

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

In the Matter of License 8012 )  
Issued on Application 19749 of )  
NEVIS INDUSTRIES, INC., ET AL., )  
Licensee )  
DAVID E. NALL, ET AL. )  
Protestants )

Order : WR 79-22  
Sources : Poodle Creek and  
          Unnamed Stream  
County : Sutter

ORDER APPROVING PETITION  
TO CHANGE POINTS OF DIVERSION

BY BOARD VICE CHAIRMAN MILLER:

Nevis Industries, Inc., Thomas E. Nevis, Sandra Nevis, Samuel A. Nevis, and Melinda R. Nevis (licensees) having filed a petition to change one Point of diversion, to add a point of rediversion, and to add a point of diversion and of rediversion; protests having been received, a public hearing having been held on December 1, 1978; licensees and protestants having appeared and Presented evidence and having filed briefs subsequent to the hearing; the hearing record having been held open for the receipt of additional evidence from the licensee; the licensee having submitted said evidence in a timely manner; the evidence received in this matter having been duly considered, the Board finds as follows:

Substance of License

1. The substance of License 8012 is summarized in Appendix A, attached hereto. As Appendix A indicates, the source for the direct diversion portion of License 8012 is water flowing in Poodle Creek and for the diversion to storage portion of License 8012 is an unnamed stream tributary to Poodle Creek.

## Background

2. Poodle Creek is a small watercourse with its headwaters in the southern end of the Sutter Buttes.<sup>1</sup> Poodle Creek generally flows south for a little over three miles to a point just north of the north levee of the Sutter) bypass. It then flows in an easterly direction for about a mile to the confluence with a major unnamed tributary - the source for the diversion to storage under License 8012.<sup>2</sup> Poodle Creek then flows in a southeasterly direction for about two miles where it discharges into the East Borrow Pit of the Sutter Bypass through two pipes.

3. The source of water diverted by Nevis by direct diversion is foreign water that collects in the channel of Butte Creek, thence Butte Slough, thence East Borrow Pit of the Sutter Bypass, thence Poodle Creek. The California Department of Water Resources (Department) controls the water levels during the irrigation season in Poodle Creek and in the East Borrow Pit, in part, with a weir one mile downstream of the confluence of Poodle Creek and of the East Borrow Pit. The Department maintains a water surface elevation behind the weir between 38.4 feet and 38.8 feet. This weir backs water in the East Borrow Pit up into the channel of Poodle Creek to the licensee's existing point of direct diversion. This weir has been operated in this manner since prior to the date of filing Application 19749. The report of field investigation on this application concluded that water from East Borrow Pit was a source for the direct diversion" portion of the application.

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<sup>1</sup> The headwaters of Poodle Creek in the Sutter Buttes is also known as "Marconi Creek".  
(RT 122)

<sup>2</sup> As will be explained *infra*, a major dispute in this case is whether that portion of the channel called Poodle Creek from the point just north of the north levee of the Sutter bypass and to the confluence of the channel and the unnamed tributary is a natural watercourse.

In effect, this weir makes the East Borrow Pit and Poodle Creek a common supply for diverters of water from the East Borrow Pit immediately upstream of the weir and from Poodle Creek, when the existing pipes between Poodle Creek and East Borrow Pit are open. The only exception to this conclusion is when the diversions from Poodle Creek equal or exceed the capacity of the two pipes connecting Poodle Creek and East Borrow Pit. In that event the level of water in Poodle Creek drops. This problem will be alleviated when the Department completes modification of the Pumping Station 3. The East Borrow Pit and Poodle Creek will then constitute a common supply when the conduit between Poodle Creek and East Borrow Pit is open.

4. The licensees began experiencing difficulty in receiving the amount authorized under License 8012 in 1975. The shortage of water was caused by several factors. Some persons with junior rights or with no rights were diverting water to which the licensees were entitled; the insufficient capacity of the pipes connecting Poodle Creek and East Borrow Pit prevented satisfying the needs of all diverters from Poodle Creek; the channel of Poodle Creek had several shallow areas which impeded the flow of water to the licensees' point of diversion (RT-53). Although the licensees cleaned the channel of Poodle Creek and took other measures, the shortage of water continued into 1976. The licensees then applied, for and received a temporary approval from the Reclamation Board to install a pump on the north levee of the Sutter Bypass. This pump transported water from the East Borrow Pit into Poodle Creek upstream of its existing points of diversion. This physical arrangement solved the licensees' problem of receiving the water authorized under License 8012. The pump has

been removed from the north levee in accordance with the requirements of the temporary approval from the Reclamation Board. The licensees have not received approval from the Reclamation Board for installation of a permanent diversion facility on the north levee. The purpose of the present petition by the licensees is to secure approval of a change in License 8012 to allow such a facility, among other things.

#### Petition to Change

5. The petition to change submitted by the licensees requests the following:

- a. Add a point of rediversion on the unnamed stream;
- b. Add a point of diversion and of rediversion, on Poodle Creek at the confluence of Poodle Creek and of the unnamed stream;<sup>13</sup> and
- c. Change a point of direct diversion from Poodle Creek to East Borrow Pit of Sutter Bypass.

The proposed changes are shown on the attached map.

#### Protests

6. Ross D. Madden, Donald Meyer, Edward E. Nall, and David E. Nall filed protests to the approval of the petition to change. They are only concerned with the change of point of diversion from Poodle Creek to the East Borrow Pit.

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<sup>13</sup> The diversion system at the confluence of Poodle Creek and of the unnamed stream would function as a point of direct diversion when the licensee was not operating the proposed diversion facility on the East Borrow Pit. When the licensee was operating the proposed diversion facility on the East Borrow Pit, the diversion system at said confluence would function as a point of rediversion.

7. Protestant Madden holds Licensee 6082 issued on Application 157631 License 6082 authorizes the direct diversion of 7.25 cubic feet per second (cfs) from April 15 to October 1 of each year. His point of diversion is upstream of the licensee's proposed point of diversion on East Borrow Pit. His place of use is shown on the attached map.

8. Protestants Meyer, E. Nall, and D. Nall hold License 3162 issued on Application 2824. License 3162 authorizes the direct diversion of three cfs from May 1 to September 15 of each year. Their point of diversion is downstream of the licensee's proposed point of diversion on East Borrow Pit. Their place of use is shown on the attached map.

9. The protestants allege that the proposed change of point of diversion from Poodle Creek to East Borrow Pit cannot be approved because the approval is against the public interest and because it will operate to the injury of legal users of the water in violation of Water Code Section 1702. The public interest allegations of the protestants will be discussed, *infra*. With respect to the latter problem the protestants allege four types of injuries resulting from the approval of the third proposed change as follows:

a. The protestants as senior appropriators will have to undertake more policing of the licensees' diversion - a junior appropriator;

b. Competition for the water supply from the East Borrow Pit of the Sutter Bypass will be increased;

c. The licensees possess no right to convey water in the channel of Poodle Creek across the intervening properties of the protestants; and

d. The proposed conveyance of water in the channel of Poodle Creek across the intervening properties of the protestants will create drainage and seepage problems that will make their land less productive.

Effect of the Proposed Changes on any  
Legal User of the Water Involved

10. Water Code Section 1702 states:

"Before permission to make such a change is granted the petitioner shall establish, to the satisfaction of the board, and it shall find, that the change will not operate to the injury of any legal user of the water involved."

11. The licensee is requesting three changes. The protestants do not object to the first two proposed changes. However, the protestants allege four kinds of injury, as stated in Finding 9, which they allege preclude the approval of the third requested change.

12. The determination of whether to approve the proposed changes depends upon the type of injury contemplated by Water Code Section 1702. The protestants would have us interpret Water Code Section 1702 broadly to include injury such as seepage from the use of the channel of Poodle Creek to transfer water from the East Borrow Pit to the confluence of Poodle Creek and the unnamed tributary stream. However, the Board's consistent interpretation of Water Code Section 1702

is that the injury contemplated by that section is an injury to a legal user's water right.<sup>4</sup> An injury occurs when the change materially diminishes the quantity of water or deteriorates the quality for the intended uses. The legal standard of when a junior appropriator's use of water injures a senior appropriator's rights applies equally here and it determines what interference constitutes an actionable injury. That standard was summarized in Waterford Irr. Dist. v. Turlock Irr. Dist., 50 Cal.App. 213, P. 757 (1920) as follows:

"The mere inconvenience, or even the matter of extra expense, within limits which are not unreasonable, to which a prior user may be subjected, will not avail to prevent a subsequent appropriator from utilizing his right. There must be a substantial as distinguished from a mere technical or abstract damage to the right of the prior appropriator by the exercise by the subsequent appropriator of his right to entitle the former to relief against any attempt of the latter to realize his right."

Ibid, at 221

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<sup>4</sup> The protestant argues that Water Code Section 1702 is derived from Section 39 of the Water Commission Act (Stats. of 1913, c. 586, §39, p. 103'2) and that changes in the language from Section 39 to the present Water Code Section 1702 evidence a legislative intent that the injury contemplated by the Water Code Section 1702 is broader than mere injury to a legal user's water rights. This argument is fallacious. Water Code Section 1702 is derived from Section 16 of the Water Commission Act, whose language in pertinent part is substantially the same as the present Water Code Section 1702. The protestant also argues that Butte T. M. Co. v. Morgan, 19 Cal. 609 (1862) and Hargrave v. Cook, 108 Cal. 72, 41 p. 18 (1892) supports their argument. For the reasons stated in the Licensee's Reply Brief at p. 4-5, the protestants reliance on the cases is misplaced.

13. Did the licensees establish that the proposed changes will not injure <sup>a</sup> any legal user of the water? Because of the relative locations of the first two changes explained in Finding 5, the first two changes will not operate to the injury of any legal user of water. The evidence amply supports our conclusion in Finding 3 that the East Borrow Pit and Poodle Creek are a common supply when the modifications at Pump Station 3 are completed and when the conduit between Poodle Creek and East Borrow Pit is open. Because of this fact the change of point of diversion from Poodle Creek to East Borrow Pit is much like, the change of points of diversion on a lake from one side to the other. The change does not diminish the quantity or quality of water available to other diverters on the lake; therefore, the third proposed change does not operate to the injury of any legal-user of the water involved.<sup>15</sup> While the Board does not wish to extend this **decision** unnecessarily, a brief response to the protestants' four alleged injuries is appropriate. Our responses follow the same order expressed in Finding 9;

a. The amount of policing of a junior appropriator by a senior  
-----appropriator does not differ when the two appropriators divert water from a water body, the hydraulic equivalent of a lake,

b. The amount of competition for water does not increase with the proposed change for the same reasons expressed in subdivision (a) above.

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<sup>15</sup> The protestants requested that the Board dismiss the third requested change because the licensees had failed to establish that no injury would occur. The protestants were advised that the Board would rule on the motion (RT 60, 61). Since the Board concludes that the licensees did establish that no injury would occur from the third requested change, the motion to dismiss the third requested change is denied.

c. The Board, does not have jurisdiction in this proceeding to determine the licensee's rights, if any, to convey water in the channel of Poodle Creek.

d. The type of injury alleged is not the type contemplated by Water Code Section 1702. Nevertheless, we find it in the public interest to consider this issue and do so, infra.

Does the Proposed Change Initiate a New Right?

14. The Notice of Hearing requested the parties to respond to whether the proposed change initiates a new right. Although none of the parties briefed this issue, we believe it to be a substantial concern. <sup>16</sup> The evidence established that the level in Poodle Creek dropped below the level in East Borrow Pit when the pumping in Poodle Creek equaled or exceeded the capacity of the existing two pipes connecting Poodle Creek and East Borrow Pit during the summer irrigation season. If that were the situation today, the third proposed change could not be approved, because the proposed change would effectively change the source from foreign water-with a maximum rate of supply equal to the capacity of the two inlet pipes to foreign water without any capacity limitation related to the anticipated demand.

<sup>16</sup> The Board has consistently interpreted Division 2, Part 2 of the Water Code as precluding a petitioner for a change of a point of diversion to initiate a new right by such a change. See Decision 1030. An example of an attempted initiation of a new right by a petition to change a point of diversion is where the original appropriative right is acquired with a point of diversion on a **stream** tributary to a much larger watercourse. Moving the point of diversion from **the tributary** to the larger watercourse makes the source for the water right different and increases the reliability of the right. Such a change in point of diversion is not permitted by Division 2, Part 2 of the Water Code.

However, the constriction in supply to Poodle Creek from East Borrow Pit will be eliminated when the planned reconstruction of Pump Station' 3 is completed by the Department of Water Resources. Poodle Creek and East Borrow Pit will then become a common supply. In light of this new development, the third requested change does not initiate a new right. However, since the connection between Poodle Creek and East Borrow Pit has been closed or restricted in the past and since this may occur again during a severe drought, a term must be included in License 8012 to assure that diversion of water from East Borrow Pit occurs only when Poodle Creek and East Borrow Pit constitute a common supply.

#### Public Interest

15. Protestants request that the Board, in considering the public interest and in exercising its discretionary authority relating to permit modification, identify and evaluate the alternative means of satisfying or protecting the prospective beneficial uses of the water involved under Section 729, Article 13, Subchapter 2, Chapter 3, Title 23, California Administrative Code. The evidence establishes that four diversions have rights junior to the licensees on Poodle Creek,<sup>17</sup> that nine diversions have inadequate rights to divert water from Poodle Creek between the licensees' point of diversion and Pumping Station 3, and four diversions have inadequate rights to divert water from tributaries to Poodle Creek. These latter diversions would effect the quantity of water available to the licensees, because of their location. The combined installed pumping capacity of the nine diversions with inadequate rights on Poodle Creek equals 78.9 cfs; the combined installed pumping capacity of the four diversions with inadequate rights on the tributaries is 25.9 cfs.

<sup>17</sup> Of the four junior water right entitlements, three of them are still pending as applications.

16. The Board does not condone the diversions of water without right that evidently exist in the Poodle Creek watershed. Appropriate action concerning them will be the subject of other proceedings. Although the enforcement of the relative priorities on Poodle Creek probably would solve the licensees problems, there are advantages to the new proposed point of diversion. Previously, the licensee had to maintain the channel downstream of his point of diversion to Pumping Station 3 (RT 29). The maintenance required from the new point of diversion will be substantially less, because of the relative length of the different channels. This reduction in the required maintenance is a substantial advantage of the third requested change and justifies its approval.

17. (a) The four injuries alleged by the protestants do not change our conclusion, except as noted in subparagraph (b) below. The protestants' arguments focused on whether the licensees have the right to use the channel of Poodle Creek to transport water from the East Borrow Pit to their point of re-diversion on Poodle Creek; this right depends, in part, on whether the existing channel is a natural watercourse as defined in Water Code Section 7075. The policy of the Board concerning such questions is expressed in Section 749, Title 23, California Administrative Code. In accordance with that section, we basically let the parties resolve the dispute and do not deny applications or petitions when such a dispute arises.

(b) Notwithstanding our interpretation of the class of rights protected by Water Code Section 1702 and our lack of jurisdiction to settle issues of title, we find it to be in the public interest to provide landowners adjacent to Poodle Creek with an administrative remedy should implementation of the proposed change threaten substantially Waterford Irrigation District vs. Turlock Irrigation District, supra) to injure such landowners or any of them, by seepage or otherwise. The use of streams to convey foreign or developed water has long been

sanctioned by California Law; the antecedent of existing Water Code Section 7075 was former Civil Code Section 1413, enacted in 1872. However, the law also protects the rights of adjacent landowners against injury caused by the additional flow [Richardson vs. Kier, 34 Cal. 63 (1867)]. The record in this matter is inconclusive on the question whether injury to adjacent landowners' lands will result from implementation of the proposed change. It appears that a period of actual operation will be necessary to secure this information. Accordingly, the point of diversion on East Borrow Pit should be subject to deletion from License 8012 if the Board finds that the conveyance of water in Poodle Creek substantially injures adjacent landowners.

#### Findings Concerning the California Environmental Quality Act

18. This Board Order authorizes several changes in the point of diversion as described in Finding 5. Such activity constitutes only a minor modification to land, and such activity is thereby exempt from the provisions of the California Environmental Quality Act (Public Resources Code Section 21000 et seq.) in accordance with Section 15104, Chapter 3, Title 14, California Administrative Code.

NOW THEREFORE, IT IS ORDERED THAT:

1. The sources in License 8012 shall be amended to include the following: (1) Poodle Creek, (2) East Borrow Pit of Sutter Bypass, (3) and (4) an unnamed stream in Sutter County.

2. The amount shall not exceed five cubic feet per second from about April 1 to about October 1 from Poodle Creek or East Borrow Pit of Sutter Bypass and 49 acre-feet per annum by storage to be collected from about October 1 of each year to about April 1 of the succeeding year from an unnamed stream.

3. The points of diversion and redirection are located:

a. A point of diversion and redirection for direct diversion on Poodle Creek  $S47^{\circ} 23' 24''$  E7041.42 feet from the NW Corner of Section 13, T15N, R1E, MDB&M, being within the SW $\frac{1}{4}$  of SE $\frac{1}{4}$  of Section 13, T15N, R1E, MDB&M.

b. A point of diversion for direct diversion from East Borrow Pit of Sutter Bypass  $S10^{\circ} 28' 47''$  W5363.23 feet from the NE Corner of Section 14, T15N, R1E, MDB&M, being within the SE $\frac{1}{4}$  of SE $\frac{1}{4}$  of Section 14, T15N, R1E, MDB&M.

c. A point of redirection for an unnamed stream  $S59^{\circ} 10' 23''$  E5701.71 feet from the NW Corner of Section 12, T15N, R1E, MDB&M, being within the NE $\frac{1}{4}$  of SE $\frac{1}{4}$  of Section 12, T15N, R1E, MDB&M.

d. A point of diversion for storage on an unnamed stream, N2,500 feet and W650 feet from NW Corner of Section 18, T15N, R2E, MDB&M, being within the NE $\frac{1}{4}$  of SE $\frac{1}{4}$  of Section 12, T15N, R1E, MDB&M.

e. A point of diversion for storage on an unnamed stream, S600 feet and W200 feet from the NW Corner of Section 18, T15N, R2E, MDB&M, being within the SE $\frac{1}{4}$  of NE $\frac{1}{4}$  of Section 13, T15N, R1E, MDB&M.

4. This order granting use of water from the East Borrow Pit of Sutter Bypass shall not be construed as conferring upon the licensee right of access to the point of diversion.

5. Water shall not be diverted from the East Borrow Pit of Sutter Bypass until the capacity of the conduit connecting Poodle Creek and East Borrow Pit has been increased in accordance with the plans of the Department of Water Resources and water shall not be diverted from the East Borrow Pit of Sutter Bypass except (a) when the conduits between the East Borrow Pit and Poodle Creek are open, and (b) when the water levels in Poodle Creek and East Borrow Pit are substantially equal.

6. ' The point of diversion authorized by paragraph 3(b) shall be deleted if, upon the motion of any landowner adjacent to Poodle Creek or, upon the Board's own motion, the Board finds, after notice of all affected parties and hearing unlesswaived, that the conveyance of water in Poodle Creek by the licensee injures landowners adjacent to Poodle Creek by seepage or otherwise. The authority of the Board to delete said point of diversion shall terminate upon expiration of a period of three years from the date of this order, unless sooner terminated, or extended, upon a finding of good cause by the Board.

Dated: August 16, 1979

We Concur:

/S/WILLIAM J. MILLER.  
William J. Miller, Vice Chairman

/S/ W. DO!! MAUGHAN  
W. Don Maughan, Chairman

/S/ L. L. MITCHELL  
L. L. Mitchell, Member

/S/ CARLA PI. BARD  
Carla M. Bard, Member