. Request for Exclusion from Further Consideration**

18 1. ***Requirements for Protests***

19 Water Code sections 1331 and 1703.2 describe the information that must be included in a
20 party's protest of an application or petition. Fundamental among these requirements are that the
21 protest must clearly and specifically set forth the protestant's objections to the approval of the

22 ¹³ Based on the Applications' 1927 priority date, this evaluation will consider whether water is
23 available for appropriation after the satisfaction of all rights with a superior priority to the 1927 date.

24 ¹⁴ As described in sections IV.B.2.b, herein, EDWPA has asked that the State Water Board consider
25 the permit terms included in certain Protestants' water rights in finding that those Protestants are
26 foreclosed from claiming any injury to their rights based on the permitting of, and appropriation
under, EDWPA's applications. However, EDWPA has only asked that these permit conditions be
acknowledged and respected, and does not believe that any State Water Board action to modify the
water rights of these protestants is necessary in order to give these conditions effect.

1 b. Sacramento Cannot Claim an Injury to its Water Rights

2 Based on the terms of Sacramento's water rights, as imposed through State Water Board
3 Decision 893, *In the Matter of Applications 12140 et al. by the City of Sacramento et. al to*
4 *Appropriate Water from the American River and its Tributaries* (1958) (hereafter "Decision 893"),
5 Sacramento cannot claim that those rights will be injured by the State Water Board's granting of the
6 Applications.¹⁵ Initially, the portions of State Filed Applications requested by EDWPA are of
7 superior priority to Sacramento's rights. Additionally, Sacramento, through its acceptance of its
8 permits pursuant to State Water Board Decision 893, has consented to a reduction in the availability
9 of water under its rights permitted under the decision. Specifically, Sacramento's rights were
10 conditioned

11 that rights thereunder remain subject to reduction in the event of future
12 appropriations of water for reasonable, beneficial use within the
13 watershed tributary to the city's points of diversion.

14 (Decision 893, slip copy, at 49.) The Executive Officer of what was then the State Water Rights
15 Board, in transmitting the decision to the applicants, protestants and other interested parties, stated:

16 Although the applications of Placer and El Dorado Counties were
17 denied the Board has ordered certain terms and conditions be inserted
18 in the permits to be issued to the City of Sacramento and the United
19 States so that future upstream development in those counties will not
20 be hampered by the projects of the City and the Federal Government.¹⁶

21 (Letter from L.K. Hill, Executive Officer, to Applicants, Protesters, and Other Interested Parties,

22 ¹⁵ If the State Water Board does not agree that Sacramento's protest should be excluded, any
23 evaluation of the potential injury to Sacramento's rights must first include Sacramento's
24 establishment of its rights. Under California law, a water right is defined by the extent to which
25 water is put to reasonable and beneficial use. (Cal. Const., art. X, § 2; Wat. Code, § 100.)
26 Reasonable and beneficial use does not include waste or the unreasonable method of use of water.
27 (*Id.*) Prior to any evaluation of Sacramento's claimed injury to its rights, Sacramento must
28 demonstrate the extent of its rights as established by its reasonable and beneficial use of water.

¹⁶ Moreover, Decision 893 described the State Water Rights Board's intent in imposing the
condition: "It ensures that meritorious upstream projects which are as yet unready to proceed with
development will not be foreclosed from diverting their requirements in due course." (Decision 893,
slip copy, at 49.)

1 transmitting *Decision on Major Applications to Appropriate Water from American River System*
2 (Mar. 21, 1958.) While Sacramento, in its protest, acknowledges the existence of these permit
3 conditions (Sacramento Protest, Attachment A, at 1), it nonetheless protests the Applications'
4 potential impacts on Sacramento's rights.

5 In this regard, EDWPA requests that the State Water Board exclude any claimed injury to
6 Sacramento's rights from further consideration in the Board's processing of EDWPA's Applications.
7 (See also Decision 1587, *In the Matter of Application 26375 and 26373 to Appropriate Water From*
8 *The South Fork of the American River and Its Tributaries* (1982), slip copy, at 43-45; WR Order 83-
9 01, *Amending and Affirming Decision 1587 and Denying Petitions for Reconsideration* (1983), slip
10 copy, at 22-23 ["Persons planning water development projects have actual or constructive notice of
11 state-held applications and must plan for the effect of such applications".])

12 Permit terms requiring the reduction in diversion in favor of a use to which the permitted
13 right is subordinated do not require administrative action to take effect; they are self-executing.
14 Protestants who base their protests on prior rights and ask the State Board to condition EDWPA's
15 application to avoid harm to these prior rights ignore the nature of the permit term itself: the permit
16 term condition defines the permittee's rights, and do not require any action by the State Water Board
17 to take effect. "[T]he extent, the limit, and the measure of the protection provided by [a condition
18 requiring reduced diversions in favor of diversions within the watershed of origin] may be found
19 only in the four corners of the condition." (Decision 1486, *In the Matter of Application 24578,*
20 *24579 to Appropriate Water from Santa Ynez River Underflow in Santa Barbara County* (1978) slip
21 copy, at 26.) When the protected El Dorado County interests require water pursuant to the
22 protections they have been extended, the protective permit limiting diversions activate automatically.
23 (See Decision 1338, *In the Matter of Application 22423 of Solvang Municipal District, 22454, 22516*
24 *to Appropriate Water from Santa Ynez River in Santa Barbara County* (1969) slip copy, p. 7
25 [holding that Reclamation could not object to appropriations based on injury to prior rights because

1 Reclamation’s permit terms automatically made its rights subject to all diversions in accordance with
2 those terms].) Similarly here, Protestants Sacramento, Reclamation, and PCWA have all accepted
3 permits subjected to reduced diversions in the event El Dorado County interests require water to
4 meet the water needs of the county. Action by the State Board is not required to effectuate these
5 conditional limitations—when the condition exists, the limitations take effect.

6 c. Reclamation Contractors Cannot Claim an Injury to any Rights under
7 Contracts with Reclamation

8 Folsom, Roseville, Sac Suburban and San Juan claim that EDWPA’s proposed
9 appropriations “would reduce inflows into Folsom Reservoir, and thereby result in less water being
10 available to Reclamation to supply water to entities in the American River watershed that have
11 water-supply contracts with Reclamation and legal preference to receive Central Valley Project
12 water.” (See Folsom Protest, Attachment 1, at 1; Roseville Protest, Attachment 1, at 1; Sac
13 Suburban Protest, Attachment 1, at 1; San Juan Protest, Attachment 1, at 1.) However, these
14 Protestants cannot claim an injury based on impacts, if any, to their water service contracts with
15 Reclamation. The State Water Rights Board conditioned Reclamation’s American River rights in
16 the same manner that it conditioned Sacramento’s rights, as described above. (Decision 893, slip
17 copy, at 71 [“The amounts which may be diverted under rights acquired or to be acquired under
18 these permits are and shall remain subject to reduction by future appropriation of water for
19 reasonable, beneficial use within the watershed tributary to Folsom Reservoir.”]; see also Decision
20 1587, *In the Matter of Application 26375 and 26373 to Appropriate Water From The South Fork of*
21 *the American River and Its Tributaries* (1982), slip copy, at 43-45; WR Order 83-01, *Amending and*
22 *Affirming Decision 1587 and Denying Petitions for Reconsideration* (1983), slip copy, at 22-23
23 [“Persons planning water development projects have actual or constructive notice of state-held
24 applications and must plan for the effect of such applications... Reclamation should have planned
25 for a reduction in the water available to the Folsom Project for local needs inasmuch as Congress

1 specifically instructed Reclamation to plan a project in accordance with state laws protecting local
2 needs.”]; see also WR Order 83-01, slip copy, at 22 [“Persons planning water development projects
3 have actual or constructive notice of state-held applications and must plan for the effect of such
4 applications or seek the assignment or release of the state-held applications in favor of the planned
5 project.”].)

6 Furthermore, Reclamation’s Contractors have no greater right in contract water supplies than
7 Reclamation itself. (See, e.g., See Decision 1338, *In the Matter of Application 22423 of Solvang
8 Municipal District, 22454, 22516 to Appropriate Water from Santa Ynez River in Santa Barbara
9 County* (1969); Decision 1486, *In the Matter of Application 24578, 24579 to Appropriate Water
10 from Santa Ynez River Underflow in Santa Barbara County* (1978).) As explained in *Israel v.
11 Morton* (9th Cir. 1977) 549 F.2d 128, 132, there can be no vesting of state law water rights by
12 beneficial users of federally-provided water. Title to the water rights under the permits is held by
13 Reclamation, not by the contractors themselves. (See *Ivanhoe Irrigation Dist. v. McCracken* (1958)
14 357 U.S. 275, 290-91.) Since Reclamation holds state water permits to all CVP water it delivers
15 pursuant to contracts with the CVP contractors, (43 U.S.C. § 511), CVP contractors may only take
16 water pursuant to the terms of their contracts with Reclamation. (*Westlands Water District v. U.S.
17 Bureau of Reclamation* (2001) 153 F.Supp.2d 1133, 1150. Federal contract law governs the CVP
18 contractor’s quantified right, not state water rights law. (See *Mohave Valley Irrigation & Drainage
19 Dist. v. Norton* (9th Cir. 2001) 244 F.3d 1164, 1165 (citing cases); see also *Westlands*, 134
20 F.Supp.2d at 1135 (applying federal law to interpret Westlands Water District’s 1963 water-service
21 contract).)

22 d. PCWA Cannot Claim an Injury to its Rights Under the Terms of its
23 Permits

24 PCWA alleges potential injury to its water rights held under its permits 13855 and 13857,¹⁷

25 ¹⁷ PCWA’s protest indicates that it holds Permit 13847 (PCWA Protest Based on Prior Filed
26 Application or Injury to Prior Rights, at 1), but this is believed to be a typographical error.

1 (WR Order 2001-022, at 61.)

2 Similarly, EDWPA's applications do not include any points of diversion located on any
3 portion of the American River designated pursuant to the Wild & Scenic Rivers Act. All diversions
4 are upstream, and any flow alterations are within the discretion of Reclamation as it chooses to
5 regulate flow by releases from Folsom Dam. EDWPA is not proposing the construction of any
6 diversion facilities on any designated portions of the American River system. Accordingly, the Act
7 does not preclude the State Water Board's granting of EDWPA's Applications.

8 **VI. FACTUAL RESPONSES**

9 **A. EDWPA Will Evaluate Flow-Related Water Right Impacts**

10 Among those protest grounds that EDWPA has not asked the State Water Board to exclude
11 from further consideration, are alleged injuries that EDWPA will evaluate through the preparation of
12 its EIR and Water Availability Analyses. EDWPA will evaluate the flow-related impacts of
13 EDWPA's planned appropriation, if any. Its evaluation will include issues raised in PG&E's
14 protest. In no way does EDWPA's failure to challenge PG&E claimed injury constitute any
15 concession that PG&E holds the rights it claims.

16 **B. EDWPA Will Evaluate Flow-Related Environmental Impacts of its Project**

17 Many of the Protests also include concerns as to the potential environmental impacts related
18 to a decrease in flows downstream of the Applications' points of diversion and points of rediversion.
19 EDWPA will evaluate the potential impacts, as follows:

- 20 • Several Protestants express concern that EDWPA's appropriations could reduce
21 inflow into Folsom Reservoir and result in reduced water availability for releases
22 into the Lower American River, potentially affecting instream and public trust
23 resources. (CDFG Protest, at 2, 4, 10-11; FOR Protest, at 2-4, 9-10; CalSPA
24 Protest, at 1-3; Roseville Protest, Attachment 1, at 1; Folsom Protest, Attachment
25 1, at 1; San Juan Protest, Attachment 1, at 1; Sac Suburban Protest, Attachment 1,

1 at 1; Sacramento Protest, Attachment 1, 3-4; Reclamation Protest of Applications
2 5645X12 and 5644X02, at 4; PCWA Protest, Supplement to Protest on Public
3 Interest Grounds, at 1.)

- 4 • Several Protestants express concern that EDWPA's appropriations could reduce
5 inflow into Folsom Reservoir and impede implementation of an improved Lower
6 American River Flow Management Plan. (CDFG Protest, at 4, 10; FOR Protest,
7 at 2-3; CalSPA Protest, at 1-2; Roseville Protest, Attachment 1, at 1; Folsom
8 Protest, Attachment 1, at 1; San Juan Protest, Attachment 1, at 1; Sac Suburban
9 Protest, Attachment 1, at 1; Sacramento Protest, Attachment 1, at 4; PCWA's
10 Protest, Supplement to Protest on Public Interest Grounds, at 1.)
- 11 • Several Protestants are concerned that EDWPA's appropriations could reduce
12 inflow into Folsom Reservoir and potentially impact water temperatures in the
13 Lower American River. (Reclamation Protest, at 4; Sacramento Protest,
14 Attachment 1, at 4; PCWA Protest, Supplement to Protest on Public Interest
15 Grounds, at 1; CDFG Protest, at 4, 10; FOR Protest, at 2-3; CalSPA Protest, at 2.)
- 16 • Sac Suburban was concerned that reductions in Reclamation deliveries could
17 require contractors to pump more groundwater, which could adversely impact
18 groundwater conditions in the basins and aquifers from which they pump
19 groundwater, and on that basis requested that any permit address impacts on
20 affected groundwater basins and aquifers. (Sac Suburban Protest. p. 1.)

21 EDWPA's preparation of the EIR will include modeling accounting for the Project's
22 proposed depletions of water from the American River system, which will show how the system
23 responds with the full implementation of the proposed project, as defined. EDWPA's EIR is based
24 on a detailed, project-level, review of the potential hydrological effects of the proposed project on
25 the various reservoirs, waterways, and physical and natural resources that rely on these waterbodies.

1 Separate hydrologic modeling was undertaken for the Upper American River basin, relative to the
2 broader system-wide modeling that addressed Folsom Reservoir, the lower American River, and all
3 points downstream throughout the CVP/SWP, including upper Sacramento River reservoirs, the
4 Feather River, and the Sacramento-San Joaquin River Delta. These two modeling frameworks were
5 integrated based on details of the proposed project, and addressed all of the potential permutations
6 related to possible diversion points and quantities applied for under the State Filed Applications
7 5645X12 and 5644X02. Numerous modeling simulations were developed and run; data output was
8 generated across the entire CVP/SWP for each simulation.

9 The modeling baselines were developed using the recent foundational model runs from
10 Reclamation's 2008 Long-Term Coordinated Operations of the Central Valley Project and State
11 Water Project Biological Assessment and Reclamation's current Operations and Criteria Plan¹⁸
12 ("OCAP"). Several updates have been included since the completion of the last OCAP in 2004
13 based on ongoing discussions and coordination within the multi-agency OCAP Commons
14 Assumptions modeling process. Modeling of the Lower American River Flow Management
15 Standard (FMS) along with detailed insight into the Water Forum Purveyor Specific Agreements,
16 Sacramento River Water Reliability Study (SRWRS), various purveyor actions, Folsom Reservoir
17 coldwater pool management, and ongoing deliberations within the Bay-Delta Conservation Plan
18 were made part of the modeling developmental process. This was coupled with a thorough
19 understanding of Reclamation operational protocols including decision-making processes through
20 the LAR Operations Group.

21 Hydrologic modeling (mass balance reservoir routing of the entire CVP/SWP, including
22 Folsom Reservoir) provided the hydrology output through the use of CALSIM II. Accepted

23
24 ¹⁸ The OCAP for the two jointly-operated projects addresses the operational impacts on delta smelt
25 by committing the two projects to take early protective actions for the species, before high numbers
26 of the fish reach the major export pumps, where losses often occur. The OCAP incorporates the
27 Environmental Water Account (EWA) into the delta smelt protective actions, along with other
28 management measures.

1 environmental models, such as Reclamation's Water Temperature models, were used to develop
2 water temperature output data, which were used as input to Reclamation's Early Life Stage Salmon
3 Mortality models. As an integrated package, compiled and focused on addressing all of the key
4 environmental parameters through the GATAER program, these modeling data provided the
5 extensive numerical dataset from which potential water-related impacts from the proposed project
6 were evaluated.

7 On this basis, the EIR fully discloses the potential changes in local, regional, and system
8 wide hydrology, its effect on instream resources, including habitat and species viability, and the
9 potential shortages that could be realized by water purveyors across the CVP/SWP, depending on
10 Reclamation's chosen mitigative prescriptions. The EIR provides a detailed description of the
11 various operational options open to Reclamation, through its joint management of the CVP/SWP to
12 effectively offset these identified impacts. Reclamation's choices, in how it will offset any shortages
13 in flow and/or impaired water temperatures will be apparent from the model results.

- 14 • Reclamation asks that the SWRCB condition any permit granted to EDWPA to
15 require the fish flows and water temperature requirements of the National Marine
16 Fisheries Service's (NMFS') 2009 Salmon/Steelhead Biological Opinion on the
17 OCAP, respectively, be adhered to. (Reclamation Protest, at 4.) CalSPA, CDFG
18 and Friends of the River, et al., expressed similar concerns. (CalSPA Protest, at
19 2-3; CDFG Protest, at 12-13; FOR Protest, at 4, 10.)

20 EDWPA expects that Reclamation will, in good faith, implement the various terms and
21 conditions and other Conservation Measures identified in the Reasonable and Prudent Alternatives
22 of the NMFS June 4, 2009 Biological Opinion on the Long-Term Coordination of the CVP and SWP
23 as required under the federal Endangered Species Act. EDWPA does not have control, ownership,
24 or influence in how Reclamation's Folsom Reservoir facilities are operated and, accordingly, has no
25 operational authority to effect any of the prescriptive recommendations contained in this Opinion.

- Folsom, Roseville, Sac Suburban, and San Juan request the insertion in any permits issued pursuant to the Applications of bypass requirements to address LAR instream flow requirements and Bay-Delta water quality objectives. (Roseville Protest, Attachment 1, at 1; Folsom Protest, Attachment 1, at 1; San Juan Protest, Attachment 1, at 1; Sac Suburban Protest, Attachment 1, at 1.)

Initially, as described above, the Draft EIR will analyze the impacts, if any, of system depletions resulting from EDWPA's proposed appropriation, and propose mitigation, including offsetting flow prescriptions, as applicable, for impacts identified. However, as described in section II.D.6 above, EDWPA has agreed to subordinate its appropriations through the UARP to SMUD meeting its bypass flow requirements under its to-be-issued FERC UARP license, and by extension the UARP-Chili Bar Settlement Agreement. These bypass requirements represent conditions either imposed or agreed to by SMUD, PG&E, USFS, the SWRCB, CDFG, CalSPA, FOR, American Whitewater, American River Recreation Association, Foothill Conservancy, and California Outdoors), which in their judgment were sufficient for the protection of the species of concern and would provide sufficient flows for instream requirements.

- CDFG has requested that EDWPA provide fish screening proposals for EDWPA's proposed intakes. (CDFG Protest, at 10.)

No new infrastructure, facility components, or associated appurtenances are part of the Current Project. However, as with all other facility elements associated with the Project, fish screen designs will be prepared, submitted for approval, and ultimately implemented as part of a future project, having its own separate environmental review and approval process if warranted.

C. EDWPA Will Evaluate Potential Impacts to Species

The Protests additionally include concerns that the Project might impact particular species, including resident and migratory bird species (CDFG Protest, at 1) and rare plants (Native Plant Society Protest, Supplemental Information, at 1-2, 5-6; CSNC Protest, at 1.) Friends of the River, et

1 al. wish to require EDWPA to demonstrate that its Project is compatible with the June 4, 2009,
2 National Marine Fisheries Service's (NMFS') Biological Opinion on salmon, steelhead and other
3 anadromous fish species, to consult with NMFS and the United States Fish Wildlife Service
4 regarding any Project effects on listed species and to comply with the Biological Opinions issued by
5 these agencies. (FOR Protest, at 10.) EDWPA's Draft EIR will include analysis of the impacts, if
6 any, on these species. Compliance with the Biological Opinion issued by these agencies,
7 particularly in the case of the referenced Opinion on salmon, steelhead, and other anadromous fish
8 species, is the responsibility of the federal agency whose action(s) prompted the Opinion. Within
9 these Opinions, the various Reasonable and Prudent Alternatives and associated terms and
10 conditions related to any Incidental Take Statements are the responsibility of the federal agencies (in
11 this case, Reclamation). EDWPA has no authority, standing, or legal or physical ability to
12 implement the actions identified in these Opinions.

13 **VII. POSSIBLE RESOLUTION OF THE PROTESTS**

14 Following its receipt of the Division's September 1, 2009 letters, EDWPA has initiated
15 discussions with many of the Protestants regarding the potential resolution of their Protests. After
16 EDWPA's Draft EIR is completed, EDWPA will engage Protestants regarding any concerns they
17 may still have following their review of the Draft EIR's analysis. As to some of the Protest grounds
18 described above, EDWPA requests their exclusion from further consideration in these proceedings.

19 **VIII. CONCLUSION**

20 On the basis of the above, EDWPA requests that the State Water Board remove from further
21 consideration in its proceedings on EDWPA's Applications the following issues:

- 22 • Any protest grounds related to the El Dorado County General Plan, except to the
23 extent EDWPA relies on the General Plan EIR to address environmental impacts
24 within EDWPA's place of use under the Applications;
- 25 • The inclusion of lands within GDPUD's service territory within the Applications'


Place of Use;

- Any future exchange with PCWA;
- The potential for EDWPA to request a change to add additional Point(s) of Diversion pursuant to the permitted Applications in the future;
- Any alleged conflict with terms of the UARP-Chili Bar Settlement Agreement;
- EID's installation of a temperature control device at its Folsom Reservoir diversion facility;
- The changes requested to the portions of Applications 5644 and 5645 that EDWPA asks it be assigned;
- Any alleged injury to any water rights of DWR;
- Any alleged injury to the water rights of the City of Sacramento;
- Any alleged injury to the contractual rights of Reclamation Water Service contractors Folsom, Roseville, Sac Suburban and San Juan;
- Any alleged injury to the water rights of PCWA;
- Any alleged injury to the contractual rights of Sac Suburban; and
- Any argument that the Wild & Scenic Rivers Act prevents the State Water Board's permitting of EDWPA's Applications.

DATED: November 24, 2009

Respectfully requested,

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By 
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PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 21 East Carrillo Street, Santa Barbara, California 93101-2782. On November 24, 2009, I served the within document:

APPLICANT'S ANSWER TO PROTESTS

by transmitting via electronic mail the document(s) listed above to the Division of Water Rights of the State Water Resources Control Board and by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the standard U S Mail service at Santa Barbara, California to the person(s) at the address(es) set forth below.

SEE SERVICE LIST ATTACHED

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on November 24, 2009, at Santa Barbara, California.



MARIA KLACHKO-BLAIR

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