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ORANGE COUNTY WATER DISTRICT

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STATE WATER RESOURCES CONTROL BOARD
OF THE STATE OF CALIFORNIA

In the Matter of State Water Resources Control) Application No. 31174
Board Hearing on Water Rights Applications)
31165 and 31370 of San Bernardino Valley)
Municipal Water District and Western) ORANGE COUNTY WATER
Municipal Water District of Riverside County;) DISTRICT'S CLOSING BRIEF
Application 31174 of Orange County Water)
District; Application 31369 of Chino Basin)
Watermaster; Application 31371 of San)
Bernardino Valley Water Conservation District;)
and Application 31372 and Waste Water)
Change Petition WW-0045 of the City of)
Riverside.)

1 I. INTRODUCTION.

2 OCWD was created by a special Act of the California Legislature in 1933. It was
3 not created as a water producer; it was chartered to manage and replenish the Orange
4 County groundwater basin for the public benefit. Its statutory mandate is to:

- 5 - manage, replenish and protect groundwater supplies in Orange County;
- 6 - regulate the use of the huge groundwater basin that underlies most of Orange
7 County;
- 8 - acquire water and water rights;
- 9 - reclaim water; and
- 10 - protect the environment. (Cal. Legislature, Ch. 924, Stats.1933, as amended.)

11 As the evidence shows, OCWD discharges each of these mandates conscientiously.
12 Its water management programs are tremendously successful, even though it operates near
13 the bottom of the Santa Ana River (“SAR”) (OCWD Ex. 4-1) where base flows are
14 predominately wastewater that has already been used, treated and released several times,
15 and where flood flows are flashy and hard to capture. These lower reaches of the SAR have
16 been channelized and concrete lined for flood control purposes by the Army Corps of
17 Engineers (“COE”) and the Orange County Flood Control District. (OCWD Ex. 2-1 p. 15,
18 l. 9-14; Trans. 5/3/2007 p. 256, l. 3 – p. 257, l. 10.) Yet OCWD is able to manage the water
19 resources from which 19 cities and districts produce water to meet the needs of over
20 2 million people. (OCWD Ex. 1-1 p. 3, l. 19-22.) Approximately two thirds of the Orange
21 County basin production comes from SAR base flows and flood flows. (OCWD Ex. 1-1
22 p.5, Figure 1.)

23 OCWD takes equally seriously its mandate to protect the environment. It has
24 restored large areas of habitat and species such as endangered least Bell’s vireo and Santa
25 Ana sucker, with programs that go well beyond mitigation for its water storage and
26 diversion projects. (OCWD Ex. 6-1 p. 3-7.) At the hearing, The Center for Biological
27 Diversity (“CBD”) acknowledged the success of these programs. (Trans 5/3/2007 p. 259,
28 l. 21 – p. 250, l. 7.)

1 OCWD filed its application in 1992, at the recommendation of the then Chief of the
2 Division of Water Rights, Mr. Ed Anton. Mr. Anton recommended that OCWD apply for
3 all water it put to beneficial use at that time, as well as all of the water it expected to put to
4 beneficial use in the foreseeable future. OCWD's Assistant General Manager, Mr. Craig
5 Miller, and its Chief Hydrogeologist, Mr. Roy Herndon, testified that OCWD has complied
6 with this suggestion. For the past fifteen years OCWD has diverted and put to beneficial
7 use an average of about 200,000 acre/feet per annum ("AFA") of water, with a wet year
8 high of 271,000 acre/feet. (Trans. 5/3/2007 p. 19, l. 3-12.) OCWD anticipates putting
9 505,000 AFA of water to beneficial use in wet years when its planned diversion projects are
10 completed, and this wet year maximum amount is reflected in its application, as
11 supplemented and updated in 1998.¹

12 In its submissions, OCWD has explained that the base flow OCWD captures is
13 water that reaches Prado Dam after upstream agencies have diverted their entitlements.
14 OCWD is not seeking to alter that dynamic. It does not seek here to compel any upstream
15 legal user to let water pass downstream in excess of levels required under the 1969
16 Judgment. OCWD seeks the water that gets to Prado after upstream legal use.

17 II. OCWD'S RIGHTS AND OPERATIONS.

18 After its formation by the Legislature, OCWD began to acquire rights to water in
19 the SAR. It did this several ways: OCWD purchased and condemned water rights held by
20 two companies which held pre-1914 rights and licenses which allowed each of them to
21 divert half of the flow of the SAR below Prado Dam. (OCWD Exs. 1-28 and 1-29).
22 OCWD also cleared phreatophytes above Prado and obtained two permits to divert the
23 salvaged water. (OCWD Ex. 1-31.)

24 By the early 1960s upstream use had gotten so heavy that both the quantity and
25 quality of flows reaching OCWD's diversion points below Prado Dam were impaired. In

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27 ¹ During the hearing on its application on May 8, 2007, OCWD further clarified its
28 application in response to the State Board's request that each applicant clarify its points,
places and rates of diversion. (OCWD Exs. 7-1, 7-2 and 7-3.)

1 1963 OCWD filed a lawsuit against the major water producers above Prado Dam. Those
2 producers crossclaimed and counterclaimed against literally thousands of entities, including
3 OCWD, so that all legal users on the river ultimately were represented in this series of
4 related cases. In 1969, the parties settled the lawsuits and the court entered Stipulated
5 Judgments. Under its 1969 Judgment, OCWD is entitled to receive an average of
6 42,000 AFA of base flow at Prado Dam, coupled with water quality guarantees, and also is
7 entitled to all storm flow reaching Prado. (OCWD Ex. 1-30, also marked as Joint Ex. 2-1.)

8 Mr. Bill Dendy, who was jointly designated as a witness by all applicants, and who
9 serves on the court appointed SAR Watermaster, explained that the 1969 Judgments
10 marked a major transition in the watershed, from competition and litigation among the
11 major water districts, to a high degree of coordination and cooperation that has ripened into
12 a model of Integrated Regional Watershed Management. (Trans. 5/2/2007 p. 95, l. 18 –
13 p. 96, l. 11; p. 99, l. 11-22.) As Mr. Dendy explained, OCWD and the upstream agencies
14 spend enormous time and effort to coordinate water use, re-use, recycling, quality
15 improvement and habitat and species restoration, and these successful efforts merit
16 significant deference.

17 Another change after the 1969 Judgments was that flows in the lower SAR began to
18 increase. In 1969, the idea of 42,000 AFA regularly reaching Prado seemed optimistic.
19 And for a few years after 1969, that amount of water did not flow past Prado. Thereafter,
20 flows have been on a marked, upward trend. (Joint Ex. 2-21, 35th Annual Report of the
21 Santa Ana River Watermaster, Plate 5.)

22 Now, 38 years after the entry of the 1969 Judgment, OCWD has spent hundreds of
23 millions of dollars on beneficial use projects aimed at capturing base flow that already has
24 been used, treated and released multiple times upstream, and storm flows that otherwise
25 would be lost to the ocean, as well as recycling and reuse projects. (OCWD Ex. 1-1 p. 23,
26 l. 20-25; Trans. 5/4/2007 p. 28, l. 11-17.)

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1 III. KEY ISSUES.

2 OCWD and the other applicants submitted extensive written testimony, oral
3 summaries of that testimony, and documentary exhibits on the four key issues not addressed
4 by stipulation of the parties. None of OCWD's evidence was challenged or controverted.
5 OCWD respectfully refers the State Board to the entirety of its evidence on the key issues,
6 and highlights some of this evidence below.

7 Key Issue 1: Is There Unappropriated Water at OCWD's Diversion Points?

8 Mr. Roy Herndon covered this in his written testimony (OCWD Ex. 3-1) and oral
9 summary. As OCWD's Chief Hydrogeologist, he has over 15 years of experience with
10 SAR flows. Mr. Herndon testified that both the COE and the Santa Ana Watershed Project
11 Authority ("SAWPA") have done separate studies of past and future SAR flows. Each of
12 these agencies has a real need for accurate flow forecasts, and each independently
13 concluded that going forward, there will be significantly more flow at OCWD's diversion
14 points below Prado than OCWD seeks. SAWPA estimates wet year flows of 562,300 AF
15 by year 2025. COE estimates wet year flows of 847,000 AF by year 2052. (OCWD
16 Ex. 3-1, p. 21, Table 3.)

17 These increases relate largely to increased urbanization upstream. As all parties at
18 the hearing appear to agree, with the millions of people who have moved into Southern
19 California over the past four decades, greatly increased wastewater discharges have caused
20 base flow to increase dramatically. The trend is continuing upward. (OCWD Ex. 3-1, p. 4,
21 l. 22 - p. 5, l. 2.) Additionally, with the development of homes, stores, churches, streets and
22 freeways, impervious groundcover has increased dramatically, so that flood flows have
23 increased, both in absolute volume and in volume per inch of rainfall. (OCWD Ex. 3-1,
24 p. 6, l. 16-26.)

25 Mr. Herndon testified that he took the independent analyses by COE and SAWPA,
26 and checked them against stream flow data. He factored in increased future upstream
27 recycling and diversions, making the models more conservative. He also spent many hours
28 with the upstream applicants to understand their diversion, reuse and wastewater plans and

1 the impacts of those plans on flows reaching Prado. He concluded that by 2052, the year
2 the COE uses, wet year flows of approximately 655,000 AF are likely to reach OCWD's
3 diversion points. (OCWD Ex. 3-1, p. 14, l. 9-18.) Given that OCWD has applied for a wet
4 year maximum of 505,000 AF, Mr. Herndon's uncontraverted analysis shows that water is
5 available for OCWD's projects.

6 There are no pending protests based on interference with prior rights, because
7 OCWD is the last legal user on the SAR and does not seek to compel upstream legal users
8 to release flows in excess of the amounts required under the 1969 Judgment. The water
9 OCWD seeks is available without injury to any lawful user.

10 Key Issue 2: What are the Impacts of the Projects on Public Trust Resources?

11 This issue was addressed in the testimony of Ms. Leslie Moulton and Mr. Chris
12 Rogers, (OCWD Ex. 4-1), who directed the preparation of OCWD's most recent
13 environmental impact report ("EIR"), certified in 2006 (OCWD Ex. 1-23), as well as in the
14 testimony Mr. Richard Zembal, OCWD's Director of Natural Resources. (OCWD Ex. 6-1.)

15 As set forth in OCWD Ex. 1-23, and in the testimony of Ms. Moulton and
16 Mr. Rogers, while some of OCWD's projects preceded the enactment of CEQA, OCWD
17 has completed eleven separate CEQA documents for its projects; the Army Corps of
18 Engineers ("COE") has prepared an Environmental Impact Statement ("EIS") for storage
19 behind Prado; and OCWD has participated with the Corps of Engineers in an
20 Environmental Impact Statement/Environmental Impact Report ("EIS/EIR") for storage
21 behind Prado Dam. Additionally, in 2006, OCWD certified its final Programmatic
22 Environmental Impact Report ("PEIR") in support of its water rights application. This
23 PEIR provided project level review of two additional components of OCWD's plan:
24 Anaheim Lake Expanded Recharge and Santiago Creek Expanded Recharge. (OCWD
25 Ex. 1-23.) With the pre-CEQA projects, these documents provide full project level review
26 for 362,000 of the 505,000 AFA OCWD seeks.

27 In her written testimony, Ms. Moulton, the primary author of this PEIR, explained
28 that the PEIR also provided project level review of the impacts to the Santa Ana River for

1 the entire 505,000 AFA of diversions. (OCWD Ex. 4-1, p. 2.) In other words, OCWD has
2 completed project level analysis of the impacts of all of its future diversions, finding no
3 significant impact on hydrology, and no significant impact to biological resources. Because
4 some of OCWD's projects are planned for 10 to 25 years in the future, the PEIR also
5 provided a program level analysis of the impacts of physical construction of the future
6 project components above 362,000 AFA, which will add 143,000 of capacity to reach the
7 505,000 AFA total.

8 Ms. Moulton and Mr. Rogers explained that this course of CEQA study showed that
9 there are few significant, unmitigated impacts of these projects. This impact analysis is
10 heavily influenced by the channelized nature of the SAR at OCWD's diversion points,
11 particularly the fact that the lower reaches where OCWD diverts are heavily modified for
12 flood control. As Mr. Carl Nelson testified based on his 47-year career on the SAR
13 (OCWD Ex. 2-1, p. 2, l. 10) this area has been modified to the point that it simply is not
14 fish or wildlife habitat and has "minimal biological resources." (Trans. 5/2/2007 p. 68,
15 l. 7-19.) CBD's witness, Ms. Anderson, conceded that the area in which OCWD operates is
16 not good habitat for the Santa Ana sucker. (Trans. 5/3/2007 p. 257, l. 11-15.) And she
17 underscored this point by mentioning that the only opportunity to do fish and wildlife
18 restoration programs is above Prado, not the area below Prado where OCWD diverts.
19 (Trans. 5/3/2007 p. 258, l. 3-5.)

20 CBD had little to say about the impacts of OCWD's projects. In its written
21 testimony, CBD identified potential impacts of OCWD's projects only in terms of
22 inundation behind Prado. (Trans. 5/3/2007 p. 258, l. 5.) However, Ms. Anderson agreed
23 that the COE has been inundating the area above Prado for flood control for 65 years, since
24 Prado Dam was completed in 1941. She did not challenge the fact that OCWD has had an
25 agreement with COE for water conservation behind the Prado Dam for only 15 years, and
26 she did not undertake any studies to differentiate the effects of long-term flood control
27 inundation behind Prado from OCWD's water conservation. (Trans. 5/3/2007 p. 259,
28 l. 6-20.) Moreover, Ms. Anderson agreed that in the 15 years of water conservation by

1 OCWD behind Prado, the number of least Bell's vireo territories there has markedly
2 increased, the number of acres of riparian habitat there has markedly increased, and a
3 number of migratory birds and song birds are benefiting from OCWD's wildlife
4 management behind Prado. (Trans. 5/3/2007 p. 259, l. 21 – p. 260, l. 7.)

5 Mr. Richard Zembal explained OCWD's environmental stewardship and mitigation
6 programs which Ms. Anderson endorsed. These programs include wetlands construction,
7 least Bell's vireo restoration, Arundo control, restoration of native fish, educational efforts,
8 and numerous other programs. (OCWD Ex. 6-1.) He testified that OCWD runs its
9 programs in cooperation with the California Department of Fish and Game, the COE and
10 the Fish and Wildlife Service. (See, e.g., Ex. 6-1, p. 7, l. 20.) He also testified that OCWD
11 has received national awards for its environmental programs.

12 There are no pending environmental protests to OCWD's application, in large part
13 because OCWD has worked hard to overmitigate and satisfy these oversight agencies.
14 There was no evidence of any unreasonable effects on fish, wildlife or other beneficial uses
15 of the SAR, and no evidence at all that bypass flows are needed in the lower reaches of the
16 SAR.

17 Key Issue 3: Whether Granting OCWD's Application is in the Public Interest.

18 Mr. Zembal's testimony is relevant on this issue as well, because it demonstrates the
19 remarkable degree of stewardship and conservation that is enabled by the revenues OCWD
20 generates from basin management. CBD also agreed that OCWD's programs are beneficial
21 to the environment and advance the goal of a healthy and diverse environment. (Trans.
22 5/3/2007 p. 257, l. 16 – p. 258, l. 3.) CBD further agreed that OCWD's appropriations are
23 beneficial to riparian species. (Trans. 5/3/2007 p. 257, l. 21 – p. 258, l. 20.)

24 Mr. Miller testified as to other public interest aspects of OCWD's projects. He
25 testified to the high degree of need for SAR water for domestic use in Orange County, and
26 the fact that the SAR is a virtually irreplaceable local supply for 2.3 million people. (Trans.
27 5/4/2007 p. 26, l. 14 - p. 27, l. 11.) He pointed out that OCWD's diversions from the SAR
28 reduce pressure on imported supplies from the Colorado River and the Sacramento Delta.

1 He explained, however, that there is not necessarily a one-to-one correlation between
2 increasing production from the SAR and decreasing draw on imported sources, because
3 OCWD must respond both to drought and growth. As Orange County experiences dry
4 periods, OCWD sometimes must maximize production from the basin, replenishing it in
5 wet years. As Orange County experiences growth in future demand, which OCWD does
6 not control, imports may need to increase to meet demands. Nonetheless, OCWD prefers to
7 increase local supplies to offset demands and its record reflects this. (Trans. 5/4/2007 p. 29,
8 l. 1-23.)

9 Mr. Miller emphasized the regional importance of SAR supplies for survival of
10 drought. (Trans. 5/4/2007 p. 27, l. 22-25.) He addressed the need to use local sources,
11 particularly in the face of climate change and the resulting uncertainty, energy cost and
12 carbon footprint of imported water. (Trans. 5/4/2007, p. 30, l. 1-19.) He also testified to
13 the water quality enhancement programs funded by the fees derived from pumping this
14 basin. (Trans. 5/4/2007 p. 31, l. 4-23.)

15 In short, the public interest benefits of OCWD's diversions from the SAR are very
16 substantial and undisputed, and it is appropriate to so find.

17 Key Issue 4: Injury to Prior Rights; and Key Issue 5: Relative Priority of Rights.

18 Both of these issues were addressed by Stipulation of the Applicants, submitted on
19 April 5, 2007.

20 Key Issue 6: What are the Impacts of the Projects on Groundwater Contamination?

21 Mr. Roy Herndon described shallow, volatile organic compound ("VOC") plumes
22 from industrial sources, in the forebay area of OCWD's groundwater basin, and the
23 \$50 million cleanup project that OCWD has undertaken to remediate these VOCs. (OCWD
24 Ex. 3-1, p. 15-18.) He explained that OCWD has tracked and modeled movement of these
25 plumes in the face of current and projected future water spreading. He testified that the
26 hydraulic gradient under increased pumping and recharge conditions would be essentially
27 the same as the current gradient condition. (OCWD Ex. 3-1, p. 17, l. 11-15; Trans.
28 5/4/2007 p. 87, l. 8-12.)

1 There was no contrary evidence on these points, so it is appropriate to find that
2 OCWD's projects will not exacerbate groundwater contamination.

3 IV. LEGAL ANALYSIS OF OCWD'S CEQA STATUS.

4 Given the status of CEQA compliance by OCWD, the State Board may issue a
5 permit for the full quantity of water requested in OCWD's application, including long-term
6 project components. The State Board has both authority and precedent for issuing a permit
7 for the full amount of water OCWD seeks, for the following reasons: (1) the State Board
8 has the authority to issue permits with long-term construction completion dates for water
9 intended for future use, and has done so, after the enactment of CEQA, for projects that
10 require some future impacts analysis; (2) a permit to appropriate is inherently conditional
11 and subject to modification or revocation if not diligently pursued, and this diligence
12 requirement may be applied to future CEQA analysis; and (3) CEQA expressly anticipates
13 use of a program EIR to evaluate long term project elements, and OCWD has sufficiently
14 evaluated the impacts to the SAR at a project level so that the State Board can discharge its
15 public trust responsibilities. At this point, the State Board should issue the permit for the
16 full 505,000 AFA, with the last 143,000 AFA conditioned on project level review of
17 construction impacts, and proper consideration of and response to comments in the course
18 of that review as separately required by CEQA.

19 A. The State Board has the Authority to Issue Permits with Long-Term Construction
20 Completion Dates for Water Intended for Future Use, and has Done So, After the
21 Enactment of CEQA, for Projects that Require Future Impacts Analysis.

22 Long-term water diversion projects could not reasonably be undertaken without
23 some guarantee that the water could be used when the project was finished. As a result,
24 California law allows the State Board to issue appropriation permits for long-term projects,
25 even when the permittee lacks specific project plans at the time a permit is issued. In fact,
26 California's appropriation process specifically anticipates this scenario. In some cases,
27 final CEQA analysis at the time of the hearing is not possible, yet the State Board has
28 proceeded to grant a permit.

1 When the State Board issues an appropriation permit, the terms must be tailored to
2 the size and difficulty of the project. This tailoring is especially important for long-term
3 projects because many of the details of such projects are unknown at the outset. Once a
4 permit is issued, the appropriator obtains only a conditional right to use the water. *Madera*
5 *Irr. Dist. v. All Persons*, 47 Cal. 2d 681, 690 (1957). The permittee then “must diligently
6 commence and complete construction of the project and apply the water to beneficial use in
7 accordance with the law and the terms of the permit.” *Madera*, 47 Cal. 2d at 690-91. Upon
8 completion of the construction works and application of the water to beneficial use, the
9 appropriator will be issued a license, perfecting its appropriative rights. Cal. Code Water
10 §1610.

11 Because water projects often require construction of diversion works prior to being
12 able to utilize the water, California has long recognized appropriative rights to water that
13 cannot be used when the right is acquired:

14 [B]efore any actual diversion or use of the water, a claimant may acquire
15 an incipient, incomplete and conditional right to the future use of the
16 water, by beginning the construction of the works necessary for such
diversion and use, and, in good faith, diligently prosecuting the same
toward completion.

17 *Haight v. Costanich*, 184 Cal. 426, 431(1920).

18 *Haight* involved a dispute between landowners over the amount of water each was
19 entitled to divert. Defendant was riparian to the stream at issue. Plaintiff utilized water
20 from the stream by way of a ditch running across Defendant’s land, which was built and
21 utilized by Plaintiff’s predecessor prior to Defendant’s entry on the land. Both parties
22 utilized the water for several years before Defendant blocked the stream and prevented
23 Plaintiff from accessing it. At issue was the amount of water Plaintiff was entitled to divert.
24 The *Haight* court reasoned that an appropriator is entitled to use all of the water which it
25 intends to use at the time of its initial appropriation, so long as it is put to beneficial use
26 within a reasonable time after the initial appropriation, by the use of reasonable diligence.
27 *Id.* at 432. Thus, the right to take a reasonable time to prepare to use the water is inherent
28 in a right of appropriation:

1 It follows that the quantity of water to which [an appropriator] is entitled by
2 right of diversion is the quantity actually used for beneficial purposes at the
3 time of the original diversion, and which was reasonably necessary for such
4 purposes, plus any additional quantity intended to be applied to future needs
at the time of the original diversion, which has been actually put to use
within a reasonable time, measured by all the circumstances of the case, after
the original diversion, and which was reasonably necessary therefor.

5 *Id.* at 433 (emphasis added).

6 While the rule set forth in *Haight* evolved under common law prior to the current
7 California Water Code, the concepts have endured as part of modern water law. This
8 history is summarized by the court in *Madera, supra*.

9 In *Madera*, the court considered a dispute between an irrigation district and the
10 United States over a contract by which the United States agreed to provide water from the
11 Central Valley Project to the irrigation district and to expend funds to construct a
12 distribution system within the district. One issue was the validity of the water right because
13 there had been an application to appropriate but the right was never perfected. The *Madera*
14 court summarized the history of appropriative water rights in California as follows:

15 Prior to legislation upon the subject, no priority of right to the use of water
16 could be acquired in advance of the taking of the first definite step to
17 divert water to beneficial use. When work was finally completed and the
18 water applied to beneficial use, a right vested in and to the use of the water
19 which “related back” for priority to the time when the claim was made, the
20 location was selected, and work was commenced looking toward the
21 conveyance of a definite amount of water from a definite source to the
22 place of its intended use. [Citation omitted.] From the time of the
23 commencement of the work to the time of beneficial use the right was
24 considered as incipient and conditional. The provisions of the Civil Code
25 enacted in 1872 were substantially declaratory of the rules laid down in
26 the early decisions. (Civ. Code, §§ 1414-1421.) (2) In *Inyo Consol. Water*
27 *Co. v. Jess*, 161 Cal. 516, the court declared at page 520 [119 P. 934] that
28 the purpose of the code sections was ‘to afford a more perfect protection
for such rights and to facilitate the subsequent acquisition of the title to the
use.’ ...

The Water Commission Act of 1913 and the existing provisions of the
Water Code changed the mechanics of the procedure for initiating and
completing an appropriation of water, but they do not change the attributes
of the water rights acquired thereunder. The filing of an application under
the present law is comparable and of like effect to the posting and
recording of notice or commencement of actual construction work under
the rules which had previously prevailed. ... The Water Code provides
that the effect of filing an application confers, for all practical purposes, a
priority only. ...

1 The issuance of a permit following application still does not confer upon
2 the permittee a fully perfected right. Section 1455 of the Water Code
3 states: ‘The issuance of a permit continues in effect the priority of right as
4 of the date of the application and gives the right to take and use the
5 amount of water specified in the permit until the issuance or the refusal of
6 issuance of a license for the use of water.’

7 *Madera* at 689-91.

8 Like the plaintiff in *Haight*, OCWD seeks a permit which includes water that will be
9 captured by future diversion projects. The testimony of Mr. Miller (OCWD Ex. 1-1) has
10 shown that OCWD has diligently pursued the current and near term elements of its
11 diversion projects, and will continue to diligently pursue the long term elements.

12 (Trans. 5/2/2007 p. 150-152.) Mr. Miller testified that OCWD is already underway on
13 studies of some of its long term projects (*id.*), and that others will be undertaken in a 10 to
14 25 year timeframe. (Trans. 5/4/2007 p. 32, l. 16 – p. 33, l. 14.)

15 This timeframe is reasonable and consistent with State Board precedent. The State
16 Board is empowered to impose timing conditions on the construction of diversion works
17 built to facilitate appropriation. Cal. Code Water §§1391, 1395. Those conditions should
18 be imposed on a case by case basis and should reflect the specific project and its likely
19 obstacles. Here, OCWD’s long term project timeframe is appropriate, and within the State
20 Board’s power to approve.

21 The State Board and the courts have rejected a fixed rule as to what constitutes a
22 “reasonable time” for an appropriator to complete a water diversion project, instead
23 determining reasonableness on a case-by-case basis. See *Haight v. Costanich*, 184 Cal. at
24 432 (rejecting the application of the Civil Code’s 5-year non-use rule for obtaining a
25 prescriptive right to the “due diligence” requirement for appropriation). “In determining
26 the period of time to be allowed to build diversion works and apply the water to full
27 beneficial use, the particular conditions surrounding each case will govern. In every case
28 the matter must be pressed with due diligence considering the size of the project and the
obstacles to be overcome.” 23 Cal. Code Regs. § 841.

1 Accordingly, because the size and difficulty of projects can vary considerably,
2 construction completion timeframes in permits also vary dramatically and are often quite
3 lengthy. See *Order WRO 2004-0029* (construction completion deadlines of 9 years and
4 6 years); *WR 97-05* (construction completion deadlines 18 years and 27 years); *In the*
5 *Matter of applications 23838 and 23690 and Permit 15140* (construction completion
6 deadline of 3 years); *In the Matter of Permits 3010, 6565, and 14704* (construction
7 completion deadlines of 22 years and 42 years).²

8 Given the length of development and construction of these projects, it is apparent
9 that some impacts of construction could not be identified and studied at the time the permits
10 were granted, yet that is not a bar to issuing permits. This approach was followed in the
11 Board's decision *In the Matter of Application 28158*. The Board granted an appropriation
12 permit with a 10 year project completion deadline despite incomplete analysis of critical
13 impacts at the time of hearing:

14 To the extent that the project may result in diversion of water in excess of
15 the average District diversions in past years, the potential adverse effects
16 on the fishery and aquatic resources cannot be fully evaluated until
17 completion of the instream flow study and monitoring program discussed
18 in Section 6.3. Following completion of the study, the Board's reservation
19 of jurisdiction would allow for imposition of additional mitigation
20 measures if appropriate. The Board finds that, in the interim period, the
21 need for water for municipal purposes overrides the potential adverse
22 environmental effects which could result from the diversion of water as
23 authorized in this decision.

24 *In the Matter of Application 28158* (1989 WL 92547) (approving issuance of permit
25 subject to specified conditions).

26 B. A Permit is Inherently Conditional and Subject to Modification or Revocation if Not
27 Diligently Pursued, and this Diligence Requirement may be Applied to Future
28 CEQA Analysis.

² Because these Orders were issued with respect to applications for extensions, it is not clear whether all of the cited completion deadlines were those issued initially, or whether they were extended beyond the initial deadline, but regardless of whether an extension was granted, the cited orders illustrate the State Board's precedent for granting permits with lengthy construction completion deadlines.

1 A permit to appropriate is conditional by nature. The State Board maintains the
2 power to revoke or modify a permit. “There shall be cause for revocation of a permit if the
3 work [of diversion, or otherwise] is not commenced, prosecuted with due diligence, and
4 completed or the water applied to beneficial use as contemplated in the permit and in
5 accordance with this division and the rules and regulations of this board.” *California Trout*,
6 207 Cal. App. 3d at 611; Cal. Water Code § 1410. *See also, In the Matter of applications*
7 *23838 and 23690 and Permit 15140*, 1976 WL 20798 at 6 (modifying permit to meet water
8 quality objectives).

9 In the case of *California Trout*, environmental groups sought the rescission of two
10 licenses issued to the City of Los Angeles and the Department of Water and Power.
11 Although the primary legal issue in that case involved the Fish and Game Code and is not
12 pertinent here, the facts are instructive. The Department of Water and Power was issued
13 permits numbers 5555 and 5556 on June 1, 1940. One permit, for the appropriation of the
14 tributaries of Mono Lake, was conditioned on the completion before December 1, 1945 of
15 the construction work for such diversions. It likewise required that the Department of
16 Water and Power complete application of the water to the proposed use by December 1,
17 1948. By the 1962-63 water year, the Department of Water and Power had not put to
18 beneficial use the full extent of its appropriation. “This situation led representatives for the
19 Water Board and the Department of Water Resources to warn L.A. Water and Power to
20 ‘take steps to develop its full entitlement to the waters of the Mono Basin or risk the
21 potential that other appropriations might be granted rights by the Water Board.’”
22 *California Trout*, 207 Cal. App. 3d at 597. The Department of Water and Power heeded
23 this warning, completed the second Los Angeles aqueduct to enable the additional
24 diversions, and was able to put to beneficial use the full amount of water allowed by the
25 diversion and storage permits 5555 and 5556 by the early 1970s. In 1974, the Water Board
26 issued licenses to perfect the rights acquired under permits 5555 and 5556, thereby
27 affirming the procedure whereby a permit was granted some 30 years before the necessary
28 diversion works were completed.

1 If the State Board does not feel it has sufficient information to determine all
2 necessary terms or conditions, it may reserve jurisdiction to amend, revise or supplement a
3 permit that has been issued. Cal. Water Code § 1394(a). The State Board has granted
4 permits for long-term projects where the details of the long-term aspects of those projects
5 were not well defined, and has even declined to revoke such permits when, years after the
6 permits were issued, the long term projects anticipated in those permits had not been
7 undertaken. For example, in 1962 the Calaveras County Water District (“Calaveras”)
8 obtained eleven permits to appropriate water from the North Fork of the Stanislaus River.
9 WR Order 80-7 (“WR 80-7”). Calaveras’s application proposed the development of a
10 hydroelectric power plant and various water supply projects, but when the permits were
11 issued, the water supply projects were described only in general terms. *Id.* at 3.
12 Approximately eighteen years later, Calaveras petitioned for changes to the permit terms,
13 including extensions on its project completion deadlines. At that time, Calaveras’s long-
14 term water supply projects were still not fully defined. The State Board nevertheless found
15 that the delay and repeated extensions in construction completion dates were warranted
16 given obstacles beyond Calaveras’s control, such as failure to obtain electoral bond
17 approval, and difficulties in obtaining a purchaser for the power, and therefore rejected
18 challenges to the permits. *Id.*

19 Because the State Board is not powerless once it issues a permit, but has wide
20 latitude to reevaluate and modify permit conditions, it should not deny OCWD’s permit
21 because of uncertainties about the future construction aspects of diversion projects
22 anticipated by OCWD. Some uncertainties are inherent in long-term projects, and the
23 failure of the Board to grant permits for those projects would stifle complicated or
24 expensive projects, and runs contrary to the State Board’s permitting authority and its prior
25 orders.

26 C. CEQA Expressly Anticipates Use of a Program EIR to Evaluate Long Term Project
27 Elements, and OCWD Has Sufficiently Evaluated the Impacts to the SAR at a
28

1 Project Level so that the State Board Can Discharge Its Public Trust
2 Responsibilities.

3 In parallel with the provisions of the Water Code, CEQA applies to projects
4 authorized by public agencies that could have adverse results on the environment, and
5 requires an approving agency to study the potential environmental impacts of a project in an
6 effort to minimize them. The lead agency, in this case OCWD, has the authority and
7 responsibility to guide the EIR process and make the decisions regarding the EIR and its
8 adequacy, including approving the EIR. Cal. Pub. Res. Code § 21067; 14 Cal. Code Regs.
9 § 15050. It is the lead agency’s job to determine whether the final EIR is adequate and
10 complete under CEQA and to approve a project after the EIR is certified. 14 Cal. Code
11 Regs. §§ 5088(a), 15132, 15090(a)(1). OCWD has done this. (OCWD Ex. 1-23.)

12 OCWD’s Program EIR is the appropriate CEQA document for the long term
13 elements of this project. CEQA recognizes that in many instances, a single environmental
14 review of several related actions is more useful and informative than piecemeal review.
15 This is especially true when certain long-term elements of a project are not fully defined at
16 its outset. In those circumstances, CEQA provides for the preparation of a “program” EIR
17 which treats those separate but related actions as a single project. A “program” EIR is
18 proper when a project is composed of a series of actions that are related geographically, as
19 logical parts in a chain of contemplated actions, or as individual activities carried out under
20 the same authority and having similar environmental impacts. 14 Cal. Code Regs.
21 §15168(a). CEQA Guidelines *require* that a lead agency prepare a program EIR when a
22 project is to be implemented in phases. 14 Cal. Code Regs. §15165. Thus, a program EIR
23 often will be used when an agency must consider a broad set of environmental issues during
24 the early stages of the planning process for a long-term project. 14 Cal. Code Regs.
25 §15168(b)(4), (d). As later-stage project activities are defined, the lead agency must
26 evaluate each activity to determine whether a supplemental EIR should be prepared for that
27 activity. If a program EIR is sufficiently comprehensive, no further environmental review
28 will be necessary. 14 Cal. Code Regs. §15168(c). Whether additional environmental

1 review is required is a decision for the lead agency. Cal. Code Pub. Res. §21166; Cal. Code
2 Regs. §15162.

3 OCWD has completed project level review for its post-CEQA current and near term
4 projects. This accounts for 362,000 AFA of diversions³. In addition, in the PEIR OCWD
5 has carefully evaluated at a project level the impacts on the SAR of its remaining planned
6 diversions up to 505,000 AFA in wet years. (OCWD Ex. 4-1, p. 2.) This specific review
7 includes hydrology and biological impacts. (OCWD Ex. 4-1, p. 12.) The future
8 construction activities associated with OCWD's future diversion components are covered at
9 a program level. Once the future projects are more fully defined, OCWD will be able to
10 evaluate what supplemental environmental review is necessary and to complete that review.
11 Presently, however, OCWD's program EIR is the proper method of environmental review
12 for this project.

13 As noted above, there is precedent in the Board's decisions for granting a permit in
14 such circumstances. See discussion of *In the Matter of Application 28158* at p. 13, *infra*. In
15 contrast to the critical impacts not yet studied in Application 28158, for which the State
16 Board nevertheless issued a permit, OCWD has carefully evaluated the central impacts of
17 primary concern – hydrology, biology and other public trust resources, reserving
18 construction related impacts for later study.

19 D. Conclusions as to CEQA.

20 It is important to note that by granting OCWD a permit for the 505,000 AFA wet
21 year maximum for which it has applied, the Board will not be sanctioning potential
22 construction impacts for which project-level CEQA has not been completed. OCWD is still
23 required to meet CEQA requirements for construction impacts, and this legal obligation can
24 be memorialized as a permit term if that is deemed desirable. Moreover, pursuant to the
25 administrative review process envisioned by CEQA, the State Board as a responsible party,
26

27

28 ³ This includes those diversions which preceded the enactment of CEQA.

1 and the public, will have the opportunity to comment on, and/or challenge, this future
2 CEQA review.

3 For all of these reasons, OCWD's program level review of the construction impacts
4 of its long-term project components does not prevent the State Board from issuing OCWD
5 the full requested permit. The State Board's prior orders show that the State Board is
6 authorized to issue the permit with long term completion deadlines. Additionally, OCWD
7 has in fact studied the impacts to the SAR of its full requested diversion amount, and the
8 remaining review of construction impacts is not grounds to issue a permit for less than the
9 requested amount. Given the need for this water, and the tremendous public benefits of
10 OCWD's activities, OCWD requests a finding that the need for the water outweighs
11 potential adverse effects of future construction projects. Furthermore, because issuance of a
12 permit conveys a conditional right to appropriate, the State Board may amend, revise or
13 supplement the permit if OCWD does not diligently pursue its diversion projects and
14 properly evaluate and mitigate these future construction impacts.

15 V. CONCLUSION.

16 OCWD submitted clear and undisputed evidence on the key issues. There was no
17 contrary evidence as to OCWD's application, and there are no pending protests to OCWD's
18 application. OCWD asks the State Board to include the following in its findings:

19 1) Water is available for OCWD's projects;

20 2) The potential impacts to public trust resources have been carefully studied and
21 mitigated and are not significant;

22 3) OCWD's application is in the public interest and the need for OCWD's project
23 outweighs potential adverse consequences of future construction activities;

24 4) OCWD's projects will not impair prior rights; and

25 5) OCWD's projects will not exacerbate groundwater contamination.

26 At this time, OCWD asks the State Board to grant OCWD's application for the full
27 amount of water requested, so that OCWD has some degree of certainty for investments


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1 into the future, and to avoid the need to return to the State Board, move to re-open the river
2 again, and proceed with another application process.

3 OCWD greatly appreciates the State Board's efforts and consideration.

4 Dated: June 6, 2007.

5 PILLSBURY WINTHROP SHAW PITTMAN LLP
6 CHRISTOPHER J. McNEVIN
7 AMY E. GAYLORD

8 By  _____
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10 Attorneys for Applicant
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STATE WATER RESOURCES CONTROL BOARD
OF THE STATE OF CALIFORNIA
Application 31174

PROOF OF SERVICE BY ELECTRONIC TRANSMISSION AND MAIL

I, Mabel W. Ng, the undersigned, hereby declare as follows:

1. I am over the age of 18 years and am not a party to the within cause. I am employed by Pillsbury Winthrop Shaw Pittman LLP in the City of Los Angeles, California.

2. My business address is 725 South Figueroa Street, Suite 2800, Los Angeles, CA 90017-5406.

3. I am familiar with Pillsbury Winthrop Shaw Pittman LLP's practice for collection and processing of correspondence for mailing with the United States Postal Service; in the ordinary course of business, correspondence placed in interoffice mail is deposited with the United States Postal Service with first class postage thereon fully prepaid on the same day it is placed for collection and mailing.

4. On June 6, 2007, at 725 South Figueroa Street, Suite 2800, Los Angeles, California, at approximately , I served a true copy of the attached document titled exactly ORANGE COUNTY WATER DISTRICT'S CLOSING BRIEF by sending them via electronic transmission to the following persons at the electronic-mail addresses so indicated:

[See Attached Service List]

5. In addition to the electronic transmission, a true copy of said document was placed in a sealed envelope, addressed as indicated in paragraph 3, above, and deposited in regularly maintained interoffice mail for collection, postage, and same-day delivery to the United States Postal Service for delivery to the addressee.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 6th day of June, 2007, at Los Angeles, California.


Mabel W. Ng

SANTA ANA RIVER HEARING
May 2, 2007 HEARING
REVISED SERVICE LIST

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(Note: The parties whose e-mail addresses are listed below agreed to accept electronic service, pursuant to the rules specified in the hearing notice.)

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