

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Permit 19572, )  
Issued Pursuant to )  
Application 28156, of )  
J.E. JENSEN, Permittee )  
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ORDER: WR 94-2  
SOURCE: Various Diversion  
Points in Harlan Creek  
Drainage  
COUNTY: San Benito

ORDER AMENDING PERMIT 19572 AND  
DISMISSING PETITION FOR RECONSIDERATION OF ORDER NO. WR 93-8

BY THE BOARD:

1.0 INTRODUCTION

On November 18, 1993, the State Water Resources Control Board (State Water Board) entered Order No. WR 93-8. The order granted a petition for an extension of time until December 31, 1996 for the permittee J. E. Jensen to complete the application to beneficial use of water diverted under Permit 19572. The time extension was granted subject to provisions of a "stipulated physical solution" agreed to by the parties at the time of the water right hearing, and also subject to certain permit amendments specified in Order No. WR 93-8. The order was mailed to interested parties on November 23, 1993.

On December 20, 1993, the State Water Board received a petition for reconsideration of the order, filed on behalf of Ann Marie Sayers. Background information concerning Order No. WR 93-8 is summarized in Section 2 below. The actions requested in the petition for reconsideration and the State Water Board's analysis of the points raised in the petition are discussed in Sections 3.0 through 4.5 of this order.

## 2.0 BACKGROUND

### 2.1 Permit 19572

The State Water Board issued Permit 19572 to J.E. Jensen on July 25, 1985. The permit authorized diversion of 25 acre-feet per annum (afa) to storage in four small reservoirs, direct diversion of 1 cubic foot per second from April 1 to September 1 of each year for irrigation, and direct diversion of 550 gallons per day on a year around basis for domestic use. The maximum amount of water authorized for diversion under the permit was 128.5 afa. The permit authorized diversion from Harlan Creek and an unnamed tributary to Harlan Creek for domestic use and irrigation on 100 acres within an area specified in the permit.

### 2.2 Petitions for Time Extension and Change in Points of Diversion

Permit 19572 required completion of construction work by December 1, 1988 and complete application of water to beneficial use by December 1, 1989. On April 10, 1990, permittee filed a petition for extension of time to complete the project and develop full beneficial use of water. Water Code Section 1398 authorizes time extensions for good cause shown.

On May 31, 1990, permittee filed a change petition which requested authorization for two new points of diversion for diversion from the underflow of Harlan Creek. In order for the State Water Board to approve a change petition, the petitioner must show that the change will not operate to the injury of any legal user of the water involved. (Water Code 1702). In addition, the change must not in effect initiate a new water right. (Title 23, California Code of Regulations Section 791)

On August 13, 1990, Ms. Sayers and five others filed a protest against the changes proposed in Jensen's petitions.

### 2.3 Procedure for Acting Upon Minor Protested Petitions

Water Code Sections 1704.1 through 1704.4 establish an expedited procedure for acting upon "minor" change petitions which are protested. Minor petitions are defined as involving direct diversion not in excess of three cubic feet per second or diversion to storage not in excess of 200 acre-feet. (Water Code Section 1704.4).

The expedited procedure calls for the Division of Water Rights to conduct a field investigation of the issues raised by the petition and any related protests, followed by preparation of a staff analysis recommending how the matter should be resolved. (Water Code Section 1704.1). Unless a written request for hearing is filed within 30 days of mailing the staff analysis, the State Water Board may act on the petition without a hearing. If a hearing is requested, the hearing before the State Water Board is restricted to the issues raised by the exceptions. (Water Code Section 1704.3).

In this case, a field investigation was conducted and a staff report was prepared (1991 Staff Analysis). The permittee requested that the State Water Board reopen the field investigation or conduct a hearing on several unresolved issues, including the availability of water for diversion under Permit 19572. In addition, on August 10, 1991, protestant Howard Harris filed a request for hearing, asking that the State Water Board prevent Jensen's diversions when visible surface flow in the stream does not reach his property and that of other senior claimants.

#### 2.4 Hearing and Stipulation

Pursuant to Water Code Section 1704.3, the hearing notice for the May 27, 1992 hearing identified 11 issues that were unresolved by the staff analysis. As stated in Order No. WR 93-8, however, petitioner's counsel stated at the start of the hearing that the parties had almost stipulated to a "proposed physical solution" to resolve the issues concerning continued diversion of water under Permit 19572. Following a series of brief recesses in the hearing, the participants returned and agreed to various points of the "proposed physical solution" as stated by Mr. Jensen's counsel.

The terms of the proposed physical solution deleted direct diversion rights from Permit 19572, limited diversions to storage to 22.4 acre-feet per annum, required abandonment of one of the previously authorized reservoirs, and imposed a number of other restrictions and monitoring requirements upon Jensen's use of water. In addition, the parties stipulated that Jensen's obligations included those set forth in Jensen's Statement of Position filed with the State Water Board on May 15, 1992. Among other things, the May 15, 1992 Statement of Position proposed that Jensen's reservoirs be limited to one filling per year and agreed to withdrawal of the change petition to add two new points of diversion. (See Order No. WR 93-8, pp. 8-12).

The parties agreed that Jensen should be allowed to divert water to storage only when there was naturally occurring visible surface flow in Harlan Creek on the property owned by CSY Investments. After a two year measuring period to provide for correlation of flows on the CSY Investment property with upstream flows at the Winkle Diversion Dam, the stipulation called upon the parties to agree upon the flow rate which must be present at the Winkle Diversion Dam as a prerequisite to diversion of water under Permit 19572. In the absence of agreement on the appropriate flow rate, the stipulation called upon the parties to submit the issue for determination by the Division of Water Rights.

Although the parties were able to agree on most aspects of the proposed physical solution, they were unable to agree on where the measuring point for "visible surface flow" should be established on the CSY Investments property. Consequently, the parties submitted that remaining issue to the State Water Board for determination and the evidence presented at the hearing focused primarily on that issue.

## 2.5 Order No. WR 93-8

Prior to adopting Order No. WR 93-8, the State Water Board augmented the record with certain additional evidence provided by parties to the proceeding and Board staff. (See Order No. Wr 93-8, pp 16-19). The additional information included an aerial photo showing the current location of Harlan Creek above the junction with Pescadero Creek, and photographs showing recently installed weirs in Harlan Creek.

In view of the installation of a new weir near the base of the Falls on Harlan Creek, the order approved staff's recommendation to substitute the Falls Weir for the Winkle Diversion Dam for purposes of measuring the flows which must be present in Harlan Creek prior to diversion of water under Permit 19572. No party objected to this change in the location of the permanent measuring point, nor is the issue raised by the petition for reconsideration.

With respect to the location of the interim measuring point on the CSY Investments property, Order No. WR 93-8 specified that the interim measuring point should be at the CSY Grant Line Weir (near the property line between the CSY Investments Property and the Sayers-Harris property). The Grant Line Weir is upstream from an alternative location for the interim measuring point which was suggested by several parties. The alternative suggested location is on Harlan Creek near the intersection with Indian Canyon Road.

In addition to specification of the interim measuring point, Order No. WR 93-8 amended a number of conditions of Permit 19572 in order to implement terms of the physical solution proposed by the parties, to provide for efficient monitoring and administration of water diversions under the permit, and to correctly state the authorized place of use.

### 3.0 SUMMARY OF PETITION FOR RECONSIDERATION

Ms. Sayers' petition asks for reconsideration of Order No. WR 93-8 based on the petitioner's allegations that there was an unfair hearing, that the order is not supported by substantial evidence, that the order is "contrary to the evidence", and that there is relevant new evidence which could not have been presented.

The petition asks:

1. "that the [interim] measuring point be established at the point where Harlan Creek crosses under Indian Canyon Road, a distance .63 mile downstream of the Grant Line-CSY boundary."
2. "that the CEQA requirements for land clearing be restored."
3. "that the petition for change of place of use, adding 53 acres of vineyard be revoked, and permitted acreage be 33."
4. "that a watermaster be appointed at Jensen's expense to enforce conditions of his permit."
5. "that the water level portion of the definition of surplus as defined in the case of Cienega Water Users v. City of Holister be restored in place of the three second feet."

### 4.0 ANALYSIS OF POINTS RAISED IN THE PETITION FOR RECONSIDERATION

The petition for reconsideration alleges that the hearing was unfair and that the order is unsupported by the evidence. The argument that the hearing was unfair is unfounded. The scope of the hearing was limited due to the parties' stipulation to a proposed physical solution. In accordance with that stipulation, the primary issue submitted for the State Water Board's consideration was location of an interim flow measuring point on Harlan Creek as discussed in Section 4.1 below. Petitioner Sayers was

represented by counsel at the hearing, and her counsel did not object to the hearing procedures.

The specific requests for relief stated in the petition for reconsideration (and relevant evidence concerning those requests) is evaluated below.

#### 4.1 Interim Measuring Point

The most significant issue raised by the petition for reconsideration is the location of the interim measuring point, the one significant issue that the parties were unable to resolve in their proposed physical solution at the time of the hearing. Upon review of the record, we do not change our previous conclusion regarding location of the interim measuring point.

The purpose of requiring the presence of surface flow at some location on the CSY property was to ensure that water is reaching other water users on Harlan Creek prior to allowing the diversion of water to storage under the junior rights granted in Permit 19572. There was disagreement among the parties at the hearing, however, as to how far water should be required to flow on the CSY Investments' property before diversions should be allowed under Permit 19572.

We believe that the CSY Grant Line Weir is an appropriate location for the interim measuring point for two reasons. First, the other identified points of diversion on Harlan Creek are located upstream of the CSY Grant Line Weir. Therefore, if surface flow is reaching the CSY Grant Line Weir, it is reasonable to assume that water is available to meet upstream needs.

The second reason that we believe that the CSY Grant Line Weir is an appropriate interim measuring point is that the channel conditions downstream are unsuitable for establishing a "surface flow" requirement at the point where Harlan Creek crosses under Indian Canyon Road. The record shows substantial uncertainty with respect to the location and condition of the Harlan Creek Channel in the area immediately upstream of Indian Canyon Road for a distance of about 3000 feet. This fact is reflected by the differing locations of the channel in the 1957 and 1984 USGS maps.

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Rather than establishing that the crossing of Harlan Creek and Indian Canyon Road is an appropriate location for the interim measuring point, the allegations of the petition for reconsideration tend to do the opposite. Page 8 of the petition for reconsideration, for example, describes the condition of the channel above Indian Canyon Road as follows:

"...the channel between the 14 foot weir and the subject creek-road crossing had been filled in with dirt when the vineyard in the area was removed, and the channel was further obliterated during several years of cultivation. The cultivation disk left dams across the path of the streamflow and spread it out to a width of over 50 feet in places." (emphasis added).

The general condition of the channel as described in the petition for reconsideration is consistent with several photographs of the channel (or former channel) which were included with the petition. In view of the limited amounts of water in Harlan Creek and the condition of the channel above the crossing with Indian Canyon Road, it would not be reasonable to subject an upstream water diverter to a requirement that there be surface flow in Harlan Creek at the crossing with Indian Canyon Road.

The petition for reconsideration is accompanied by a geologist's report concerning the condition of the alluvium in the Harlan Creek area. (Report of Robert L. Rose, "Geology of the Lower Harlan Creek Area"). Based on the geologist's report and evidence in the record, the petition, in essence, argues that establishing the interim measuring point at the CSY Grant Line Weir will not provide for sufficient recharge of water to the Harlan Creek alluvium.

The quantity of water in the alluvium downstream of the CSY Grant Line Weir, however, is not an issue which we are required to resolve under the terms of the proposed physical solution presented by the parties to this Board. If the parties' intentions were to ensure that the alluvium fed by Harlan Creek was fully recharged prior to allowing any diversion of water under Permit 19572, that requirement could have been expressly stated in the stipulation presented at the hearing. The stipulation, however, contains no such requirement. Consequently, the additional evidence provided in Mr. Rose's geological report does not justify reconsideration of Order No. WR 93-8.

In summary, we conclude that the CSY Grant Line Weir is an appropriate location for the interim measuring point and that the presence of flow over that weir will protect the availability of water for diversion from Harlan Creek at the points of diversion on Harlan Creek identified in the record.

#### 4.2 Compliance with CEQA Prior to Land Clearing

The petition for reconsideration requests "that the CEQA requirements for land clearing be restored." The reference to the California Environmental Quality Act (Public Resources Code Section 21000 et seq.) appears to be based upon a term included in an earlier draft of an order proposed for the State Water Board's consideration. The term would have required that an environmental impact report be prepared prior to a selective land clearing program by Permittee Jensen. The term was not included in Order No. WR 93-8. The order includes a general provision, however, that no construction or selective clearing shall be commenced and no water shall be collected to storage or used under Permit 19572, until all necessary federal, state and local approvals have been obtained.

When Permit 19572 was issued in 1985, the project was determined to be categorically exempt from CEQA and that determination was not challenged. Order No. WR 93-8 significantly reduces the amount of water that can be diverted under the permit and imposes a number of other restrictions upon water diversions to protect other water users. The actions taken under Order No. WR 93-8 are exempt from CEQA under Section 15304 of Title 14 of the California Code of regulations. Moreover, the proposed physical solution to which petitioner stipulated contains no requirement that the permittee prepare an environmental impact report.

#### 4.3 Petition for Change in Place of Use

Order No. WR 93-8 revised the location of the 100 acre authorized place of use under Permit 19572 to identify the locations of the existing and proposed vineyards as designated on a map filed with the State Water Board dated March 1993. The record was augmented to include the March 1993 map as described in a letter dated October 13, 1993 from the Division of Water Rights to the parties. The petition for reconsideration asks that approval of the revised place of use be revoked and that the authorized place of use under Permit 19572 be limited to 33 acres.



At the hearing, the parties stipulated that Jensen could petition to add a 14 acre portion of his vineyard to the place of use authorized under Permit 19572, provided that he delete another 14 acres from the overall place of use authorized in the permit. It appears from the record that all parties assumed that the other existing vineyard areas were within the authorized place of use. Following the hearing, staff of the Division of Water Rights discovered that the place of use stated in the original application and permit were incorrectly described. Jensen then submitted a corrected map dated March 1993 showing the correct vineyard locations, including the 14 acres which the parties stipulated could be added to Jensen's authorized place of use.

Order No. WR 93-8 revised the place of use authorized under Permit 19572 in accordance with the corrected map. The revised place of use includes the 14 acre area covered by the parties' stipulation as well as a correction of the place of use that was erroneously described in the original application and permit. Water Code Section 1359 provides that the State Water Board may amend a decision or order to correct an obvious oversight without the necessity of a hearing. In addition, Section 795 of Title 23 of the California Administrative Code provides that notice is not required for a petition for a change in place of irrigation use provided that the return flow is unchanged. Thus, whether the correction of the place of use is viewed as a correction under Water Code Section 1359 or as a change for which no notice was required under Section 795 of Title 23, it was appropriate to specify the corrected place of use as was done in Order No. WR 93-8.

#### 4.4 Appointment of a Watermaster

The petition for reconsideration asks "that a watermaster be appointed at Jensen's expense to enforce conditions of the permit." The monitoring and inspection procedure to which the parties agreed at the time of the hearing, however, provided for the parties to designate an agreed upon person responsible for receiving data from Jensen and for inspecting Jensen's water use. The parties' stipulation provides that the cost of any inspections are to be shared equally between Jensen and the protestants, with Jensen to pay 50 percent of the costs and the remaining 50 percent to be divided equally among the protestants. The stipulation did not require that the State Water Board appoint a watermaster to monitor Jensen's diversions.

Order No. WR 93-8 requires that the natural surface flows in Harlan Creek shall be continually measured during the diversion season October 1 through March 31, and that daily flows at the Falls Weir be reported to the State Water Board and the party designated under the parties' stipulation as discussed above. (Order No. WR 93-8, p.22). The order does not, however, address the issues of inspection or how the costs of any inspections shall be paid.

In order to resolve any ambiguity regarding the subject of inspections of Jensen's water use, Condition 16 of Permit 19572 should be amended to include a third provision as specified below in the directive portion of this order. In view of the monitoring and inspection requirements applicable under the conditions of Permit 19572, and the stipulation of the parties to this proceeding, there is no basis for designation of a watermaster at Jensen's expense as requested in the petition for reconsideration.

#### 4.5 Relationship of Diversions Under Permit 19572 to Rights Adjudicated in Cienega Water Users v. City of Hollister

The last action requested in the petition for reconsideration appears to be a request to condition diversions under Permit 19572 upon compliance with the conditions governing diversions by water users subject to the court decree entered in Cienega Water Users v. City of Hollister (San Benito County, Superior Court No. 14797). The Cienega case adjudicated the water rights of specified water users who divert water from Pescadero Creek and its tributaries, including Harlan Creek.

Permittee J.E. Jensen was not a party to the Cienega action and is not bound by the court decree. At some future time, Jensen may be made a party to Cienega action or Jensen and parties to that action may reach some agreement on regulation of Jensen's diversions with respect to rights subject to the Cienega action. In recognition of that possibility, Order No. WR 93-8 reserved jurisdiction to require release of stored water based on lack of flow in Pescadero Creek as agreed to by affected parties or as directed by court order. In view of the fact that Jensen was not a party to the Cienega action, however, we conclude that it would not be appropriate for this Board to subject Jensen's diversions to the restrictions specified in that judgment. Moreover, we note that there was no provision in the proposed physical solution to which petitioner Ann Marie Sayers stipulated that would have subjected Jensen to the provisions of the Cienega judgment.

## 5.0 CONCLUSION

Based on the information discussed above, the State Water Board concludes:

1. Permit 19572 should be amended to include an additional requirement governing data reporting and inspection of water use as specified below.
2. In order to clarify that storage reservoirs are limited to one filling as agreed to by the parties, Condition 5 of Permit 19572 should be amended as specified below.
3. Except as modified herein, the actions taken in Order No. WR 93-8 are supported by the findings in that order and the additional findings set forth above.
4. The net effect of the amendments to Permit 19572 under Order No. WR 93-8 and this order is to substantially reduce the quantity of water which can be diverted under Permit 19572, and to closely regulate diversions which do occur in a manner consistent with the parties' proposed physical solution.
5. The relief requested in the petition for reconsideration filed by Ann Marie Sayers should be denied and the petition should be dismissed.

### ORDER

#### IT IS HEREBY ORDERED THAT:

1. Condition 16 of Permit 19572 shall be amended to include an additional subparagraph as follows:

"(3) The natural surface flows in Harlan Creek shall be continually measured during the diversion season October 1 through March 31, and daily flows at the Falls Weir shall be reported on at least a monthly basis to the designee under Item 7 of the May 27, 1992 stipulation among the parties. If the parties are unable to agree upon a designee to receive the information, the Chief of the Division of Water Rights shall designate a person who shall receive the flow data and who may inspect Jensen's water use without prior notice to Jensen. Fifty percent of any inspection costs shall be paid by Jensen, and the

remaining fifty percent shall be divided equally among the other parties to the May 27, 1992 stipulation. All records provided by Jensen shall be made available to all parties and to the Division of Water Rights upon request."

2. Condition 5 of Permit 19572 shall be amended to read:

"5. The water appropriated shall be limited to naturally occurring surface flow and to the quantity which can be beneficially used, and shall not exceed a total of 22.4 acre-feet per annum to be collected to storage from October 1 of each year to March 31 of the succeeding year. Water diverted under this permit shall be stored in the existing Reservoir 1 (having an approximate capacity of 10 acre-feet) and, upon approval of the Chief of the Division of Water Rights, in Reservoirs 2 and 4. Reservoirs may be filled only once per year.

Water may be collected to storage only during times when there is flow over the CSY Grant Line Weir, and the Harlan Creek Falls Weir, or when flow at the Harlan Creek Falls Weir is equal or greater than the rate agreed to by the permittee and protestants or specified by the Chief of the Division of Water Rights.

Within 60 days of entry of this order, the permittee shall notify and confer with the protestants to determine if there is a suitable location for measuring the presence of surface flow between the Harlan Creek Falls Weir and the CSY Grant Line Weir. Consideration shall be given to a location near the Native American traditional sweat lodge. The permittee shall report back to the Chief of the Division of Water Rights within 60 days regarding location of an alternative measuring point. If a location suitable to the Chief of the Division of Water Rights is identified, the reference to the Harlan Creek Falls Weir shall be replaced with the measuring point location specified by the Chief of the Division of Water Rights.

Following a two year evaluation period, the parties shall by agreement, fix a minimum flow rate to be measured at the Falls Weir required before the permittee may collect water to storage under Permit 19572. If the parties cannot agree as to the proper flow rate, they shall submit the matter to the Division of Water Rights for determination."

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3. The relief requested in the petition for reconsideration filed by Anne Marie Sayers is denied and the petition is hereby dismissed.

#### CERTIFICATION

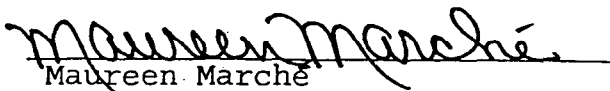
The undersigned, Administrative Assistant to the State Water Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on February 2, 1994.

AYE: John Caffrey  
James M. Stubchaer  
Mary Jane Forster  
John W. Brown

NO: None

ABSENT: None

ABSTAIN: Marc Del Piero



Maureen Marché  
Administrative Assistant to the Board

