

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Permit 10472 )  
(Application 15287) )  
MADERA IRRIGATION DISTRICT, )  
Permittee and Petitioner, )  
UNITED STATES BUREAU OF RECLAMATION, )  
Protestant. )

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ORDER: WR 85-4  
SOURCE: Fresno River  
COUNTY: Madera

ORDER REGARDING PETITIONS FOR  
EXTENSION OF TIME AND CHANGES FOR PERMIT 10472

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BY THE BOARD:

1.0 Madera Irrigation District (hereinafter "MID") having filed petitions for (1) an extension of time to complete construction and application of water to use under Permit 10472; (2) a change in the point of diversion and addition of two points of redirection; (3) a change from direct diversion at Franchi Weir to diversion to storage at Hidden Dam (termed by MID a change in place and purpose of use); (4) addition of a point of diversion at Island Tract; notice having been given and a protest received; notice of hearing having been given; a hearing having been held on November 16, 1982 to consider the petitions and to consider whether to revoke Permit 10472; the Board having considered all evidence in the record; the Board finds as follows:

2.0 BACKGROUND

On April 26, 1956 the State Engineer (predecessor to the Board) adopted Decision D 854, approving Water Right Application 15287.

Permit 10472 was subsequently issued on Application 15287, authorizing MID to divert up to 200 cubic feet per second from the Fresno River for irrigation purposes from November 1 of each year to April 30 of the next year. The water was to be spread on lands within MID's boundaries to arrest or retard the subsidence of groundwater levels. Complete application of water to beneficial use was to be made by December 1959. MID has since requested four extensions of time to complete the project. Extensions were granted in 1959, 1964, and 1969. The last date for completion was December 1974. MID requested a five-year extension in 1975. Action on this request was delayed to allow it to be processed with a petition MID intended to file to change the point of diversion and place of use. In 1980 MID instead filed a petition to change the point of diversion and to change from direct diversion to diversion to storage at Hidden Dam. This petition and the petition for extension of time are subjects of this proceeding.

### 3.0 SUBSTANCE OF PETITIONS

#### 3.1 Petition for Extension of Time to Complete Project

In June 1975 MID filed the petition under consideration herein for extension of time to complete the project. This petition requested an additional five years to complete construction and put the water to full beneficial use. This petition has not been protested.

#### 3.2 Petition to Change the Point of Diversion to Hidden Dam and to Change from Direct Diversion to Storage

In July 1980 MID filed its petition to change the point of diversion from Franchi Weir to Hidden Dam and to change from direct diversion at

Franchi Weir to storage at Hidden Dam with subsequent release and rediversion at Franchi Weir and Island Tract. Under this petition MID would store water appropriated under Permit 10472 in Hensley Lake behind Hidden Dam. This change was requested to allow more convenient use of the water authorized to be appropriated.

#### 4.0 PROTEST

The United States Bureau of Reclamation (hereinafter "Bureau") has a permit to store water in Hensley Lake behind Hidden Dam (Permit 16584, issued on Application 18733) up to the full conservation capacity of the lake. The Bureau protested MID's petition to change the point of diversion and to change from direct diversion to storage on the basis that authorizing MID to store water in Hidden Reservoir under Permit 10472, which is senior in priority to Permit 16584, would impair the Bureau's water right under Permit 16584.

#### 5.0 PETITION FOR EXTENSION OF TIME OR CAUSE FOR REVOCATION

When Permit 10472 was issued, construction was to have been completed on or before December 1, 1958, and complete application of the water to the proposed use was to be made on or before December 1, 1959. In December 1959 the time to complete construction and application of water was extended to December 1, 1962. In January 1964 the time was extended to December 1, 1965. In January 1969 the time was extended to December 1, 1974. The current petition was filed in 1975.

A key issue in the hearing upon which this decision is made was, "Should permittee be granted an extension of time to complete the project or should Permit 10472 be revoked?" If good cause is shown, the Board may grant an extension. Water Code §1398. If, however, the Board finds that good cause is not shown, the Board should deny the petition for extension and either revoke the permit pursuant to Water Code §1410 et seq. or determine the rights which have vested by beneficial use of water under the permit and issue a license under Water Code §1610 confirming such rights.

Good cause for an extension of time is defined in the Board's regulations at 23 Cal.Admin.Code §779. This section states that an extension will be granted:

"[O]nly upon such conditions as the Board determines to be in the public interest and upon a showing to the Board's satisfaction that due diligence has been exercised, that failure to comply with previous time requirements has been occasioned by obstacles which could not reasonably be avoided, and that satisfactory progress will be made if an extension of time is granted. Lack of finances, occupation with other work, physical disability, and other conditions incident to the person and not to the enterprise will not generally be accepted as good cause for delay."

Since 1975 MID has not, in its annual permit progress reports for Permit 10472, claimed any diversion and use of water under its permit during the authorized season of diversion (November 1 through April 30). In 1975 MID claimed diversion and use under its permit of small amounts of water in November, December, February and March. (See Staff Exhibit 1.) However, it reported use under its decreed

pre-1914 appropriative right (Union Colonization Co. et al. v. Madera Canal and Irrigation Co., Madera County Superior Court No. 687 (1916)) of much less than the 200 cubic feet per second authorized for the decreed right during those months. The decreed right is senior to Permit 10472. To prevent the establishment of water rights in excess of available water and in excess of the reasonable needs of the user, diverted water is credited to the senior right to the limit of that right. See Water Code §1201; Cal.Const. Art.X, Section 2. Only diversion in excess of the senior right can be credited to the junior right. Since less than 200 cfs was being diverted, the flow must be accounted for under the decreed right during those months. Consequently, the flows claimed in 1975 for Permit 10472 should have been attributed to the more senior decreed right. Attributing the 1975 flows to the decreed right, there were eight years before the hearing in November 1982 in which MID did not use water under Permit 10472. Subtracting the drought years of 1976 and 1977, there were six years of nonuse. Under a vested right, water not used for five years may revert to the public. Water Code §1241. Here, we are asked to grant an extension of time where the water under a nonvested right has been unused for more than five years. Where water has been unused long enough to forfeit a vested right, and could have been used in the exercise of due diligence, as herein, it can be concluded that the permittee has not exercised due diligence and has not applied the water to beneficial use as contemplated in Permit 10472.

MID's case for an extension of time is dependent primarily on the Board's granting it the right to store water in Hidden Reservoir under

the permit instead of diverting it to direct application to land. If the change in point of diversion and the change from direct diversion to storage is not approved, it is unclear whether MID will make satisfactory progress toward completing its construction and use of water under Permit 10472. MID's witness testified that MID does not want to divert water to underground storage as authorized under the permit because the expense of extracting the water from underground has increased, so that surface storage is now much more economical. (See Reporter's Transcript p. 63, l. 11-26.)

The permittee has attempted to show use of water under the permit by alleging diversion at an unauthorized diversion point and by alleging use outside of the authorized season of diversion and use. These allegations do not support an extension of time, because they do not include diversion and use under the permit. Instead, they indicate unauthorized diversion without claim of right.

Evidence in the record shows that MID is receiving as much water as it can use for irrigation. If it used water under Permit 10472, it would have to refuse water from the Bureau delivered via the Madera Canal, for which it has contracted and for which it must pay regardless whether it uses the water. (See, for example, Reporter's Transcript p. 62, l. 9-15.) Since MID has not been using water available under Permit 10472, it is apparent that MID has no need for this water right.

Considering the lack of progress toward completing the project and toward applying the water to beneficial use in accordance with the



permit, the failure to use water at all for a period of five years or more, and the lack of evidence that the project will be completed as permitted if an extension is granted, we find that the permittee has failed to show due diligence in prosecuting completion of the project and in utilizing the water for beneficial purposes. We also find based on these facts that grounds exist to revoke the permit. The failure to show due diligence is not excused by MID's reasons for delay. These reasons are budgetary restrictions after the adoption of California Constitution Article 13A in 1978, increasing construction costs, and delays in construction of Hidden Dam. The first two are financial reasons and are not good cause for delaying completion of a project. 23 Cal.Admin.Code §779. In fact, the first reason tends to show that satisfactory progress will not be made even if an extension of time is granted. The third reason is unrelated to completion of the project under the current terms and conditions of the permit and is therefore also not good cause for delay.

Because the permittee has failed to show due diligence, and has failed to apply water to beneficial use as contemplated in the permit for five years or more, we will deny an extension of time to complete the project and will revoke the permit. If, after a further hearing as provided in Order paragraph 5, we decide not to revoke Permit 10472, we will cause licensing proceedings to be commenced pursuant to Water Code §1600 et seq.

6.0

PETITION TO CHANGE THE POINT OF DIVERSION AND TO CHANGE FROM DIRECT DIVERSION TO STORAGE

The change requested by MID would allow MID to store up to the equivalent of 200 cfs in Hensley Lake during the authorized diversion

season instead of directly applying the 200 cfs to land. This amount of storage would be roughly equivalent to the capacity of Hensley Lake. While discussion of this change may be unnecessary in view of our determination that Permit 10472 should be revoked, we discuss it herein as an alternative decision in the event that the revocation is not consummated or is set aside.

6.1 Board's Power to Authorize the Requested Change

MID argues that the Board can authorize this change under Water Code §1700 et seq., as a change in purpose of use. The Bureau argues that the change cannot be made under §1700 et seq.

MID argues that under Water Code §1266 storage of water is a purpose of use, and that under Water Code §1700 et seq. the Board can change the purpose of use from direct application to land (irrigation) to storage. However, §1266 cannot be construed as making storage a purpose of use. Instead, the purpose of the section is to specify the information required if a water right applicant intends to store water in a reservoir. Thus, the requested change is not a change in purpose of use.

As it is described by MID, the requested change appears to be a change in the method of diversion, from direct diversion to diversion to storage, and a change in the point of diversion. If the change is a change in method of diversion, it is not a change which can be made under Water Code §1700 et seq. However, the permitted direct diversion may be construed as a diversion to storage because of its

characteristics. Permit 10472 authorizes diversion of water for spreading on land from November 1 through April 30. Pursuant to Water Right Decision D 854, this water was to be used for groundwater recharge during the authorized diversion season, and could be extracted from the ground when needed for irrigation of crops. The Board's predecessor stated in D 854 that it expected this use to retard declines in groundwater levels. Since groundwater recharge is a form of storage (see Water Code §1242), the implication in Decision D 854 and in Permit 10472 that the water right at issue is not a storage right, may be misleading. Thus, the Board arguably could authorize the change as a change in point of diversion if it made the necessary findings. If the Board were to authorize the change, however, it should quantify the authorized annual amount of storage in acre-feet.

## 6.2 Injury to Legal User of Water

The Bureau argues that approval of the requested change would operate to its injury, and that consequently the change cannot be approved. The Bureau's argument is based on Water Code §1702, which requires that before the Board gives a petitioner such as MID permission to make a requested change, the Board must find that the change will not operate to the injury of any legal user of water. As the Bureau points out, Hensley Lake is not physically large enough to store both the water under the Bureau's Permit 16584 and the water under MID's Permit 10472. Since Permit 10472 is senior, it would be stored first, precluding storage under Permit 16584. Nonuse of Permit 16584 for five years could result in its revocation.

MID argues that the change will not operate to the injury of the Bureau, and that in any event §1702 does not protect a junior appropriator such as the Bureau.

6.2.1 Arguments That No Injury Will Result From the Change

MID cites two reasons why the Bureau will not be injured. First, MID argues that the proposed change would conserve water and energy to extract the water diverted under Permit 10472 from the ground. MID reasons that under Water Code §1011 (no forfeiture of appropriative right if water use is reduced because of conservation) a reduction in diversion under the Bureau's Permit 16584 to accommodate storage of water under Permit 10472 would not result in the Bureau's loss in part or in whole of Permit 16584.

This argument fails for two reasons. (1) While the proposed change arguably might reduce the energy MID consumed,<sup>1</sup> it would not reduce MID's use of water under Permit 10472. Instead, MID's use of water under Permit 10472 likely would increase. Water Code §1011 applies to a reduction in use of water, not energy. (2) Water Code §1011 protects a permittee who reduces water use by engaging in a conservation effort. It does not protect another permittee such as the Bureau who would be forced to reduce its diversions because it has inadequate storage space. Nor can it be construed to allow one permittee to change its diversion of water at the expense of another

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<sup>1</sup> Since MID did not divert water under Permit 10472 for several years before the hearing, it is doubtful whether there would be an actual reduction in energy use.

permittee. Consequently, the Bureau is not protected by Water Code §1011 from loss of its appropriative water right if the requested change is approved.

Second, MID argues that the Bureau will not be injured because the Bureau has waived its right, as against MID, to store water in Hensley Lake. This argument is based on MID's contention that a contract between MID and the Bureau gives MID the sole right to store water in Hensley Lake and that MID has been storing water pursuant to the contract in Hensley Lake under Permit 10472 since Hidden Dam became operational. However, we note that the Bureau cannot by contract authorize a change in the terms and conditions of MID's water right permit. Only the Board can do this. Water Code §§1250, 1701. Thus, MID's contention that it has already stored water in Hidden Dam under Permit 10472 cannot be accepted. Any contract between the Bureau and MID purporting to allow this would have no force or effect.

Further, the Board has received evidence that water has been stored in Hensley Lake under the Bureau's permit continuously since Hidden Dam commenced operation. Thus, MID's contention that it has been storing its own water in Hensley Lake conflicts with evidence of storage under the Bureau's permit. We find that any water stored in Hidden Lake under a water right permit has been stored under Permit 16584.

Additionally, it is doubtful that the contract means what MID claims it means. It contains no language explicitly authorizing MID to store water in Hensley Lake other than water diverted under the Bureau's permit. It would strain the limits of logic to the breaking point to

conclude, as MID requests us to, that MID's contractual right to request storage or release of water means that the water is not stored and released under the Bureau's permit.

#### 6.2.2 Protection of Junior Appropriators Under Water Code §1702

Finally, contrary to MID's assertion, Water Code §1702 protects a junior appropriator such as the Bureau. Section 1702 provides:

"Before permission to make such a change is granted the petitioner shall establish, to the satisfaction of the board, and it shall find, that the change will not operate to the injury of any legal user of water." (Emphasis added.)

The plain language of this section is that it protects any legal user of water. Its protection is not limited to senior water right holders. Thus, if the proposed change would operate to the injury of the Bureau, a legal user of water, the Board could not give permission for the change. Based on the foregoing discussion, we find that the proposed change to divert water at Hidden Dam and store it in Hensley Lake would operate to the injury of the Bureau with regard to its diversion to storage and use of water appropriated under Permit 16584.

#### 6.2.3 Public Interest Considerations

Even if it were found that there would be no injury to the Bureau, however, the change would not best develop, conserve and utilize water in the public interest, because it would actually reduce the water supply available to MID (see paragraph 6.3, infra, and record cited therein). Under Water Code §1253, therefore, this change should not be made.

The proposed change also is not in the public interest because it would contribute to uncertainty in the Bureau's exercise of its water rights. Such a result would be contrary to the policy expressed in In re Waters of Long Valley Stream System, 25 Cal.3d 339, 158 Cal.Rptr. 350 (1979). Therein, the court stated that: "Uncertainty concerning the rights of water users has pernicious effects." (25 Cal.3d at 355, 158 Cal.Rptr. at 360.) "Uncertainty also fosters recurrent, costly and piecemeal adjudication." (25 Cal.3d at 355, 158 Cal.Rptr. at 360.) "Finally, uncertainty impairs the state's administration of water rights." (25 Cal.3d at 356, 158 Cal.Rptr. at 360.) Concluding, the court stated: "[C]larity and certainty foster more beneficial and efficient uses of state waters as called for by the mandate of article X, section 2." Thereupon, the court made a holding which would promote certainty in the exercise of water rights.

Because of injury to the Bureau and because the proposed change would not be in the public interest, the proposed change will be denied.

### 6.3 Effect of Proposed Change on Water Supply

If the Board authorized MID to move the point of diversion under Permit 10472 to Hidden Dam and store water behind Hidden Dam for use in another season, the water would occupy a substantial space in Hensley Lake. Theoretically, MID could store enough water to fill Hensley Lake if water were continuously available to supply the 200 cfs authorized under Permit 10472 during the diversion season.<sup>2</sup> Any

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<sup>2</sup> It is questionable whether 200 cfs is ever continuously available during the authorized diversion season. The Board's findings in D 854, pages 18-20, show that the supply of water for Permit 10472 is very irregular.

space in Hensley Lake occupied by water appropriated under Permit 10472 would not be available for water appropriated under Permit 16584, and water available for appropriation under Permit 16584 would not be stored. However, if the point of diversion for Permit 10472 is not moved to Hidden Dam, it will be possible to appropriate the full amount of water under both permits, subject to availability. (See Reporter's Transcript, p. 62, l. 4-15.)

Since MID is the recipient of the water appropriated under both permits (See Permit 16584 and Permit 10472; Reporter's Transcript, p. 46, l. 15 - p. 48, l. 1; p. 52, l. 22 - p. 53, l. 20.), the effect of the proposed change would be to reduce the water supply available to MID by the amount of water available for appropriation under Permit 10472.

#### 6.4 Point of Diversion at Island Tract

MID has indicated that it wants to add a point of diversion at Island Tract, even if it is not granted permission to divert at Hidden Dam. We find that a change adding a point of diversion at Island Tract would not injure any legal user of water. Consequently, if Permit 10472 is not revoked, we herein grant permission for such change.

#### 7.0 CEQA COMPLIANCE

If Permit 10472 is revoked, the provisions of the California Environmental Quality Act will be inapplicable. Public Resources Code §21080(b)(5).



This order alternatively authorizes the addition of a point of diversion at Island Tract pumping station, an existing facility. There would be a negligible expansion of use of the pumping station as a result of the addition of the point of diversion. This would be a minor change which is exempt from the provisions of the California Environmental Quality Act (Public Resources Code Section 21000 et seq.) in accordance with 14 Cal.Admin.Code §15301.

#### 8.0 CONCLUSION

Based on the foregoing findings, the Board concludes that except for addition of a point of diversion at Island Tract the petitions of MID regarding Permit 10472 (Application 15287) should be denied, and Permit 10472 should be revoked.

#### ORDER

#### IT IS HEREBY ORDERED THAT:

1. Madera Irrigation District's petition for an extension of time to complete construction and application of water to full beneficial use under Permit 10472, is denied.
2. Madera Irrigation District's petition to change the point of diversion under Permit 10472 from Franchi Weir to Hidden Dam and to add points of rediversion at Island Tract and Franchi Weir is denied.

3. Madera Irrigation District's petition for a change from direct diversion to diversion to storage is denied.
4. Madera Irrigation District's petition to add a point of diversion at Island Tract pumping station is approved as a point of direct diversion if Permit 10472 is not finally revoked.
5. This Order shall be deemed a notice of proposed revocation under Water Code §1410. Unless a written request for a further hearing signed on behalf of the permittee is delivered or mailed to the Board within 15 days after receipt of this Order or within the period allowed for reconsideration of this Order under Water Code §1357, whichever is later, the Board may act upon the proposed revocation without a further hearing. Any request for a further hearing may be made by delivering or mailing the request to the Chief of the Division of Water Rights at 901 P Street, Sacramento, California, or P. O. Box 2000, Sacramento, California 95810.

Any request for a further hearing on the revocation must include an offer of evidence relevant to the proposed revocation. Such evidence may not be repetitive of the evidence already received by the Board in this matter. The existing record in this proceeding, including all transcripts taken and exhibits received in evidence shall be part of the evidentiary record in any further hearing in this matter and official notice of such record shall be taken in any such hearing.

If, as a result of any further hearing in this matter the Board decides not to revoke Permit 10472, the Board will instruct the Division of Water Rights to commence licensing proceedings with regard to Permit 10472.

#### CERTIFICATION

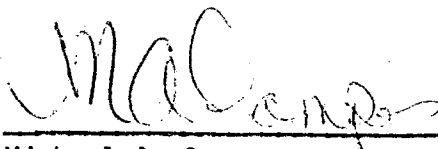
The undersigned, Executive Director of the State Water Resources Control Board, does hereby certify that the foregoing is a full, true, and correct copy of a Order duly and regularly adopted at a meeting of the State Water Resources Control Board held on May 16, 1985.

AYE: Raymond V. Stone  
Kenneth W. Willis  
Darlene E. Ruiz  
Edwin H. "Ted" Finster

NO:

ABSENT:

ABSTAIN:

  
\_\_\_\_\_  
Michael A. Campos  
Executive Director

MADERA CO.  
M.D.B.E.M.

A-18733 P-16584  
U.S.B.R.

T. 9 S.

HIDDEN DAM

T. 10 S.

MADERA  
EQUALIZATION  
RESERVOIR

T. 11 S.

MADERA  
LAKE

ISLAND TRACT DIVERSION

T. 12 S.

FRESNO

JOHN FRANCHI DAM  
A-15287 P-10472

EXTENSION OF TIME  
CHANGE P.O.D. TO HIDDEN DAM  
DIRECT DIVERSION TO STORAGE

T. 13 S.

Madera

RIVER



R. 16 E.

R. 17 E.

R. 18 E.

R. 19 E.

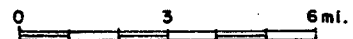
**LEGEND**

-  Madera Irrigation District
-  Service Area

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

**APPLICATION**  
A-15287 P-10472  
**PETITIONS FOR CHANGE**

SCALE



DATE: 10-13-82 DRAWN: A. G. CHECKED: K. B. DWG 3275