

# THERMALITO IRRIGATION DISTRICT AND TABLE MOUNTAIN IRRIGATION DISTRICT

**ORDER WR 85-06**

**Determination Regarding  
Possible Nonuse of Water  
Under Licensed Applications  
1739 and 3040**



**August 1985**

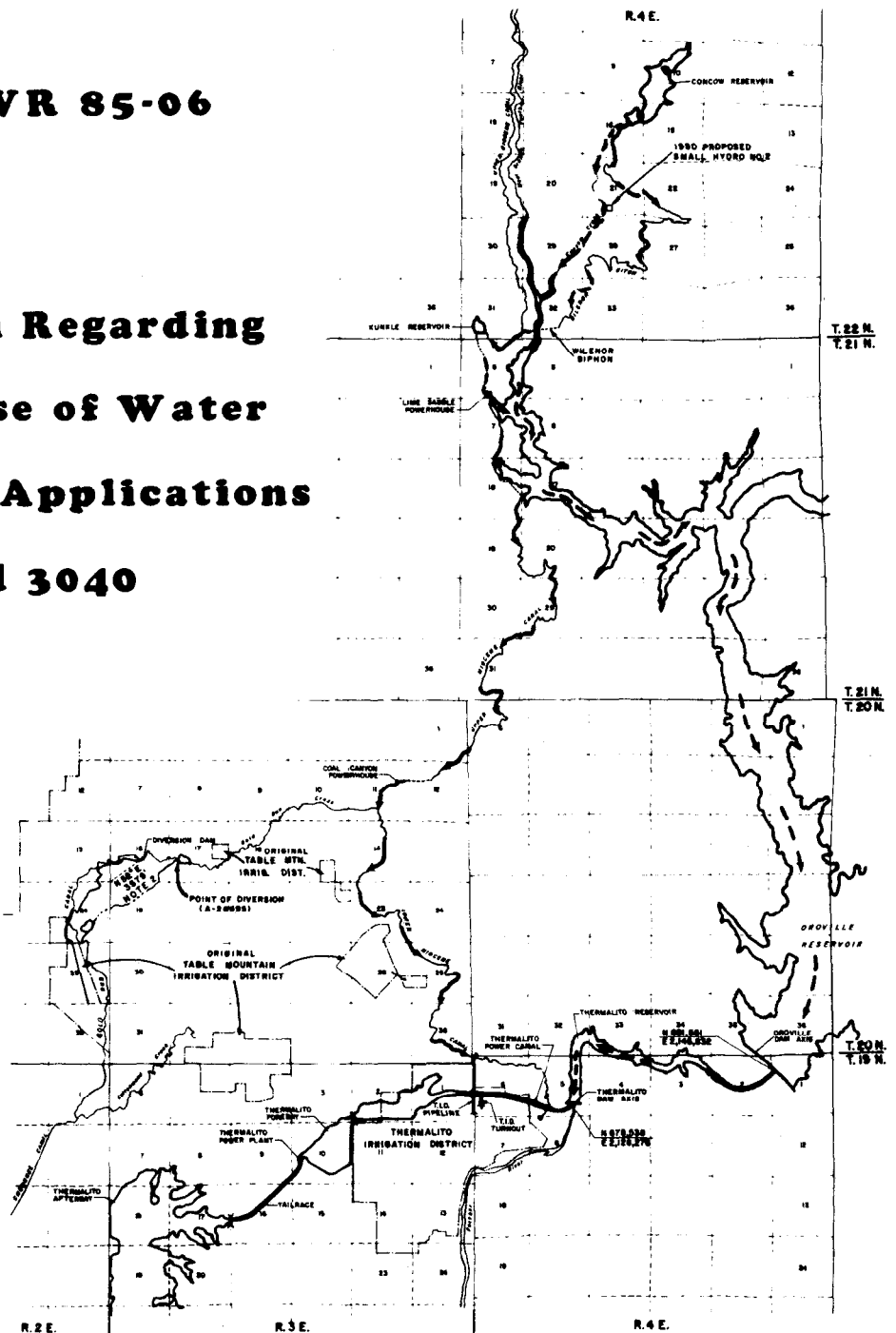




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## CITING THE RECORD

When citing evidence in the hearing record the following convention has been adopted:

Information derived from the hearing transcript:

T, 1Y, 22:03-24:12

ending page (can be same as the starting page)-maybe omitted if a single line reference is used

beginning page and line number

hearing transcript volume number

identifying abbreviation of the info. source

Information derived from an exhibit:

STAFF, 5, E4

page number; table, graph, or figure number; or application number if a file

exhibit number

identifying abbreviation of the information source

Abbreviations of the information Sources are:

TID - Thermalito Irrigation District  
TMID - Table Mountain Irrigation District  
ASSOCIATION - Golden Feather Community Association  
DFG - California Department of Fish and Game  
DWR - Department of Water Resources  
STAFF - State Water Resources Control Board  
REPORT - Report of Investigation of Association  
Complaint  
T - Hearing Transcript

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Licenses 845 )  
and 737 )  
Issued Pursuant to Applications )  
1739 and 3040 )  
THERMALITO IRRIGATION DISTRICT )  
AND TABLE MOUNTAIN IRRIGATION )  
DISTRICT, LICENSEES )

ORDER: WR 85-6  
SOURCE: Concow Creek  
COUNTY: Butte

ORDER DECIDING NOT TO REVOKE LICENSES TO APPROPRIATE WATER

1.0 INTRODUCTION

Golden Feather Community Association (Association) having filed a complaint dated July 27, 1983 against Thermalito Irrigation District (TID) and Table Mountain Irrigation District (TMID); an investigation having been conducted by the State Water Resources Control Board (Board); a Report of Investigation (Report) having been filed on January 28, 1984; a public hearing having been held by the Board on July 17 and 18, 1984; TID, TMID and the Association having appeared and presented evidence; the evidence having been duly considered; the Board finds as follows:

2.0 SCOPE OF LICENSED APPLICATIONS

Licenses were issued for Applications 1739 and 3040 on April 25, 1929, and September 20, 1928, respectively, for 8,200 acre-feet per annum (afa) by storage in Concow Reservoir for irrigation and domestic use (Application 1739) and for power generation (Application 3040). The

rights under licensed Applications 1739 and 3040 are held jointly, with the historical division of water being 45 percent to TID and 55 percent to TMID.

Water stored in Concow Reservoir was released for rediversion through the Wilenor Ditch and Siphon to the Miocene Canal of Pacific Gas and Electric Company (PG&E). The Districts were credited for power generated by this water at PG&E's Lime Saddle and Coal Canyon Powerplants which are on the Miocene Canal. Water was then delivered for consumptive use (1) via the Lower Miocene Canal to TID, and (2) via Gold Run Creek to TMID.

With the development of Oroville Dam and Powerplant, TID in 1965 signed an agreement with the Department of Water Resources (DWR) whereby TID's share of water would be released from Concow Reservoir, wheeled through Oroville Reservoir and Powerplant and rediverted for consumptive use from the Thermalito Power Canal. TID is credited with power generated from its share of water. This change was approved by the Board in June, 1966.

On July 24, 1983, the Association filed a complaint against TMID and TID for allegedly violating the terms and conditions of their licenses in operation of Concow Reservoir.

Pursuant to licensed Applications 1739 and 3040 current operations at Concow Reservoir are as follows:

1. TMID and TID continue to hold water rights jointly as evidenced by the above licensed applications.

2. TID's water is wheeled through Oroville Reservoir and Powerplant to TID's place of use, which also remains unchanged.
3. TMID's only method of delivering water to its place of use is through Wilenor Ditch, Miocene Canal, and Gold Run Creek. As will be more fully discussed below, this delivery system has been unusable for some time.

2.1 Substance of Licensed Application 1739

Licensed Application 1739 is for a right to store 8,200 afa in Concow Reservoir for (1) agricultural, domestic and municipal uses by TID within 3,100 acres of its service area; and (2) agricultural and domestic uses by TMID within its service area of 935.8 acres. The storage season is from about December 1 to about April 1 of each season.

2.2 Substance of Licensed Application 3040

Licensed Application 3040 is for a right to use 8,200 afa for power generation. The season of diversion is from about November 1 to about July 1 of each season. TID's place of use is the Oroville Dam Powerplant. TMID's place of use is listed as PG&E's Lime Saddle and Coal Canyon Powerplants.

3.0 COMPLAINT OF GOLDEN FEATHER COMMUNITY ASSOCIATION

The Association's complaint set forth two allegations against TID and TMID as follows:

1. TID and TMID used excessive amounts of water from 1951 to 1975;
2. TMID failed to put its share of water to beneficial use after July of 1976.

The Association requested that the Board take the following actions against the Districts:

- "1. Seek penalties against the Districts for the unauthorized and unreasonable use of said water.
- "2. Revoke said license held by the Districts, subject to hearings and reconditioning of said license.
- "3. Require the unused water entitled to the Table Mountain Irrigation District to revert to the public as unappropriated water to be allowed to remain in storage at Concow Reservoir as a minimum pool for fish and wildlife and for esthetic purposes.
- "4. Require the Districts to construct, maintain and monitor a recording gage immediately downstream from Concow Reservoir, on Concow Creek. The daily records of maximum and minimum streamflow releases from Concow Reservoir should be provided to the California Division of Water Rights and the California Department of Fish and Game for public information and enforcement purposes.
- "5. Require the Districts to record the daily reservoir levels (elevations) and provide said records to the California Division of Water Rights and the California Department of Fish and Game for public information and enforcement purposes.



"6. Hold in abeyance Application No. 26588, filed by the Districts for additional power purposes, until Board actions against the Districts have been resolved and determinations made by the Board.

"7. Place any additional requirements on the Districts as deemed necessary." (STAFF, 1, 3040(A))

#### 4.0 REPORT OF INVESTIGATION

The Board's staff filed a "Report of Investigation, Licenses 845 and 737 (Applications 1739 and 3040) Concow Reservoir in Butte County", on January 28, 1984. The Report was in response to the Association's complaint dated July 27, 1983. During the course of investigating the Association's allegations, Board staff found data that indicated TID used only 1,327 afa of its 3,610 af (45%) share of water under licensed Application 1739. However, the Association did not allege that TID failed to use its full share of water pursuant to licensed Application 1739.

As previously indicated, one of the Association's allegations was that TMID and TID used an excessive amount of water from 1951 through 1975. The Report addressed said allegation and found that there was excessive use of water. However, the allegation was not given further consideration in the Report for the following reasons:

- 1) The allegations of excessive use, if there had been any, were not brought in a timely manner.

- 2) Since the excessive use could not occur again due to the defunct conveyance system, the Wilenor Ditch, the immediacy of the harm and damage was no longer a problem.

Said allegation was not considered during the hearing and therefore will not be discussed further in this decision.

#### 4.1 Findings From the Report Regarding the Issue of Nonuse of Water

The Association alleged in its complaint that TMID has failed to use its share of water beneficially under licensed Applications 1739 and 3040. The findings of the Report regarding the above-stated allegations are as follows:

- "1. Wilenor Ditch sustained severe conveyance losses not as a direct result of an earthquake and subsequent drought conditions, but as a result of neglect by the Districts.
- "2. The Districts have not made any diligent efforts to repair and maintain the Wilenor Ditch.
- "3. Operation of the Wilenor Ditch ceased in 1975 and there has been no means by which to deliver water stored in Concow Reservoir under Licenses 845 and 737 [Applications 1739 and 3040] to TMID since that date.
- "4. TMID water has not been put to beneficial use under either License 845 or License 737 [Application 1730 or Application 3040] since 1975.

"5. TMID is in no way contractually dependent on [i.e., committed to] the delivery of a dedicated quantity of water [to supply water to its service area] but has, in fact, actively sought and utilized significant quantities of other appropriated water for irrigation purposes." (STAFF, 5, 262.0)

#### 4.2 Conclusions From the Report

With respect to the issue of TMID's nonuse of water the Report concluded substantially as follows:

- 1) TMID failed to use its share of water under licensed Applications 1739 and 3040 for the five-year forfeiture period set forth in Water Code Section 1241.
- 2) However, TMID's right to said water was not forfeited due to said water having been beneficially used for recreation, a non-consumptive use, at Concow Reservoir.
- 3) TMID's nonuse of water was a result of the Wilenor Ditch being in a state of disrepair and TMID's inability to establish a conveyance system to carry water to its service area or to the PG&E powerplants on the Miocene Canal.

In addition, with respect to TID, the Report concluded that TID had failed to use 65 percent of its share of water, which is 3,690 afa, for the five year forfeiture period set forth in Water Code Section 1241.

#### 5.0 RESPONSES BY TMID AND TID TO THE ISSUE OF NONUSE OF WATER

The evidence presented by the TMID and TID in response to the Association's complaint and the findings in the Report regarding nonuse of water focus on three areas: first, the reasons for nonuse

of water by TMID under licensed Applications 1739 and 3040; second, the efforts made by TMID to reestablish beneficial use of water; and third, the nonuse of water by TID.

5.1 Nonuse of water by TMID

The nonuse of water by TMID is due to the loss of the Wilenor Ditch as a conveyance system. TMID alleged that there was subsidence in one section of the Wilenor Ditch which caused water to overflow the bank instead of moving down the ditch. (See TMID 6A 3: 4-6.) TMID alleged that the above-described problem was caused by the August 6, 1975 earthquake. However, no evidence to substantiate this argument was submitted. The Association did submit records from PG&E (ASSOCIATION, 5) and testified to show that the last time TMID delivered water through the Wilenor Ditch was August 17, 1975. (See, T, I, 132:1-5.)

TMID stated that efforts to maintain the ditch ceased in 1976 for the following reasons: (See, T,I, 134: 13-15.)

- 1) the ditch subsided;
- 2) there was leakage into an old mine shaft (T,I, 134:20-135:09); and
- 3) the soil in the ditch was cracked due to a lack of water primarily as a result of the drought. (T,I 135: 14-26)

With the Wilenor Ditch and Siphon out of service, TMID was unable to deliver irrigation water to its place of use under licensed Application 1739 or supply water to the PG&E powerplant on the Miocene Canal under licensed Application 3040.

Effort By TMID to Maintain Beneficial Use of Water

TMID engaged an engineering firm to prepare cost estimates for construction of a siphon to bypass the problem area in the Wilenor Ditch. The estimates indicated that the repairs were not financially feasible. (TMID, 6A, 3:17-24) Furthermore, TMID stated that efforts of men and equipment to repair the ditch and stop leakage due to cracking were unsuccessful. (See T, I, 134:20-136:15.)

TMID also attempted to negotiate an exchange agreement with PG&E to obtain water through the Western Canal but no agreement was reached. (T,I 146:20-24.)

TMID's attempt to work out an exchange with the California Water Service Company was also unsuccessful. (T,I, 154: 3-6; T,I, 167:4-8) Several other attempts to put the water to beneficial use proved fruitless. (See T, I 154:7-10)

TMID entered into an agreement with DWR, whereby water could be stored in Oroville Reservoir for a period of three years. This water was to be released for TMID, but they were never able to arrange for delivery of the water. (T,I, 153: 13-18.)

Given the facts set forth above, the Board finds that TMID does not have a physical means of delivering water to its service area. Therefore, TMID's place of use shall be deleted from licensed Application 1730.

5.3 Nonuse of Water by TID Under Licensed Application 1739

Licensed Applications 1739 and 3040 were originally filed in the early 1920's and subsequently licensed. (STAFF, 5, 262.0) In 1929, the principal consumptive use of the water diverted from Concow Reservoir was for irrigation of olive and orange trees, as well as pasture lands. (TMID/TID, 1A, 3) However, land use in TID's service area since the issuance of the license, has undergone a change from agricultural to domestic and municipal. (Ibid). This change was not within TID's control, but it did substantially impact the district.

In response to the above-described change, TID had to develop and execute a plan to convert its water system from one used primarily for irrigation to a modern domestic water system. The endeavor was costly and took years to implement. Since 1960, at least \$1,737,297 has been spent to improve TID's capacity to utilize Concow Reservoir water.

Said expenses are calculated as follows:

Reservoir (regulating) lining and sedimentation basin	\$227,572
Treatment plant and tank	770,323
Booster pumps	34,000
Treatment plant expansion	214,800
Additional 2.5 M.G. tank	490,602
(TMID/TID, 1A, 6)	

Other factors impeded TID's return to use of its full share of Concow Reservoir water. First, meters were installed in 1957. TID's general

manager testified that this conservation measure was so effective that water sales declined from 6,000 acre-feet to 2,300 acre-feet in five years immediately following installation. (TMID/TID 1A, 6: 26-28, -7: 1) Since then, however, sales have increased.

Water Code Section 1011(a), in part, sets forth the following:

"When any person entitled to the use of water under an appropriative right fails to use all or any part of the water because of water conservation efforts, any cessation or reduction in the use of such appropriated water shall be deemed equivalent to a reasonable beneficial use of water to the extent of such cessation or reduction in use. No forfeiture of the appropriative right to the water conserved shall occur upon the lapse of the forfeiture period applicable to water appropriated pursuant to the Water Commission Act or this code or the forfeiture period applicable to water appropriate prior to December 19, 1914."

Clearly the installation of meters by TID was an act resulting in water conservation. To penalize TID subsequently by reducing its water allotment pursuant to licensed Application 1739 would violate the letter and spirit of the law as set forth above.

An additional factor impeding TID's return to using its full share of Concow Reservoir water was that TID was required to use an alternate source of water from wells in order to provide water of necessary quality to ensure the continued functioning of the state fish hatchery at Oroville. (TMID/TID 1A 7:2-8)

We conclude that many factors contributed to TID's inability to utilize its full share of Concow Reservoir water as set forth above.

Therefore, the Board finds that no action should be taken regarding TID's allotment of water pursuant to licensed Application 1739.

5.4 TID's Expansion of Its Service Area

James O. Schmidt, the general manager of TID, testified at the hearing that TID's service area has increased from 3,000 acres to 14,000 acre (T,I, 177: 6-8) The expansion is the result of an annexation that occurred approximately two years ago. (T, I, 178 5:8) Said annexation was the result of an agreement between TID and the City of Oroville. (See T, I, 186:16-26)

Given the fact that TID's service area has expanded, the Board concludes that TID should be required to submit a petition to include its entire service area in the place of use under this license.

5.5 TID's Use of 8,200 af of Water Pursuant to Licensed Application 1739

Mr. Chaffin, General Manager of TMID, testified at the hearing that "there is an agreement that goes back to the 1920's...where, if one district doesn't use the water, the other one has the right to use it...." (T, I, 161:11-16) Mr. Schmidt corroborated the testimony set forth above. He testified that "agreements that we (TMID and TID) have back in the Twenties specifies that if one district is unable to use their water the other district has the ability to do this." (T, II, 277:18-25) In addition, testimony was given that TMID and TID acted as joint partners with respect to Concow Reservoir. (See T, II, 279: 11-13.)



Given the testimony received at the hearing the Board concludes that to allow TID use of the total amount of 8,200 acre-feet pursuant to licensed Application 1739 would be consistent with said agreement and joint tenancy law.<sup>1</sup>

6.0 TMID'S RIGHTS UNDER LICENSED APPLICATION 3040

In 1980, TMID along with TID filed a petition to change the place of use under licensed Application 3040. TMID and TID submitted a new Application 26588 for a power project. Given the fact that the change petition and new application were inextricably linked, no action was taken by the Board with respect to the change petition. Consequently, TMID was not able to use its water beneficially pursuant to said licensed application for a period in excess of five years, the statutorily mandated forfeiture period. (See Water Code Section 1675.)

Assuming arguendo that licensed Application 3040 was revoked and a new application filed (and permit issued), the result would be the same as if said licensed application was not revoked. Therefore, the Board concludes that it would be more efficacious to hold TMID's right under licensed Application 3040 in abeyance and consider the change petition at the hearing scheduled for Application 26588. The Board, therefore, finds that no action should be taken with respect to licensed Application 3040 in this decision.

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<sup>1</sup> See 63 Cal Jur 3d 662 et seq. for a general discussion of joint tenancy as it relates to ownership of ditch rights, which is analogous to the joint ownership of a water right and reservoir as is the case in this matter.

7.0 CONCLUSION

Based on the foregoing findings, the Board concludes the following:

- 1) TMID's place of use should be deleted from licensed Application 1739.
- 2) TID must file a petition with the Board to include its entire service area under licensed Application 1739.
- 3) TID should be entitled to use up to 8,200 acre-feet of water pursuant to licensed Application 1739.
- 4) No action should be taken regarding TMID's right under licensed Application 3040 until the Board acts on Application 26588.
- 5) The complaint submitted by Golden Feather Community Association should be dismissed.
- 6) Nothing in this decision shall be interpreted as determining the rights, inter se, of TMID and TID as joint licensees under licensed Application 1739 or as precluding consideration of a petition to change said license by enlarging the place of use thereunder, pursuant to Water Code Section 1700, et seq.

ORDER

IT IS HEREBY ORDERED THAT:

1. The place of use designated for consumptive use by Table Mountain Irrigation District shall be and is hereby deleted from licensed Application 1739.

2. Thermalito Irrigation District shall file a petition with the Board to include its entire service area designated under licensed Application 1739.
3. Thermalito Irrigation District shall be entitled to use up to 8,200 acre-feet of water pursuant to licensed Application 1739.
4. No action shall be taken regarding Table Mountain Irrigation District's right under licensed Application 3040 until the Board acts on Application 26588.
5. The complaint submitted by the Golden Feather Community Association is hereby dismissed.

#### CERTIFICATION

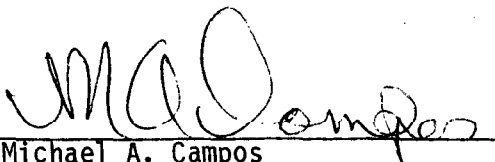
The undersigned, Executive Director of the State Water Resources Control Board, does hereby certify that the foregoing is a full, true, and correct copy of an order) duly and regularly adopted at the meeting of the State Water Resources Control Board held on August 7, 1985.

Aye: Raymond V. Stone  
Darlene E. Ruiz  
Edwin H. Finster  
Eliseo M. Samaniego

No: None

Absent: None

Abstain: None

  
Michael A. Campos  
Executive Director

