

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD
DIVISION OF WATER RIGHTS

DIVISION OF WATER RIGHTS

ORDER WR 2006-0018-DWR

**In the Matter of Permit 10477 (Application 12842)
Regarding Diversion by
NORTH SAN JOAQUIN WATER CONSERVATION DISTRICT**

SOURCE: Mokelumne River

COUNTY: San Joaquin

**ORDER APPROVING CHANGES IN THE POINT OF DIVERSION AND PLACE OF STORAGE
OF PERMITTED WATER RIGHT AND DENYING AN EXTENSION OF TIME**

BY THE CHIEF, DIVISION OF WATER RIGHTS:¹

1.0 INTRODUCTION

North San Joaquin Water Conservation District (District), which holds Permit 10477 (Application 12842), petitions for an extension of time to complete beneficial use of water by December 31, 2010. The District also seeks permission to add a point of diversion and to add a place of underground storage to its permit. The State Water Resources Control Board's (State Water Board or Board) Division of Water Rights (Division) conditionally approves the change in point of diversion and place of use. The District's petition for extension of time is denied.

2.0 FACTUAL BACKGROUND

2.1 History of Application 12842

On December 2, 1948, the District filed Application 12842 to appropriate a total of 500 cubic feet per second (cfs) from two points of diversion on the Mokelumne River and 50,000 acre-feet (af) per annum (afa) to storage from the river for irrigation use and incidental domestic, municipal, recreational, and industrial uses. The District proposed to store the water in a reservoir to be constructed at the Mehrton site on the Mokelumne River. The proposed place of use for irrigation purposes covered a net area of 45,000 acres and the proposed place of use for the domestic, municipal, recreational and industrial uses covered a gross area of 52,000 acres within the boundaries of the District.

In 1949 the East Bay Municipal Water District (EBMUD) filed water right Application 13156 also seeking to appropriate water from the Mokelumne River to develop the Camanche and Pardee Reservoir projects for municipal purposes. The State Water Board's predecessor, the State Engineer, subsequently held a hearing on the competing applications of the District, EBMUD,

¹ The State Water Board has delegated to the Chief, Division of Water Rights, the authority to act on change petitions where no hearing is held and on requests for permit extensions in certain instances. (Board Resolution No. 2002—0106, attachment, §§ 2.6.5, 2.6.11.)

and the Calaveras County Water District (Calaveras) and on July 3, 1956, it issued Decision 858 granting EBMUD's Application 13156 priority over the District's application. The State Engineer concluded that there would be no available water for the District after the higher priority rights of EBMUD and Calaveras were fully satisfied, but decided that the District should receive a temporary permit for the appropriation of surplus water pursuant to Water Code section 1462.² The State Engineer accordingly issued Permit 10477 to allow the District to divert water that is surplus to EBMUD's needs.

Permit 10477 initially authorized the direct diversion of 500 cfs and storage of 50,000 afa from about December 1 of each year to July 1 of the succeeding year. Beneficial uses include irrigation, domestic, municipal, recreational and industrial uses. The permit initially required the District to complete construction by December 1, 1960, and to put water to beneficial use by December 1, 1970.

In a 1963 agreement between the District and EBMUD, EBMUD agreed to collect and store no more than 20,000 af of water in Pardee or Camanche Reservoirs, as space may be available, for the District's use. Permit 10477 includes Camanche Reservoir as a point of diversion. The water, which is released from Camanche Reservoir during the summer months, flows down the Mokelumne River to the District's pumps. The District thus claims a right under Permit 10477 to use the water that EBMUD releases from storage under this agreement.

The District previously has requested and received three extensions of time from the State Water Board. Most recently, after petitioning for an extension of time in 1991, in 1992 the District entered into a stipulated agreement with EBMUD, the Department of Fish and Game (DFG), and the California Sportfishing Protection Alliance (CSPA) to resolve the protests over the time extension petition. In the stipulated agreement, the District agreed to limit its direct diversion and diversion to storage to a combined total of 20,000 afa. The District also agreed to limit the maximum rate of direct diversion from the two existing pumping facilities to a combined total of 80 cfs with no more than 40 cfs to be diverted at any one pumping facility. Permit 10477 was subsequently amended to include similar, but not identical, provisions.³

Additionally, as part of the stipulated agreement, the District agreed not to divert water until it (i) installed a fish screen or entered into an operating agreement with DFG and (ii) reached agreement with DFG regarding bypass flows or the State Water Board entered an order regarding such flows. Accordingly, Terms 15 and 23 were also included in the permit.⁴

2.2 Water Use Under Permit 10477

In July 1981 the Division staff conducted an inspection and determined that the maximum use of water under Permit 10477 occurred in 1973 when the District diverted 9,487 af. In its change

² A temporary appropriation of excess water authorized under Water Code section 1462 is distinct from a temporary urgency permit issued pursuant to Water Code section 1425 et seq. A temporary urgency permit may be issued to persons who demonstrate an urgent need for water to be diverted and used. (Wat. Code, § 1425.) Under Water Code section 1462, when the State Water Board issues a permit to a municipality for a quantity of water exceeding existing municipal needs, the Board may also issue a permit for the temporary appropriation of water that is in excess of those existing needs.

³ Term 5 of the amended permit, which is dated December 11, 1992, provides that: "The water appropriated shall be limited to the quantity which can be beneficially used and shall not exceed a combined total of 80 [cfs] by direct diversion. Direct diversion shall be limited to no more than 40 [cfs] at any one pumping facility to be diverted from December 1 of each year to July 1 of the succeeding year and 20,000 [afa] by storage to be collected from December 1 of each year to July 1 of the succeeding year. The total amount of water to be taken from the source shall not exceed 20,000 acre-feet per water year of October 1 to September 30."

⁴ Term 15 states, in part: "No water shall be diverted under this permit during the 1992 or subsequent water years, until the permittee has constructed screening facilities adequate to protect fishlife and/or has entered into an operating agreement with the [DFG] that will protect fishlife." If fish screens are constructed, then DFG is required to notify the Division of its approval of the plans in writing. Term 23 provides that: "No diversion shall be made under this permit until an agreement has been reached between the permittee and the [DFG] with respect to flows to be bypassed for aquatic life," or failing to reach such agreement, until further order is entered into by the State Water Board.

petition, the District affirms that this quantity approximately represents the maximum amount of water use by the District to date.

According to the District's progress reports filed between 1992 (when Permit 10477 was last amended) and December 31, 2000 (when the time to complete beneficial use under the permit expired), the District diverted water in seven of the eight years.⁵ During this eight-year period, the District diverted a maximum amount of 3,199 af. As discussed below, however, it appears that the District's diversions since 1992 have been unauthorized.

3.0 PETITION FOR CHANGE IN POINT OF DIVERSION AND PLACE OF STORAGE

In May 2004 the District filed a petition to include a new point of diversion on the Mokelumne River and to add underground storage as a place of storage to Permit 10477.⁶ According to the District, the proposed changes are necessary to implement a CALFED-funded pilot conjunctive use project, the North San Joaquin Pilot Recharge Project (Bureau of Reclamation Cooperative Agreement 02FC200107). The State Water Board provided public notice of the time extension and change petitions on July 14, 2004, and received a protest from DFG regarding the proposed new point of diversion. DFG's protest was resolved with the proposed addition of certain terms in Permit 10477.⁷

3.1 Proposed Conjunctive Use Project

According to the District's change petition, CALFED has awarded the District a grant for a proposed conjunctive use pilot project in eastern San Joaquin County in the Acampo/Victor area. The pilot recharge project will involve the construction of two four-acre infiltration ponds and the District will divert 1,000 afa to the ponds during wet years. The District proposes to add a point of diversion on the Mokelumne River that is located closer to the infiltration ponds than the District's current points of diversion under Permit 10477. The District will use a 10-cfs pump at the new point of diversion to divert water to the ponds. Water stored underground will be either discharged into the Mokelumne River or used for irrigation. The District estimates that up to fifty percent of the recharged water, less annual losses, may be available for discharge into the Mokelumne, thus providing additional Delta inflow during dry years.

3.2 Applicable Law

Water Code sections 1700 through 1705 govern changes in the place of use, purpose of use, or point of diversion, of an appropriative water right. Permission to make such change must be granted by the State Water Board and "[b]efore permission to make such a change is granted the petitioner shall establish, to the satisfaction of the [State Water Board], and it shall find, that the change will not operate to the injury of any legal user of the water involved." (Wat. Code, § 1702.) The petitioner also must establish that the proposed change will not effectively initiate a new right. (Cal. Code Regs., tit. 23, § 791, subd. (a).)

3.3 Limited Amendment of Term 20

A preliminary issue is whether the proposed changes will violate Term 20 of the District's permit. As explained above, in 1991 the District, DFG, CSPA, and EBMUD entered into a stipulated agreement to resolve the outstanding protests regarding the District's 1991 time extension

⁵ In certain years, the District's diversions were curtailed pursuant to Term 91, which prohibits diversion under specified conditions.

⁶ The change petition states that the present and proposed purposes of use are irrigation and groundwater recharge. As discussed below, Permit 10477 does not identify groundwater recharge as an existing purpose of use.

⁷ By letter dated January 12, 2005, the Division informed DFG and the District that it would include standard terms incorporating DFG's dismissal terms in any order approving the change petition. These terms prohibit any diversion of water under Permit 10477 until the District installs a fish screen at the proposed new point of diversion or obtains approval of an alternative from DFG. Before beginning construction or diverting water, the District must also provide the Division with a copy of a stream alteration agreement with DFG.

petition and the terms of that agreement were included in Permit 10477. Effective December 11, 1992, Permit 10477 was amended to include the following Term 20: “No additional pumping capacity or storage facilities shall be constructed under Permit 10477.” Thus, Term 20 prohibits the physical changes contemplated by the District’s change petition—installing a new pump and constructing the infiltration ponds that are part of the underground storage facilities. Absent a change in Term 20, the District cannot proceed with the conjunctive use project. Accordingly, it is reasonable to construe the District’s change petition as a request to amend Term 20 solely for the purpose of constructing the conjunctive use project so that the term does not apply to the changes that the District seeks. By letter dated December 19, 2005, the Division gave DFG, CSPA, and EBMUD an opportunity to comment on the proposed limited amendment of Term 20. The Division received no objections.

3.4 Approval of the Change Petition

The evidence in the record supports a finding that the proposed change will not result in injury to any legal user of water. The State Water Board provided notice of the change to water users downstream of the District’s existing points of diversion and received no protests claiming injury. In addition, there is no evidence in the record that the proposed change will initiate a new right. Accordingly, the District’s petition is approved subject to the conditions herein and Permit 10477 will be amended to add the new point of diversion and place of underground storage.

Water Code section 1242 provides that underground storage constitutes a beneficial use if the stored water is subsequently applied to the beneficial uses for which the diversion to storage was made. The District’s change petition seeks to add irrigation, which is an existing use, and groundwater recharge as purposes of use. The District also states that the proposed conjunctive use program will result in additional inflow to the Delta in dry years. Because the District proposes to discharge water stored underground for environmental purposes, the State Water Board will treat the District’s petition for change as a request to add fish and wildlife preservation and enhancement and water quality as beneficial uses for which the diversion to storage will be made. Thus, Permit 10477 will be amended to add underground storage with subsequent application to irrigation, water quality, and fish and wildlife preservation and enhancement uses as a purpose of use.

Additionally, pursuant to the terms of the protest resolution between DFG and the District, the standard terms requiring a fish screen at the new point of diversion and a streambed alteration agreement will be added to Permit 10477. State Water Board standard permit terms governing endangered species, archeological conditions, waste discharge reports, and measuring devices also will be added to the permit. Term 19, which refers to potential actions that may be taken after the 1992 Mokelumne River hearing, will be deleted because that hearing did not resolve the issues identified in that term. Term 20 will be amended to allow the physical changes necessary to construct the conjunctive use project. The original limitations of the term, however, will remain in Permit 10477 and will continue to apply to all other aspects of the District’s permit.

To ensure that the District diligently pursues the proposed conjunctive use project, the District must complete construction of any facilities necessary to implement the project, including construction of a pump at the new point of diversion and the infiltration basins, within two years of the date of this Order. The changes in the District’s permit authorizing a new point of diversion and groundwater storage will cease to be in effect if the District does not timely submit written confirmation to the Chief, Division of Water Rights, that it has completed construction within the two-year period.

3.5 The California Environmental Quality Act and the Public Trust Doctrine

Under the California Environmental Quality Act (CEQA), the District is the lead agency for the preparation of environmental documentation for the proposed pilot conjunctive use project. On

April 2, 2004, the District adopted a Mitigated Negative Declaration and on May 5, 2004, it issued a Notice of Determination for the project.

The State Water Board is a responsible agency for purposes of considering whether to approve the change petition that will allow the District to proceed with the proposed recharge project. As a responsible agency, the State Water Board must consider the environmental documentation prepared by the lead agency, and any other relevant evidence in the hearing record, and reach its own conclusions on whether and how to approve the project involved. (Cal. Code Regs., tit. 14, § 15096, subd. (a).) The State Water Board has considered the Mitigated Negative Declaration in deciding whether to approve the change petition.

The District's environmental review was limited to the impacts associated with the proposed pilot recharge project, i.e., the impacts associated with the diversion of 1,000 afa to the infiltration ponds and the installation of a 10-cfs pump. Consequently, the State Water Board's approval of the change petition must be similarly limited in scope. The change petition is approved subject to the condition that the District may only divert 1,000 afa to underground storage and the maximum rate of diversion to underground storage shall be 10 cfs at the new point of diversion.

In addition to any obligation the State Water Board may have under CEQA, the Board has an independent obligation to consider the effect of the proposed project on public trust resources and to protect those resources where feasible. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419 [189 Cal.Rptr. 346].) There is no evidence that approval of the change petition, with the inclusion of the State Water Board's standard terms, will have any adverse impacts on public trust resources.

3.6 Unauthorized Diversion and Use of Water

Based on the information in the Division's records, the District has diverted and used water in violation of the terms of Permit 10477 since Terms 15 and 23 were added in 1992. Both of these terms expressly prohibit the District from diverting water until certain conditions are met. Term 15 prohibits the District from diverting water during the 1992 water year or subsequent water years until the District has constructed fish screens or has entered into an operating agreement with DFG that protects fishlife. DFG has informed Division staff that DFG is not aware of any construction of permanent fish screens or of any operating agreement. The District has complied with Term 15 in only one year—1993—when the District installed a temporary fish screen loaned to it by DFG for that single diversion season. By letter dated April 8, 1993, DFG informed the District that the temporary installation would be unacceptable on a permanent basis and that DFG expected the District to develop a long-term solution. In a letter to the Division dated October 13, 2005, however, the District states that at the end of the 1993 diversion season, a DFG employee told the District that fish screens were not needed in the future. The Division, however, has no record that this is DFG's official position with respect to compliance with Term 15. Moreover, in 2006 DFG staff informed the State Water Board that DFG does not agree with the District's statement that the District does not need to comply regarding compliance with Term 15. Accordingly, with the exception of 1993, the District has diverted water without complying with Term 15.

Term 23 similarly prohibits the District from diverting water until the District and DFG reach an agreement regarding bypass flows or, failing to reach such an agreement, until the State Water Board enters an order regarding those flows. The State Water Board has not entered any such order pertaining to Permit 10477 and there is no evidence that the District has entered into an agreement with DFG. In its October 13, 2005 letter to the Division, the District states that it believes that bypass flows are provided pursuant to the "EBMUD-FERC agreement" (the Joint Settlement Agreement for the Lower Mokelumne River Project, which was approved by the Federal Energy Regulatory Commission (FERC) in November 1998). An agreement between

other entities, however, does not substitute for the required agreement with DFG. DFG staff have informed the Division that DFG is not aware of any construction of permanent fish screens or of any operating agreement.

Absent affirmative evidence of the District's compliance with Terms 15 and 23, the State Water Board must conclude that the District has diverted water without authorization since 1992. To ensure that the District complies with Terms 15 and 23 in the future, the State Water Board will impose a compliance schedule as a condition of its approval of the change petition. No water shall be diverted for use at the new point of diversion until the District submits written confirmation, with a copy to DFG, that it has complied with Terms 15, 23, and the new term requiring a fish screen at the new point of diversion. If the District fails to submit this confirmation within a year from the date of this order, then approval of the change petition will cease to be in effect.

4.0 PETITION FOR EXTENSION OF TIME

The District petitions for an extension of time to complete construction and beneficial use of water by December 31, 2010. The District's request is denied.

4.1 Applicable Law

Water Code section 1396 requires a permittee to prosecute project construction and beneficial use of water with due diligence, in accordance with the Water Code, the State Water Board's regulations, and the terms specified in the permit. The State Water Board may approve a request for an extension of time if the Board finds that there is good cause for the extension. (Wat. Code § 1398, subd. (a).) The State Water Board's regulations allow an extension of time to be granted only on such conditions as the Board determines to be in the public interest, and on a showing to the Board's satisfaction that (1) due diligence has been exercised, (2) failure to comply with previous time requirements has been occasioned by obstacles which could not reasonably be avoided, and (3) satisfactory progress will be made if an extension of time is granted. (Cal. Code Regs., tit. 23, § 844.) The State Water Board generally will not accept conditions incident to the person and not to the enterprise as good cause for delay. (*Ibid.*) After a hearing on a petition for an extension of time, the State Water Board may revoke the permit. (Wat. Code § 1398, subd. (b); § 1410, subd. (a) – (b)(1).)

4.2 Previous Petitions for Extension of Time

Permit 10477 has been extended three times to allow the District to put water to full beneficial use. The time to complete construction and put water to beneficial use originally expired on December 1, 1960, and December 1, 1970, respectively. On September 6, 1972, the District petitioned the State Water Board to extend the time to complete construction to 1975 and the time to complete beneficial use of water to 1980. According to the District, it had completed construction of diversion and distribution facilities to serve 3,000 acres and had nearly completed diversion and distribution facilities for an additional 3,000 acres. On October 26, 1972, the Division approved a time extension giving the District until December 1, 1975, to complete construction and until December 1, 1980, to apply the water to full beneficial use.

The District filed a second petition for extension of time on March 10, 1983, claiming that the project was eighty percent completed. The petition requested an extension until 1988 to complete construction and until 1989 to complete full beneficial use of water. The Division granted the second time extension on January 30, 1984, giving the District until December 1, 1988, to complete construction and until December 1, 1989, to apply the water to full beneficial use.

The District filed a third petition for extension of time on January 3, 1991. The petition requested an extension until December 31, 2000, to both complete construction and to apply the water to full beneficial use. The District claimed that construction and beneficial use was not

completed due to drought conditions. On February 19, 1991, the Division issued a notice of the time extension petition, and CSPA and DFG subsequently filed protests based on environmental and public trust concerns. As discussed above, the protests were resolved in 1992 when CSPA, DFG, EBMUD and the District stipulated to granting the District a time extension until December 31, 2000. The District's permit was amended accordingly.

4.3 Pending Petition for Extension of Time

On December 29, 2000, the District filed a fourth petition for an extension of time. This pending petition is the subject of consideration in this order. The District seeks an extension until 2010 to complete both construction and use of the water under Permit 10477. The District claims that it has not been able to put the water to full beneficial use and that it will continue to attempt to utilize its full water allotment under Permit 10477.

4.4 Time to Complete Construction

The District's time to complete construction under Permit 10477 expired on December 1, 1988 and the District now seeks an extension of time until December 31, 2010 to complete construction. As noted above, the District has two years to construct the conjunctive use facilities that are the subject of the change petition. There is no indication, however, that the District has specific plans or funds to construct any other project facilities currently authorized under its permit. Accordingly, there is no evidence to support granting additional time to construct other project facilities under Permit 10477. The petition for extension of time to complete construction of other facilities is denied.

4.5 Time to Complete Beneficial Use of Water

The evidence in the record does not support a finding that there is good cause to extend the time for the District to make full beneficial use of the 20,000 afa of water authorized under Permit 10477 and accordingly, the State Water Board denies the District's petition for extension of time to complete full beneficial use of water. The Division will determine the amount of water that has been applied to beneficial use for licensing purposes, and that amount may be used to implement the proposed conjunctive use pilot project.

4.5.1 Due Diligence

In determining whether there is good cause to approve the District's request for an extension of time to complete the beneficial use of water, the State Water Board must consider whether the District has exercised diligence over the past 50 years in putting water to beneficial use. Due diligence requires a demonstrable effort to put water to beneficial use within the time period specified in the permits. (But see 25 Ops.Cal.Atty.Gen. 32, 40 (1955) [noting that diligence may require something more than simply complying with time limits in permits].)

The District received Permit 10477 in 1956, and in 1992 its diversions under the permit were limited to a maximum of 80 cfs by direct diversion and 20,000 afa by diversion to storage. In the past 50 years, the District never has come close to diverting this amount of water. The District's maximum annual diversion was 9,487 af in 1973 and the District's recent diversions have been much lower. Between the second time extension period of 1984 to 1989, the District's maximum annual diversion was 6,040 af in 1986. Between the most recent extension period of 1992 to 2000, the District diverted a maximum amount of 3,199 af in 1993 and an average annual amount of approximately 2,515 afa.

Moreover, the District's diversions of water after 1992 cannot be used to support an extension of time. A permittee must apply the water to beneficial use in accordance with the Water Code, the State Water Board's regulations, the terms of the permit, and within the period specified in the permit. (Wat. Code, § 1397.) A permittee cannot support an extension of time by showing water use under the permit that violates the terms of the permit. The diversion and use is not made under the permit; instead it is unauthorized and made without a claim of right. (See Board

Order WR 85-4 [concluding that the permittee's diversion of water at an unauthorized point of diversion and outside the season of diversion did not support an extension of time].) In 1992 the District agreed not to divert water until it complied with certain terms required for fishery protection. (Permit Terms 15 and 23.) As discussed above, according to the information in the Division's records, the District has diverted water since 1992 in direct contravention of the terms of its permit.

Nonetheless, even if the State Water Board considered quantities of water used in violation of the District's permit terms (or even if the District provides documentation that it has complied with those terms), the District at best has diverted approximately 3,199 afa of water under its permit since 1992. The District has not exercised diligence in putting the full amount of water authorized under Permit 10477—20,000 afa—to beneficial use.

4.5.2 Obstacles Not Reasonably Avoided

The State Water Board must also consider whether the District's failure to comply with previous time requirements has been occasioned by obstacles that could not reasonably be avoided. Lack of finances and other conditions incident to the person and not the enterprise will not generally be accepted as good cause for delay. (Cal. Code Regs., tit. 23, § 844.)

The District identifies a potentially unavoidable obstacle in completing full beneficial use of water under Permit 10477; namely, the available water supply is uncertain. Permit 10477 only allows the District to divert water that is surplus to EBMUD's needs and also subjects the District to Term 91 curtailments. Consequently, according to the District, its surface water supply is variable and it has had to rely on groundwater as its primary source of water.⁸

A review of the facts, however, indicates that the District has not used the water that has been available to it. Pursuant to the District's 1963 agreement with EBMUD, as supplemented in 1969, the District must notify EBMUD on or before February 15 of each year of the quantity of water that the District wishes to divert each month during the remainder of the calendar year. It must also request EBMUD to store a sufficient quantity of water in its reservoirs for later release to satisfy the District's requirements when the Mokelumne River's flow is insufficient to satisfy those requirements by direct diversion without interference with the rights of others. EBMUD then must release the quantity of water requested by the District.

Between 1993 and 2001, the District requested EBMUD to store 20,000 af in Pardee Reservoir or Camanche Reservoir and in each of those years, except 1994 and 2001 (when drought conditions precluded such diversions), EBMUD collected the full 20,000 af in storage for the District. The District, however, rediverted far less than the 20,000 af stored by EBMUD. For example, the District rediverted a maximum quantity of 3,199 af in 1993, and a minimum quantity of 1,465 af in 1997. The District's average annual rediversion during this period was approximately 2,515 af. Between 2002 and 2005, the District requested EBMUD to store from 4,000 to 6,000 af, but the District only diverted a maximum amount of 3,152 af in 2003. In sum, although water often has been available for the District's rediversion over the past thirteen years, the District has not sought to put the full amount of available water to full beneficial use.

The District also asserts that it cannot fully develop the permitted project because it does not have funds to install surface water pumping facilities, noting that water users within the District are reluctant to expend money when the District only has a permit for the appropriation of surplus water. Lack of finances, however, is not generally a good cause for delay. Thus, the

⁸ Both Decisions 858 and 893 rejected the District's applications for permanent water supplies from the Mokelumne River and the American River and directed them to look to other options for a permanent water supply. The District notes that it has followed the direction given to it by the State Water Board and its predecessors, but it still has been unable to establish a permanent water supply. This information, however, is unrelated to the causes supporting an extension of time.

District's inability to comply with Permit 10477's time requirements cannot be attributed to obstacles not reasonably avoided.

4.5.3 Satisfactory Progress

Evidence in the record before the State Water Board indicates that the District will not make satisfactory progress if the State Water Board grants an extension of time to complete beneficial use of water. Although the District's permit is for the appropriation of surplus water, it still has a right to divert up to 20,000 afa from the Mokelumne River to the extent that water is available. The District, however, has not provided sufficient specificity regarding any plans to appropriate this amount.

In its time extension petition, the District states that it "proposes several projects that will require improvements to be constructed that will permit the District to put its entire permitted water supply to full beneficial use." It identifies improvements that will be required for the following projects: the CALFED conjunctive use project, the Farmington groundwater recharge project, replacement of the District's north distribution system, a three-well injection/extraction project, and an investigation into a water treatment plant with the City of Lodi. Although the District has described its efforts and general intent to develop these projects, neither specific construction plans nor financing were in place at the time of the District's time extension petition. Accordingly, the completion of these projects and their relationship to the District's completion of beneficial use of water under Permit 10477 is speculative at best. In fact, the project with the greatest likelihood of completion in the near future—the District's proposed conjunctive use project—will only use 1,000 afa over a five-year period. Accordingly, the record does not support a finding that the District will make satisfactory progress in completing full beneficial use of water under Permit 10477.

4.6 CEQA and the Public Trust Doctrine

As the lead agency under CEQA, the District prepared a Negative Declaration for the proposed extension of time and the State Water Board considered the document in deciding whether to approve the time extension petition. CEQA, however, does not apply to projects that an agency rejects or disproves and accordingly, no further action is necessary under CEQA. (Pub. Resources Code, § 21080, subd. (b)(5).) Similarly, before approving an extension, the State Water Board would have to consider the effects on instream beneficial uses of allowing the additional diversions that would be authorized if an extension were granted – in this case an increase from the existing level of diversions to the full 20,000 afa per year that would be authorized if the permit were extended. Because the extension is being denied, however, it is not necessary to evaluate those public trust impacts.

5.0 CONCLUSION

Based on the evidence in the record, the State Water Board conditionally approves the District's petition to add a point of diversion, purposes of use, and a place of underground storage to Permit 10477. The evidence in the record does not support a finding of good cause to extend the time to complete construction and beneficial use of 20,000 afa of water under the permit. The petition for extension of time is denied.

ORDER

NOW THEREFORE IT IS HEREBY ORDERED THAT:

1. The petition to change the District's point of diversion and place of use is approved subject to the conditions herein. The changes approved in this paragraph and in paragraphs 2, 3, 4, 7, 8 and 9 of this order shall cease to be in effect if (i) the District does not submit to the Chief, Division of Water Rights, the documentation required in paragraph 1.a, below, within one year from the date of this order; or (ii) the District does not submit to the Chief, Division of Water Rights the documentation that the District has completed construction of the facilities necessary to implement the North San Joaquin Pilot Recharge Project (Bureau of Reclamation Cooperative Agreement 02FC2200107), including any pumping and infiltration facilities, within two years from the date of this order.

- a. Term 2 of the permit is amended to add the following point of diversion and rediversion:

California Coordinates Zone 3, North 603,200 feet and East 1,793,790 feet.
In the SE $\frac{1}{4}$ of NW $\frac{1}{4}$ of Section 33, T4N, R7E, MDB&M.

No water shall be diverted at this point of diversion until permittee informs the Division of Water Rights in writing, with a copy to the Department of Fish and Game, that it has complied with Terms 15, 23, and any other provision of this permit requiring the installation of fish screens prior to diverting water.

The water appropriated at this point of diversion shall be limited to the quantity that can be beneficially used and shall not exceed 1,000 acre-feet per annum to be collected to underground storage at a maximum rate of 10 cubic feet per second from December 1 of each year to July 1 of the succeeding year.

- b. Term 5 of the permit is amended to read:

The water appropriated shall be limited to the quantity that can be beneficially used and shall not exceed a combined total of 80 cubic feet per second (cfs) by direct diversion from all pumping facilities. Direct diversion shall be limited to no more than 40 cfs at any one pumping facility to be diverted from December 1 of each year to July 1 of the succeeding year and diversion to storage shall be limited to 20,000 acre-feet per annum (afa) by storage in (a) Camanche Reservoir, and (b) underground storage at a maximum rate of 10 cfs to be collected from December 1 of each year to July 1 of the succeeding year. The combined rate of direct diversion and diversion to underground storage shall not exceed 80 cfs.

The total amount of water to be taken from the source shall not exceed 20,000 af per water year of October 1 to September 30.

This permit does not authorize collection of water to storage outside of the specified season to offset evaporation and seepage losses or for any other purpose.

- c. Term 3 of the permit is amended to add the following purpose of use:

Underground storage with subsequent application to irrigation, water quality, and fish and wildlife preservation and enhancement uses.

2. Term 20 of the permit is amended to read:

No additional pumping capacity or storage facilities shall be constructed under Permit 10477, except for the installation of the pumping facilities and the construction of underground storage facilities necessary to implement the North San Joaquin Pilot Recharge Project (Cooperative Agreement 02FC200107).

3. Permit 10477 is amended to include the following condition:

No water shall be diverted under this Permit until permittee has constructed a fish screen at the point of diversion to be used for the conjunctive use pilot project or has proposed and constructed an alternative to a fish screen. Any alternative must comply with the Department of Fish and Game's (DFG) criteria and receive DFG's written approval. Permittee shall submit a copy of DFG's written approval of the plans and design calculations to the Division of Water Rights (Division) within 30 days from the date of the approval. Construction, operation, and maintenance of any required facility are the responsibility of the permittee. If the fish screen or any alternative is rendered inoperative for any reason, the permittee shall notify the Division Chief immediately and shall restore the equipment to service as soon as possible.

(0000213)

4. Permit 10477 is amended to include the following condition:

No work shall commence and no water shall be diverted, stored or used under this permit at the point of diversion to be used for conjunctive use purposes until a copy of a stream or lake alteration agreement between the Department of Fish and Game (DFG) and the permittee is filed with the Division. Compliance with the terms and conditions of the agreement is the responsibility of the permittee. If a stream or lake alteration agreement is not necessary for this permitted project, the permittee shall provide the Division a copy of a waiver signed by DFG.

(0000063m)

5. Permit 10477 is amended to include the following Endangered Species condition:

This permit does not authorize any act which results in the taking of a threatened or endangered species or any act which is now prohibited, or becomes prohibited in the future, under either the California Endangered Species Act (Fish and Game Code sections 2050 to 2097) or the federal Endangered Species Act (16 U.S.C.A. sections 1531 to 1544). If a "take" will result from any act authorized under this water right, the permittee shall obtain authorization for an incidental take prior to construction or operation of the project. Permittee shall be responsible for meeting all requirements of the applicable Endangered Species Act for the project authorized under this permit.

(0000014)

6. Permit 10477 is amended to include the following archeological conditions:

Should any buried archeological materials be uncovered during project activities, such activities shall cease within 100 feet of the find. Prehistoric archeological indicators include: obsidian and chert flakes and chipped stone tools; bedrock outcrops and boulders with mortar cups; ground stone implements (grinding slabs, mortars and pestles) and locally darkened midden soils containing some of the previously listed items plus fragments of bone and fire affected stones. Historic period site indicators generally include: fragments of glass, ceramic and metal objects; milled and split lumber; and structure and feature remains such as building foundations, privy pits, wells and dumps;

and old trails. The Chief of the Division of Water Rights shall be notified of the discovery and a professional archeologist shall be retained by the Permittee to evaluate the find and recommend appropriate mitigation measures. Proposed mitigation measures shall be submitted to the Chief of the Division of Water Rights for approval. Project-related activities shall not resume within 100 feet of the find until all approved mitigation measures have been completed to the satisfaction of the Chief of the Division of Water Rights.

(0000215)

If human remains are encountered, then the Applicant shall comply with Section 15064.5 (e) (1) of the CEQA Guidelines and the Public Resources Code Section 7050.5. All project-related ground disturbance within 100 feet of the find shall be halted until the county coroner has been notified. If the coroner determines that the remains are Native American, the coroner will notify the Native American Heritage Commission to identify the most-likely descendants of the deceased Native Americans. Project-related ground disturbance, in the vicinity of the find, shall not resume until the process detailed under Section 15064.5 (e) has been completed.

7. Permit 10477 is amended to include the following condition:

Prior to diversion of water under this permit, permittee shall (1) install devices to measure the quantities of water placed into underground storage and (2) install devices to measure or provide documentation of the method to be used to determine the quantity of water recovered from underground storage and placed to beneficial use. All measuring devices and the method of determining the quantity of water recovered from underground storage shall be approved by the Chief of the Division of Water Rights prior to diversion of water at the Mokelumne River point of diversion under this permit. All measuring devices shall be properly maintained.

(0080117)

8. Permit 10477 is amended to include the following water quality condition:

No water shall be used under this permit until permittee has filed a report of waste discharge with the California Regional Water Quality Control Board, Central Valley Region, pursuant to Water Code Section 13260, and the Regional Board or State Water Resources Control Board has prescribed waste discharge requirements or has indicated that waste discharge requirements are not required. Thereafter, water may be diverted only during such times as all requirements prescribed by the Regional Board or State Board are being met. No point source discharges of waste to surface water shall be made unless waste discharge requirements are issued by a Regional Board or the State Board. A discharge to ground water without issuance of a waste discharge requirement may be allowed if, after filing the report pursuant to Section 13260:

- (1) the Regional Board issues a waiver pursuant to Section 13269, or
- (2) the Regional Board fails to act within 120 days of the filing of the report.

No permittee shall be required to file a report of waste discharge pursuant to Section 13260 of the Water Code for percolation to ground water of water resulting from the irrigation of crops.

(0290101)

9. Permit 10477 is amended to include the following term:

The permittee shall obtain all necessary state and local agency permits required by other agencies prior to construction and diversion of water. Copies of such permits and approvals shall be forwarded to the Chief, Division of Water Rights.

10. Permit 10477 is amended to delete Term 19.

11. All other conditions of Permit 10477 remain in full force and effect.

STATE WATER RESOURCES CONTROL BOARD

ORIGINAL SIGNED BY

*Victoria A. Whitney, Chief
Division of Water Rights*

Dated: November 30, 2006