
State Water Resources Control Board

**STATE WATER RESOURCES CONTROL BOARD
DIVISION OF WATER RIGHTS
STAFF REPORT**

October 20, 2020

SUBJECT

CONSIDERATION OF A RESOLUTION GRANTING A PETITION BY MADERA IRRIGATION DISTRICT FOR THE STATUTORY ADJUDICATION OF WATER RIGHTS IN THE FRESNO RIVER WATERSHED

Introduction

This staff report provides relevant background information and a staff recommendation related to the pending Petition for Statutory Adjudication of the Fresno River Watershed (Petition) by Madera Irrigation District (District) and consideration of the Petition by the State Water Resources Control Board (State Water Board or Board) at its October 20, 2020 Board Meeting.

Background

On October 18, 2018, the State Water Board Division of Water Rights (Division) received the [Petition](#) from the District, seeking to initiate a statutory adjudication of the water rights to the Fresno River and its tributaries in order to resolve long-standing and ongoing conflicts over water rights, water use, and water allocations within the watershed.

After the petition was received, State Water Board staff (staff) conducted outreach to the District, the U.S. Bureau of Reclamation (Reclamation), the California Department of Fish and Wildlife (CDFW), and representatives of riparian landowners along the lower Fresno River. Staff also sent an outreach package to all known water right holders or claimants in the Fresno River watershed in July 2019, including a [letter](#), a [Notice of Public Meeting](#), and a [Fact Sheet](#) on the Petition and statutory adjudications. This outreach informed the September 2019 staff recommendation to the Board.

At the September 17, 2019 Board Meeting, the Board adopted [Resolution No. 2019-0049](#) postponing action on the Petition and giving the District and riparian landowners (parties, collectively) approximately eight more months, until May 2020, to negotiate a settlement and management framework for the lower Fresno River that would resolve existing and future conflicts over the diversion and use of water. In May 2020 the

parties' negotiation timeframe was extended to October 2020, in part due to the COVID-19 public health crisis.

Staff Investigation and Facilitation Services

Board Resolution No. 2019-0049 directed staff to examine all water rights and claims along the Fresno River below Hidden Dam and make the results of the investigation publicly available. Staff released the results of the desktop investigation on December 4, 2019 and the Fresno River Investigation Geodatabase on July 24, 2020; both are available on the Division's [Fresno River Adjudication website](#).¹ The goal of the desktop investigation was to provide an initial set of consistent publicly available information on water rights and claims to the river to aid the parties in their negotiations. The Geodatabase is an online mapping tool presenting visual information on points of diversion, places of use, land ownership, beneficial uses of water, reported diversion data, and lands which may be associated with unclaimed riparian rights. The investigation data and Geodatabase are preliminary findings and not legal determinations of water rights. Parties were invited to submit comments or corrections to the investigation results.

Board Resolution No. 2019-0049 also directed staff to investigate available funding sources for facilitation services to aid the parties in their negotiations. Staff arranged for a Board-funded facilitator, Kearns & West, to mediate negotiations between the parties with the goal of achieving substantial progress towards a successful settlement within the timeframe specified in Resolution No. 2019-0049. Kearns & West conducted interviews with water rights claimants and a multi-track mediation approach to identify and confirm water rights, design a water management system, and determine a governing water schedule. Kearns & West held a series of plenary, legal workgroup, subgroup, and steering committee meetings between November 2019 and July 2020, with a Final Report on the Mediation² submitted to Board staff on August 7, 2020.

All but one of the parties named in the Petition, as well as additional riparian landowners identified in the staff Desktop Investigation and representatives from CDFW, participated in negotiations facilitated by Kearns & West in 2019 and 2020. While Board staff attended the first plenary meeting to present information about the Desktop Investigation and held occasional progress check-ins with Kearns & West, the State Water Board was not a participant in the negotiations.

After receiving the Final Report on Mediation, staff conducted additional outreach to all negotiation parties to inform the current recommendation.

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https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/fresno_riv_adjud/

² Instructions for viewing the Final Report on Mediation and Attachments can be found on the [Fresno River Adjudication website](#).

Parties' Progress Since September 2019 Board Meeting

Board Resolution No. 2019-0049 outlined eight requirements that the parties' negotiated settlement and management framework should meet to address the issues raised in the Petition, as well as seven milestones which the Board would use to assess progress towards a successful negotiated settlement. The Final Report on Mediation describes that parties have made progress in some areas, including sharing of water right claim information and conceptual approaches to hiring a consultant, cost sharing, and continued negotiations. (Final Report on Mediation, at pp. 6-7 and 9-14.) However, there is presently no agreement on water right quantities, water accounting, or administration. (Final Report on Mediation, at pp. 14-16.) Parties have not met or made substantial progress toward most of the required elements described in Board Resolution No. 2019-0049 (see Attachment A of this Staff Report for a staff evaluation). The Final Report on Mediation includes a list of issues which have yet to be resolved, most of which are focused on the quantification of water rights and other issues that would best be addressed by the State Water Board. (Final Report on Mediation, at pp. 7-9.)

Not all parties listed in the Petition endorsed the Final Report on Mediation, (Final Report on Mediation, at pp. 18-22.) including the District, which asserts that negotiations were unable to resolve any substantive issues in the watershed and renews its request for the Board to conduct a statutory adjudication (see letter dated May 8, 2020, Exhibit G of the Final Report on Mediation, and letter dated August 7, 2020, in Exhibit J). Other parties expressed concern that negotiations did not meaningfully resolve conflicts and further discussions would not be productive without the District's involvement and additional guidance from the State Water Board. (Final Report on Mediation, at pp. 19-22.) Parties endorsing the Final Report on Mediation requested an additional six months of time to negotiate before the Board evaluates their progress, though they acknowledged that the resolution of all outstanding issues would ultimately take longer. (Final Report on Mediation, at pp. 16 and 18.)

Statutory Adjudications – Determination of Public Interest and Necessity

In a statutory adjudication, the rights to water in a stream system are determined through a State Water Board proceeding and court decree. (Wat. Code, §§ 2500-2900.) Upon being petitioned by a claimant to water of a stream system, the Board evaluates whether an adjudication would serve the public interest and necessity. (Wat. Code, § 2525.) In making its determination, the State Water Board must consider relevant facts and conditions including: (1) the degree to which the waters of the stream system are fully used; (2) the existence of uncertainty as to the relative priority of rights to the use of waters of the stream system; (3) the unsuitability of less comprehensive measures, such as private litigation or agreements, to achieve certainty of rights to the use of waters of the stream system; and (4) the need for a system-wide decree or watermaster service, or both, to assure fair and efficient allocation of the waters of the stream system. (Cal. Code Regs., tit. 23, § 946.) Public trust considerations may also be included as part of a statutory adjudication.

The history of conflicts over water diversion and use in the Fresno River watershed and the present status of parties' negotiations suggest that a statutory adjudication of the stream system would serve the public interest and necessity.

Several State Water Board actions³ have declared that the Fresno River is fully appropriated from the spring through fall. [Decision 1047](#) in 1961 declared Carter Creek, an upstream Fresno River tributary, fully appropriated for the month of June. With the issuance of [Decision 1407](#) in 1973, the State Water Board determined that the entire Fresno River watershed upstream of Hidden Dam was fully appropriated between May 1 and November 30 (with a reservation for small stockponds). The entire Fresno River watershed is tributary to the Sacramento-San Joaquin Delta, which was declared fully appropriated from June 15 to August 31 by Board [Decision 1594](#) in 1983 (as amended in 1984). These designations as Fully Appropriated Stream Systems (FASS) were confirmed by the Board in [Order WR 98-08](#) and its [Attachment](#) in 1998.⁴

The Petition and Final Report on Mediation are both clear that uncertainties exist regarding the relative priority of water rights in the Fresno River watershed. In its Petition, the District asserts that there is "significant uncertainty regarding the priority of rights claimed to the waters of the [Fresno] River" and expresses specific concerns that the Fresno River Allocation Model (FRAM) currently used to manage the basin "subverts the chain of water right priority by ensuring water is first delivered to junior users before all senior users." (Petition, at p. 3) The Final Report on Mediation also acknowledges remaining uncertainty over water right priorities even following negotiations, stating the need to determine: (1) "whether (and to what extent) there are any pre-1914 appropriative rights on the Fresno River with priority to water ahead of riparian lands," (2) "the priority, nature, and extent of any adjudicated Fresno River water rights," (3) "the order of priority of rights to satisfy public trust/instream obligations," and (4) "scheduling the order of priority of any post-1914 appropriative permits and licenses." (Final Report on Mediation, at pp. 7-8.)

Prior efforts to address disputes regarding the Fresno River demonstrate that measures less comprehensive than a statutory adjudication are not suitable means of achieving certainty of water rights to or resolving conflicts over water use in the Fresno River stream system. The State Water Board's previous actions in the Fresno River basin were limited in scope to Reclamation's water rights and have not fully resolved the uncertainties about rights to the Fresno River. In 1999 the State Water Board issued [Order WR 99-001](#), following complaints that Reclamation was storing water intended for diversion by senior downstream users. Order WR 99-001 required that Reclamation provide sufficient water to satisfy the rights of three downstream riparian landowners. (Order WR 99-001, at p. 27.) While the order acknowledged and quantified some

³ Available on the Board's website:

https://www.waterboards.ca.gov/board_decisions/adopted_orders/

⁴ Additional information on FASS watersheds and a mapping tool are available on the Division's website:

https://www.waterboards.ca.gov/waterrights/water_issues/programs/fully_appropriated_streams/

riparian lands, this action was not a comprehensive determination of rights. (Order WR 99-001, at pp. 4-20.) Reclamation was issued [License 13836](#) for Hidden Dam in 2011, which required the release of “sufficient water to satisfy the prior rights” of specific landowners. (License 13836, at p. 4.) Many of the questions raised in the District’s Petition regarding riparian acreage, diversion points, and recently increased diversions concern parties that were not addressed in Order WR 99-001 or Reclamation’s license. (Petition, at pp. 8-14.)

Furthermore, in the nearly two years that have passed since the District filed the Petition, the parties have not made progress towards a resolution of the disputes regarding rights to the Fresno River sufficient to indicate that a privately negotiated solution is feasible. Though negotiations facilitated by Kearns & West included information exchanges and produced a roadmap for parties to continue negotiating, the Final Report on Mediation suggests reluctance by some parties to continue negotiations without the participation of the District and further guidance from the State Water Board.

The Petition and Final Report on Mediation also indicate that fair and efficient allocation of Fresno River waters would more likely be achieved following a system-wide decree and potential designation of an independent administrator (i.e., a watermaster). The District’s petition requests that the Board conduct a statutory adjudication to “reduce uncertainty in the system administration, prevent the mistreatment of riparian rights, and ensure the system is managed fairly and efficiently.” (Petition, at p. 20.) Because it must operate Hidden Dam to meet the needs of downstream senior rights pursuant to Reclamation’s license, the District also expresses concern that it has been forced to effectively act as a watermaster without “legal authority to regulate or enforce the appropriate allocation of water for its most beneficial and reasonable use under the FRAM.” (Petition, at p. 22.) A complaint pending before the Division also alleges that the management of the Fresno River system by the District has caused issues with proper water allocation. In the Final Report on Mediation parties expressed an interest in quantifying “the extent and priority of all diversion right to the Fresno River” in order to determine how water should be managed. (Final Report on Mediation, at p. 11.) The Final Report on Mediation also indicates that “parties expressed strong support for bringing on a watermaster who would be charged with overseeing and managing future water allocations on the Fresno River.” (Final Report on Mediation, at p. 16.) Both the Petition and the Final Report on Mediation also state that physical solutions which are consistent with water right principles could offer mutually beneficial opportunities to manage water efficiently within the Fresno River system. (Petition, at p. 4; Final Report on Mediation, at p. 13.)

Staff Recommendation

Given the lack of progress made by Fresno River parties on the milestones and requirements that the Board set in Resolution No. 2019-0049 (see Attachment A), staff does not believe that further delay for negotiations will be successful without Board intervention. Furthermore, the largest Fresno River water user (Madera Irrigation District) has withdrawn from negotiations and renewed its request the Board conduct a

statutory adjudication to offer greater certainty to all Fresno River water rights. Therefore, staff recommends that the Board grant the Petition.

Proceeding with a statutory adjudication would not foreclose the possibility of incorporating the result of any future successful negotiations in a Board determination of water rights. Parties may continue to collaborate, coordinate, and seek resolution of ongoing disputes, and stipulated or negotiated settlement terms can potentially be incorporated into the court-approved final decree following the adjudication.

Statutory Adjudication Procedures

A statutory adjudication is a proceeding by which all of the rights to water in a stream system are determined through an administrative proceeding conducted by the State Water Board and confirmed by entry of a decree by the superior court. Since 1924, the State Water Board has completed approximately 28 statutory adjudications of surface streams throughout the state. In a statutory adjudication, the State Water Board may determine all of the water rights to a stream system, whether based on appropriation, riparian status, or other basis of right. (Wat. Code, § 2501.) Under certain circumstances, the State Water Board may exempt users of minor quantities of water from being subject to the adjudication proceedings. (Wat. Code, § 2502-2503.) A statutory adjudication would not include groundwater unless the water is pumped from a subterranean stream.

A statutory adjudication may be initiated by a claimant to water of any stream system by a petition to the State Water Board requesting the determination of the rights of the claimants to the water of that stream system. (Wat. Code, § 2525.) The State Water Board may either grant or deny the petition after evaluating whether an adjudication would serve the public interest and necessity. In making its determination, the State Water Board must consider (1) the degree to which the waters of the stream system are fully used; (2) the existence of uncertainty as to the relative priority of rights to the use of waters of the stream system; (3) the unsuitability of less comprehensive measures, such as private litigation or agreements, to achieve certainty of rights to the use of waters of the stream system; and (4) the need for a system-wide decree or watermaster service, or both, to assure fair and efficient allocation of the waters of the stream system. (Cal. Code Regs., tit. 23, § 946.)

If a petition for statutory adjudication is granted, the State Water Board initiates the process by notifying all known potential water right claimants in the watershed of the pending proceeding. The notices set a deadline by which claimants to water of the stream system must notify the State Water Board in writing of their intent to file proofs of their claimed water rights. (Wat. Code, § 2526.) The State Water Board then conducts an investigation of the water supply and demands in the watershed and conducts field visits of each point of diversion and place of use. (Wat. Code, §§ 2550-2552.) After the field investigations are complete, claimants are provided with a copy of the investigation findings for reference in preparing their proofs of claim to water in the system. (Wat. Code, § 2553.) A proof of claim must be submitted on the form provided by the State Water Board and includes the nature of the claimed right, the date initiated, the purpose

of use, a description of the diversion works, the season of diversion, the amount of water diverted and used, and other relevant facts necessary for the State Water Board to make a determination of right. (Wat. Code, §§ 2553, 2575; Cal. Code Regs., tit. 23, § 947.) If a water user does not participate in the proof of claim process, the State Water Board will make a determination of that person's water rights based on the information it collects during the field investigation. (Wat. Code, §§ 2554, 2577.)

After conducting the investigations and receiving the proofs of claim, the State Water Board prepares a report describing the water supply and abstracting the claim of water right of each claimant. (Wat. Code, § 2600.) The report also includes a preliminary order of determination establishing the rights to the water of the stream system. (Wat. Code, § 2603.) A copy of the report is sent to each claimant, and copies of the proofs of claims and any evidence collected by the State Water Board during the proceedings are made available to inspection by all interested persons. (Wat. Code, §§ 2604, 2625.) Within the time period set by the Board, claimants may file objections to the findings in the report and the order of determination. (Wat. Code, § 2604.) These objections are subject to the taking of evidence and hearings before the State Water Board. (Wat. Code, §§ 2650-2653.) Upon completion of the hearings, the Board adopts an order determining and establishing the rights to water in the stream system. (Wat. Code, § 2700.) The order of determination and a statement of expenses incurred by the Board in conducting the proceeding is mailed to each party. (Wat. Code, § 2701.) State law requires the State Water Board to recover expenses incurred in performing an adjudication from participating parties through fees and other cost recovery equitably apportioned among the parties to the proceeding. (Wat. Code, §§ 2850-2868.)

A certified copy of the order, the evidence submitted, and a transcript of testimony received by the Board is filed with the clerk of the superior court of the county in which the stream system is located. (Wat. Code, § 2750.) Interested parties may file notices of exceptions to the order of determination with the court clerk. (Wat. Code, §§ 2757-2758.) Exceptions typically will not be considered by the court unless they were presented to the State Water Board in the form of an objection during the Board adjudication process. (Wat. Code, § 2763.5.) After conducting a hearing of exceptions and other necessary proceedings, the court enters a decree that conclusively determines the rights of all parties involved in the proceeding. (Wat. Code, §§ 2763-2773.) After a decree is entered, any claimant who failed to appear and submit proof of claim is barred from subsequently asserting any right to water of the stream system other than as provided in the decree, unless entitled to relief under other laws of the state. (Wat. Code, § 2774.)

ATTACHMENT A: Parties' Progress towards Key Criteria and Milestones in Board Resolution 2019-0049

Key Criteria	Demonstrated Progress
5a. Inclusion and consent of a substantial number of water users and riparian landowners in the watershed, including, at a minimum, consent by all water right claimants named in the Petition, Madera Irrigation District, and Reclamation	<i>Partially achieved</i> ; all parties listed in the petition participated in negotiations except for Menefee River Ranch (furthest downstream Fresno River user). The District and Reclamation chose not to endorse the Final Report on Mediation, and other parties expressed concern about negotiation productivity without their participation and further Board guidance.
5b. Procedures for administration and enforcement of the terms of the agreement	<i>Not achieved</i> ; the Final Report on Mediation states that an independent third-party watermaster is required first.
5c. Protocol for water rights accounting that meets, at a minimum, the state's legal requirements for the measurement and reporting of water diversion and use	<i>Not achieved</i> ; the Final Report on Mediation proposes a conceptual approach to developing a water management system and hiring a technical consultant, but it's unclear if all parties are in agreement with this conceptual approach (see 5a above).
5d. Clear rules for water allocation during various hydrologic conditions, from wet to critically dry	<i>Not achieved</i> ; the Final Report on Mediation proposes a conceptual approach to developing a water management system and hiring a technical consultant, but it's unclear if all parties are in agreement with this conceptual approach (see 5a above).
5e. Protocol for changes in location or capacity of points of diversion, changes in place of use, and new points of diversion and places of use	<i>Not achieved</i> .
5f. Consideration of flows to protect public trust resources and meet water quality standards	<i>Not achieved</i> ; CDFW released a report on Instream Flow Criteria on a Watershed Scale for the Fresno River in March 2020. Parties have not agreed upon specific ways to incorporate public trust or water quality in the administration of the basin.
5g. Identification of a party or entity (i.e., a watermaster or equivalent) who will oversee and have authority to enforce water allocations on the Fresno River, including any flows to protect public trust resources, and a mechanism to fund that role	<i>Not achieved</i> ; the Final Report on Mediation expressed support for a neutral watermaster and proposes to identify a specific entity later in the negotiation process.
5h. Protocol for ensuring longevity of the negotiated solution and contingency plans for modification of the agreement's terms in the future	<i>Not achieved</i> .
Key Milestones	Demonstrated Progress
6a. Identification of a mediator or committee who will take a primary role in drafting a proposed settlement and agreement on the allocation of any associated costs	<i>Achieved</i> ; Board staff identified and funded the hiring of Kearns & West as a professional facilitator.
6b. Exchange of data and information by a substantial number of water right claimants, demonstrating the nature of their water right entitlements (e.g., riparian acreages, documentation of the priority date and quantity of pre1914 water right claims)	<i>Achieved</i> ; following release of the Board staff water right investigation, parties shared water rights documentation and compared their claims to the Board's data. Parties who signed a Mediation Agreement were permitted to view others' claims, and some parties submitted Disagreement Forms if they had issues with the rights claimed by others. Because it was exchanged during confidential negotiations, the Board has not reviewed the parties' supporting water right information.
6c. Quantification of the location, capacity, and source of existing points of diversion	<i>Not achieved</i> ; parties focused first on the verification of water rights and riparian acreage.
6d. Substantial agreement regarding the location and quantity of riparian acreage in the watershed	<i>Partially achieved</i> ; parties exchanged information and discussed disagreements, but no final quantification was reached.
6e. Substantial progress in developing or identifying i. A comprehensive system of water accounting and agreement as to measurement and reporting protocols;	<i>Not achieved</i> ; the Final Report on Mediation proposes that a technical consultant be hired to develop a water management and accounting system, after which an independent third-party watermaster will be identified to

<p>ii. Protocols for senior right holders to submit a “call” on the river; and iii. Potential physical solutions for storage and delivery of replacement water in exchange for forbearance in the exercise of senior rights.</p>	<p>administer its terms. A conceptual approach for addressing physical solutions is included in the Final Report on Mediation, but it’s unclear if all parties are in agreement with this conceptual approach (see 5a above).</p>
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