
State Water Resources Control Board

NOTICE OF REQUEST FOR HEARING

The State Water Resources Control Board
Administrative Hearings Office
has received a request for hearing by

United States Army Corps of Engineers

on the March 24, 2022 Notice of Proposed Revocation of water-right License 881B
issued by
the State Water Resources Control Board
Office of the Delta Watermaster.

NOTICE OF PROPOSED REVOCATION

On March 24, 2022, Michael Patrick George, the Delta Watermaster for the State Water Resources Control Board (State Water Board or Board), issued a Notice of Proposed Revocation of water-right License 881B (Notice of Proposed Revocation) (Attachment 1).

The following is a summary of the Delta Watermaster's allegations in the Notice of Proposed Revocation:

On November 27, 1929, the predecessor to the State Water Board issued water-right License 881, with a priority date of September 17, 1924. License 881 authorized the diversion of water from Liberty Cut, within the Sacramento-San Joaquin Delta, for the purpose of irrigation from June 15 to August 30. On May 1, 1989, the State Water Board divided License 881 into parts A and B. The Board issued License 881B to William C. and W. Ashley Payne. License 881B retained the priority date of September 17, 1924, and authorized diversion of up to 1,450 acre-feet of water per year from Liberty Cut for irrigation of 1,400 acres of land in the Sacramento-San Joaquin Delta.

In 2010, the State Water Board updated its records to reflect that the United States Army Corps of Engineers (USACE) had acquired License 881B. USACE filed Reports of Licensee for License 881B for calendar years 2007, 2008, 2009, and 2010. The reports indicated that USACE had not diverted water or put water to beneficial use pursuant to License 881B in any of those years.

The Delta Watermaster proposes to revoke License 881B pursuant to Water Code sections 1675 and 1241 based on the allegation that, since at least 2007, USACE has not diverted or put to beneficial use all or any part of the water available for diversion and beneficial use under License 881B.

REQUEST FOR HEARING

On April 8, 2022, Assistant District Counsel for the Sacramento District of the USACE, sent a letter to the Delta Watermaster requesting a hearing on the Notice of Proposed Revocation (Attachment 2). The letter also requests the opportunity by motion to dismiss or other appropriate procedure for the USACE to formally challenge, through a special appearance, the State Water Board's jurisdiction and authority to revoke License 881B in the manner described in the Notice of Proposed Revocation.

ADMINISTRATIVE HEARINGS OFFICE

Water Code section 1110 established the AHO as an independent organizational unit within the State Water Board. Water Code section 1112, subdivision (a)(3), provides that, subject to an exception not applicable here, an AHO hearing officer shall preside over a hearing in any matter involving a notice of proposed revocation of a license issued under Water Code section 1675. Water Code section 1114, subdivision (c)(1), provides that, after holding this hearing, the AHO hearing officer shall prepare a proposed order and transmit it to the Board for the Board's consideration.

HEARING OFFICER AND HEARING TEAM; NOTICE OF PRE-HEARING CONFERENCE AND HEARING

Hearing Officer Nicole Kuenzi will preside over the hearing in this matter and related proceedings. Other members of the AHO may be present and assist the hearing officer throughout these proceedings.

The AHO will be issuing a notice of pre-hearing conference and hearing for these proceedings.

PROHIBITION ON EX PARTE COMMUNICATIONS

Parties and interested persons are prohibited from having any ex parte communications with any members of the AHO hearing team regarding these proceedings. (See Wat. Code, § 1110, subd. (c); Gov. Code, §§ 11430.10-11430.80.) For a discussion of ex parte communications regarding AHO hearing officers and staff, see the response to FAQ 16 of the AHO FAQs, which are posted at https://www.waterboards.ca.gov/water_issues/programs/administrative_hearings_office/docs/2021/2021-07-06_webpage_faq.pdf.

If any party or interested person wants to communicate with the AHO regarding a procedural or substantive issue related to these proceedings, the party or interested person shall make the communication in writing, shall serve all parties listed on the service list for this proceeding with copies of the communication, and include a proof of service demonstrating such service with the written communication to the AHO.

Any such communication shall be sent to the AHO by e-mail to:

AdminHrgOffice@waterboards.ca.gov, or by letter addressed to:

State Water Resources Control Board
Administrative Hearings Office
P.O. Box 100
Sacramento, CA 95814-0100

A party or interested person may provide the proof of service through a formal proof of service or by other verification. Until the AHO issues an updated service list for these proceedings, parties shall use the initial service list attached to this notice (Attachment 3). Transmittals of copies may be by e-mail to the people on this service list with listed e-mail addresses.

Please do not attempt to communicate by telephone or in person with AHO staff or any AHO hearing team member regarding these proceedings because other parties would not be able to participate in such communications. If oral communications with members of the AHO hearing team are necessary to discuss a procedural or substantive issue, the AHO will set up a conference call in which representatives of all parties may participate. Any party may request such a conference call at any time using the written communications protocols described above.

INITIAL SERVICE LIST AND UPDATES; FUTURE AHO NOTICES

For this notice, the AHO is using the attached initial service list (Attachment 3). The AHO requests that any person or party listed on the attached initial service list who has updated contact information provide the AHO with the updated contact information by e-mail at adminhrgoffice@waterboards.ca.gov, or by letter to the AHO mailing address listed above, on or before **May 13, 2022**. People and parties do not need to send copies of these e-mails or letters to the other people and parties on the initial service list.

After May 13, the AHO will issue the AHO's notice of pre-hearing conference and hearing, including any updates to the initial service list. The notice of pre-hearing conference and hearing will contain instructions for filing Notices of Intent to Appear (NOIs) for the pre-hearing conference and hearing and a deadline for filing NOIs. After the deadline for filing NOIs, the AHO will prepare an updated service list, which will list the persons and parties that have filed NOIs. The AHO will use that updated service list for transmitting subsequent notices in these proceedings.

AHO WEBPAGE AND NOTICES

Subject to legal limitations, including the requirements for Internet website accessibility in Government Code section 11546.7, the AHO will post all of its notices and other documents regarding these proceedings on the AHO's Internet webpage at https://www.waterboards.ca.gov/water_issues/programs/administrative_hearings_office/

Any interested person may sign up to receive all AHO notices by e-mail at https://www.waterboards.ca.gov/resources/email_subscriptions/swrcb_subscribe.html.

Date: April 28, 2022

SIGNATURE ON FILE
Nicole Kuenzi, Hearing Officer

Attachments:

- Attachment 1 – March 24, 2022 Notice of Proposed Revocation
- Attachment 2 – April 9, 2022 Letter from U.S. Army Corps of Engineers
- Attachment 3 – Initial Service List

STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD

OFFICE OF DELTA WATERMASTER

In the Matter of Water Right license 881B
United States Army Corps of Engineers

NOTICE OF PROPOSED REVOCATION

SOURCE: Liberty Cut, tributary to Cache Slough thence the Sacramento River

COUNTY: Yolo and Solano

1. The predecessor of the State Water Resources Control Board (State Water Board) issued water right License 881 on November 27, 1929 pursuant to Application 4218 and following inspection of diversion works completed pursuant to Permit 2076. License 881, with a priority date of September 17, 1924, authorized diversion from Liberty Cut, within the Legal Delta, for the purpose of irrigation of specified lands within the Legal Delta. The season of authorized diversion was from June 15 to August 30 annually.
2. On May 1, 1989, upon petition of the owners, the State Water Board divided License 881 into parts A and B. Thereupon, License 881B was issued to William C. and W. Ashley Payne (Payne). License 881B retains the priority date of September 17, 1924 and allows the diversion of up to 1,450 acre-feet of water per year from Liberty Cut for irrigation purposes on 1,400 acres of specified land, within the Legal Delta. See Exhibit A: Map to Accompany Request for Division of License (January 1988).
3. On May 9, 1990, pursuant to Payne's petition in their capacity as owners of License 881B, the State Water Board adopted an ORDER ALLOWING TEMPORARY TRANSFER OF WATER TO HEIDRICK FARMS IN THE YOLO BYPASS (Temporary Transfer Order), See Exhibit B: Temporary Transfer Order.
4. In 2010, based upon ownership records in the Solano and Yolo County Assessors' records, the State Water Board updated its records to reflect that License 881B had been acquired by the United States Army Corps of Engineers (USACE). Following outreach to USACE by the State Water Board's Division of Water Rights and subsequent exchange of emails, on or about May 24, 2010,

the State Water Board notified USACE of the change of its License 881B ownership records. See Exhibit C: Verification of Change of Ownership of License 881B.

5. On October 25, 2021, USACE filed Reports of Licensee for License 881B for calendar years 2007, 2008, 2009 and 2010. In each of those Reports, USACE indicated that no water had been diverted or put to beneficial use pursuant to License 881B in any of those years. Similarly, USACE has filed annual Reports of Licensee indicating, for each year from 2011 through 2020, that no water has been diverted pursuant to License 881B, See Exhibit D: copies of Reports of Licensee filed by USACE for each year from 2007 through 2020.

6. Water Code section 1675 (a) states:

If, at any time after a license is issued, the board finds that the licensee has not put the water granted under the license to a useful or beneficial purpose in conformity with this division or that the licensee has ceased to put the water to that useful or beneficial purpose, or that the licensee has failed to observe any of the terms and conditions in the license, the board may revoke the license and declare the water to be subject to appropriation in accordance with this part.

7. Water Code section 1241 states, in part:

If the person entitled to the use of water fails to use beneficially all or any part of the water claimed by him or her, for which a right of use has vested, for the purpose for which it was appropriated or adjudicated, for a period of five years, that unused water may revert to the public and shall, if reverted, be regarded as unappropriated public water. That reversion shall occur upon a finding by the board following notice to the . . . licensee . . . and a public hearing if requested by the . . . licensee.

8. Pursuant to Water Code section 85230, the Delta Watermaster exercises the State Water Board's authority to monitor and enforce terms and conditions of licenses having points of diversion within the Legal Delta.

9. Pursuant to its Resolution No. 2018-0037, the State Water Board has delegated to the Delta Watermaster the authority to issue a Notice of Proposed Revocation of a license, in appropriate circumstances, pursuant to Water Code section 1675, and to prepare and sign an order canceling or revoking a license after a Notice of Proposed Revocation has been sent to the licensee and no request for hearing has been received.

10. USACE, in its capacity as the owner of License 881B, is hereby notified, pursuant to Water Code section 1675, et seq., that the State Water Board, acting by and through the Delta Watermaster, proposes to revoke License 881B because USACE has not diverted nor put to beneficial use all or any part of the water available pursuant to License 881B since at least 2007.

11. Further, because USACE has failed to divert or put to beneficial use any water available under License 881B, at least between 2007 and 2020 (a period well in excess of five years), the State Water Board, acting by and through the Delta Watermaster, has determined that the water available under License 881B has reverted to the public pursuant to Water Code section 1241.
12. Unless a written request for a hearing on the matters in this Notice of Proposed Revocation, signed by or on behalf of USACE, is delivered or mailed to the State Water Board within 15 days after receipt of this Notice of Proposed Revocation, the Delta Watermaster may act upon the proposed revocation of the license without a hearing. A request for a hearing may be made by delivering or mailing the request to: State Water Resources Control Board, Attention: Michael Patrick George, Delta Watermaster, 1001 I Street, 25th Floor, Sacramento, CA 95814.
13. Based on the above facts, exhibits, conclusions, and statutory provisions, the Delta Watermaster will revoke License 881B following the passage of fifteen days after delivery of this Notice of Proposed Revocation to USACE, unless by that date the Delta Watermaster has received a written request for a hearing signed by or on behalf of USACE.



Michael Patrick George,
Delta Watermaster

Dated: March 24, 2022



DEPARTMENT OF THE ARMY
U.S. ARMY ENGINEER DISTRICT, SACRAMENTO
CORPS OF ENGINEERS
1325 J STREET
SACRAMENTO, CALIFORNIA, 95814-2922

Office of Counsel

8 April 2022

State Water Resources Control Board
Attn: Michael Patrick George, Delta Watermaster
1001 I Street, 25th Floor
Sacramento, CA 95814

Dear Mr. George:

On March 24, 2022, the Sacramento District, U.S. Army Corps of Engineers (USACE) received a Notice of Proposed Revocation in the Matter of Water Right License 881B. The notice states the State Water Resources Control Board (State Board), acting through your office pursuant to Water Code § 1675, proposes to revoke License 881B for failure to put all or any part of the water granted under the license to beneficial use.

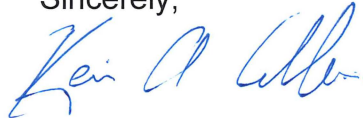
The USACE recognizes the importance of the State Board's recent efforts to account for the water rights in the Sacramento/San Joaquin Delta, particularly in light of the severe to extreme drought conditions currently pervading throughout the Delta and associated drainage basins.

However, the Notice of Proposed Revocation is not a viable option for the ultimate disposition of License 881B, because the State Board lacks jurisdiction to revoke the license in this manner. The USACE, as a federal agency, enjoys sovereign immunity from state action unless Congress clearly and unequivocally waives such immunity. *See Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471 (1994). The USACE has no authority to waive sovereign immunity on its own. *See United States v. N.Y. Rayon Importing Co.*, 329 U.S. 654, 660 (1947). The statute most nearly providing a waiver of sovereign immunity, the McCarran Amendment, does not apply to these proceedings, as the water right in License 881B has never been subject to statutory adjudication. *See* 43 U.S.C. § 666(a); State Water Resources Control Board, *Order WR 2016-0001, In the Matter of License 659 (Application 553): Morongo Band of Mission Indians* (Jan. 19, 2016). The Ninth Circuit has explained, "Congress intended a waiver of immunity under subsection (2) [of the McCarran Amendment] only after a general determination under subsection (1) has been made." *S. Delta Water Agency v. U.S. Dep't of Interior, Bureau of Reclamation*, 767 F.2d 531, 541 (9th Cir. 1985). Moreover, the instant action by the State Board is not a "suit" within the meaning of the McCarran Amendment, because the revocation proceeding involves only administrative action, and does not include automatic participation of a court. *See United States v. Puerto Rico*, 287 F.3d 212 (1st Cir. 2002). In short, because there is no applicable waiver of sovereign immunity, the State Board may not revoke this federally-owned license pursuant to the Notice of Proposed Revocation. Accordingly, the USACE respectfully requests that the State Board withdraw its Notice of Proposed Revocation.

Should the State Board disagree with the USACE and continue to assert its jurisdiction, this letter requests, as a matter of comity, a hearing pursuant to Water Code 1675.1. The USACE also requests the opportunity to formally challenge, through a special appearance, the State Board's jurisdiction with a motion to dismiss or other appropriate procedure. Please note the USACE's special appearance to contest jurisdiction does not constitute a waiver of sovereign immunity or an admission of the State Board's jurisdiction.

The USACE is committed to reaching an amicable resolution with the State Board and is willing to work with the State Board and other federal, state, or local stakeholders. Our office would welcome any discussion of alternative resolution of the matter. Please feel free to contact the undersigned, 916-557-5229, Kevin.A.Cullen@usace.army.mil, or A. L. Faustino, District Counsel, 916-557-5291, Al.Faustino@usace.army.mil.

Sincerely,



Kevin A. Cullen
Assistant District Counsel
Sacramento District

ATTACHMENT 3

SERVICE LIST

Michael Patrick George
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Sacramento, CA 95814
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