



August 16, 2021

Mr. Ted Craddock, Deputy Director
DWR State Water Project
P.O. Box 942836
Sacramento, CA 94236-0001

Re: Response to DWR letter dated July 27, 2021 regarding Article 9(a) of Contract dated January 28, 1981 between the State of California Department of Water Resources and the North Delta Water Agency for the Assurance of Dependable Water Supply of Suitable Quality (“Contract”)

Dear Mr. Craddock:

I am writing in response to your letter dated July 27, 2021 providing notice by DWR of its intent to open negotiations under Article 9(a) of the 1981 Contract referenced above. Although I received your letter in an email from your assistant at 4:35 p.m. on July 27, 2021, our office did not receive your letter via U.S. Post Office delivery until July 29, 2021.

Your letter did not include any language proposing revision of Article 10 of the Contract for the North Delta Water Agency (NDWA/Agency) to consider. Instead, it merely proposed that DWR and NDWA, on October 25, 2021, “exchange lists of initial goals for renegotiation of Article 10 of the 1981 Contract.” Your letter further states that you expect the proposed negotiations will “take some time to reach a productive and agreeable amendment.”

For the reasons stated below, the Agency respectfully declines your request to negotiate changes to the payment provisions of Article 10 of the 1981 Contract pursuant to the process described in Article 9(a).

Period of Adjustment Expired

Article 9(a) establishes a “period of adjustment” that commenced “40 years after execution of this contract,” for the purpose of negotiating changes to the payment provisions set forth in Article 10, and expressly states that the period of adjustment “shall be” six months. The start of the six-month period of adjustment is not in dispute as your letter acknowledges that the period commenced on January 28, 2021. There is no language in Article 9(a) that provides for the extension of the six-month period of adjustment, as proposed in your letter.

Therefore, the six-month period of adjustment for parties to negotiate revisions under the process described in Article 9(a) ended on July 28, 2021 and does not reopen until January 28, 2061.

No Revisions to Negotiate

Article 9(a) is quite clear that the purpose of the six-month adjustment period is to “revise” the contract payment provisions set forth in Article 10. This wording means both parties are specifically provided an opportunity to seek amendment of the Article 10 payment provisions every 40 years. The importance of the period of adjustment being six months is to allow sufficient time for the parties to negotiate revisions and to reach mutual agreement on final amendment language, but not to allow the adjustment negotiations to drag on. Waiting until the end of the six-month period to request an amendment leaves no time for the parties to negotiate in good faith during the period of adjustment specified in the Contract. Not only did DWR email its letter requesting to negotiate under Article 9(a) the day before the end of the six-month period of adjustment; it did not include a written proposal to “revise” Article 10.

Under Article 9(a), the only circumstance under which the parties may petition a court to render a decision is “[i]f during this period, agreement as to a requested revision cannot be achieved, . . .” If there is no requested revision submitted by either party, and no negotiations take place between January 28, 2021 and July 28, 2021, then the parties have failed to satisfy the condition precedent for court involvement—namely, good faith negotiations during the six-month period of adjustment.

For these reasons, it is the firm position of NDWA that there is no basis under the 1981 Contract for DWR’s assertion of a right to extend the Article 9(a) period of adjustment beyond July 28, 2021 or to have negotiations drag on indefinitely.

Accordingly, the NDWA will not agree to negotiate payment provisions under the terms set forth in Article 9(a) three months after the period of adjustment has ended as proposed in your July 27, 2021 letter. However, the Agency is willing to meet with DWR on October 25, 2021 (or another mutually acceptable date) pursuant to Article 14 of the 1981 Contract. Article 14 provides: “This contract may be amended or terminated at any time by mutual agreement of the State and the Agency.” NDWA’s willingness to meet with DWR pursuant to Article 14 shall not be construed as a waiver, express or implied, of its position that Article 9(a) is inapplicable, and NDWA reserves all rights, claims and defenses in support of that position.

Based on the longstanding relationship NDWA has with DWR, the Agency remains committed to working together on finding mutually beneficial resolutions during any future discussions regarding the Contract and protecting water quality and availability in the Delta.

Sincerely,

Melinda Terry
Manager, North Delta Water Agency

Cc: NDWA Board of Directors
Kevin M. O’Brien (Downey Brand)