

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Order WR 85-06,
Licenses 845 and 737 Issued Pursuant
to Applications 1739 and 3040

THERMALITO IRRIGATION DISTRICT and
TABLE MOUNTAIN IRRIGATION DISTRICT,

Licensees,

GOLDEN FEATHER COMMUNITY ASSOCIATION,

Petitioner.

ORDER: WR 85- 9

SOURCE: Concow Creek

COUNTY: Butte

ORDER DENYING PETITION FOR RECONSIDERATION OF ORDER WR 85-06

BY THE BOARD:

1.0 INTRODUCTION

Petitioner Golden Feather Community Association (Association) who filed a complaint against Thermalito and Table Mountain Irrigation Districts (TID and TMID, respectively), has petitioned the Board to reconsider Order WR 85-06. The petition for reconsideration presents several contentions which are set forth below followed by the Board's findings in response to each contention.

2.0 PETITIONER'S CONTENTIONS

2.1 The Association Objects to the Board's Decision Not to Address the Excessive Use by TMID and TID. The Association Contends That Charges of Excessive Use Were Brought in a Timely Manner and Therefore the Board Abused Its Discretion in Refusing Evidence and Testimony on This Point.

Finding: The petitioner would like penalties to be assessed against TMID and TID for unauthorized and unreasonable use of water pursuant to licensed Applications 1739 and 3040.

Chapter 12 of the Water Code sets forth the statutory authority for enforcement of the terms and conditions of water right permits and licenses. Water Code Section 1825 reads as follows:

"It is the intent of the Legislature that the state should take vigorous action to enforce the terms and conditions of existing permits and licenses to appropriate water and to prevent the unlawful diversion of water."

As previously discussed in Order WR 85-06, the incidents of excessive use involved diversion through the Wilenor Ditch prior to 1976, at which time the Wilenor Ditch fell into disrepair. Since the ditch is no longer operable, the Board could not and did not have to take "vigorous action" to prevent excessive use of water pursuant to licensed Applications 1739 and 3040.

Article 2 of Chapter 12 of the Water Code sets forth the statutory authority for cease and desist orders, the principal enforcement tool used to prevent unlawful diversions of water by permittees and licensees. Water Code Section 1831 reads as follows:

"When the board determines that any person holding a permit or license to appropriate water pursuant to this division is violating any term or condition of the permit or license, the board may issue a preliminary order to any such person to cease and desist from such violation. The preliminary cease and desist order shall require such person to comply forthwith or in accordance with a time schedule set by the board. The board may issue a preliminary cease and desist order only after a notice and an opportunity for hearing pursuant to Section 1834." (Emphasis added.)

The operative language in the statute cited above is to require a water user to "comply forthwith". The Board's primary goal in taking enforcement action is to seek compliance with license or permit terms or conditions rather than to pursue damages, penalties or fines for their own sake. In this instance the issue of excessive use was moot by the time the hearing occurred in this matter. TMID and TID were no longer diverting water in amounts that exceed their licensed rights because the conveyance system through which excess diversions had occurred, the Wilenor ditch, was out of service.

The Board normally seeks penalties only when the holder of a water right fails to comply with a cease and desist order. (See Water Code Section 1845.)

The petitioner also refers to Water Code Section 1245 which addresses instances in which municipal corporations and other suppliers of water may be liable for damages caused by their diversion and use of water. Petitioner is advised, however, that the Board is not the equivalent of a court of general jurisdiction with authority to award damages, even if evidence of such damages had been presented. Section 1245 may be relevant to a civil action for damages, but it does not apply to the present proceeding.

2.2 SWRCB Should Require TMID's Unused Water to be the Subject of Hearings to Recondition Its License.

Finding: The issue of placing new terms and conditions in licensed Application 3040 for the purpose of protecting and preserving fish, wildlife and recreation should be addressed in the pending

hearing on Application 26588 and licensed Application 3040. The new flow regime likely to result by the proposed power project may require the addition of new terms and conditions in licensed Application 3040 to ensure the protection of fish, wildlife, aquatic resources and recreation. The proceeding where Order WR 85-06 was adopted did not address the issue of the current method of operation of the reservoir.

2.3 The Board Fails to Consider or Set a Minimum Pool Requirement.

Finding: The issue of a minimum pool requirement will be addressed in the upcoming hearing on Application 26588 and licensed Application 3040. A change in flow regime will necessitate an evaluation of environmental impacts and the addition of new conditions and terms in licensed Application 3040 to address those impacts. The Board will exercise its authority granted pursuant to Water Code Section 1243 when addressing the subjects of the upcoming hearing.

2.4 When TID Failed to Beneficially Use All of Its Allotment, It Lost Its Right to Use. Section 1241.5 of the California Water Code Reads:

"When the person entitled to the use of water fails to beneficially use all or any of the water claimed (agricultural and domestic uses, and not recreation) by him, for which a right of use has vested, for the purposes for which it was appropriated or adjudicated, for a period of three years, such unused water reverts to the public and shall be regarded as unappropriated public water."

Finding: The subject of Water Code Section 1241.5 is the loss of water rights on lands held in trust for Indians and the applicability of state laws to said lands. The citation by petitioner refers to Water Code Section 1241 prior to its being amended.

Water Code Section 1241 as amended reads as follows:

"When the person entitled to the use of water fails to use beneficially all or any part of the water claimed by him, for which a right of use was vested, for the purpose for which it was appropriated or adjudicated, for a period of *** five years such unused water *** may revert to the public and shall, if reverted, be regarded as unappropriated public water. Such reversion shall occur upon a finding by the board following notice to the permittee and a public hearing if requested by the permittee." (Changes from former statutory language highlighted.)

Pursuant to Section 1241 as amended, the reversion of water to the public is no longer automatic. The Board has the discretion to find that the holder of a license has valid justification for its nonuse of water; therefore, the Board may choose not to revoke a license.

Order WR 85-06 at Section 5.3, pp. 10-12 sets forth the Board's reasons for finding that no action be taken regarding TID's allotment of water pursuant to licensed Application 1739.

2.5 Neither TMID or TID Submitted a Copy of the Alleged Agreement to the Board as an Exhibit to the Proceedings. This is Thus Rank Heresy [sic] and Was Objected to at the Hearing. It is Unsubstantiated Testimony, is Entirely Self Serving and Cannot be the Basis for the Board's Decision.

Finding: California Administrative Code Section 733(c) and (d)

sets forth the following:

- "(c) Hearings shall be conducted in such manner as the board deems most suitable to the particular case with a view toward securing relevant information expeditiously without unnecessary delay and expense to the parties and to the board.
- "(d) The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be

admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Evidence that is irrelevant or unduly repetitious shall be excluded."

The Board has more latitude in the type of evidence that it will accept as opposed to civil actions tried in a court of law. (See CAC Title 23, Section 733(d) cited above.) The goal at the hearing is to gain information but without undue expense to the parties (see CAC Title 23, Section 733(d) above).

2.6

The Board Fails to Require TMID to Remove the Wilenor Ditch and Replace the Land to Its Original State, Despite Evidence that Leaving It There Causes Damage to Property. Section 1254 of the Water Code Protects Homeowners of the Concow Watershed from Damages Caused by Operations of the District.

Finding: Petitioner is probably referring to Water Code Section 1245 since the subject of Section 1254 is policy guiding action on applications.

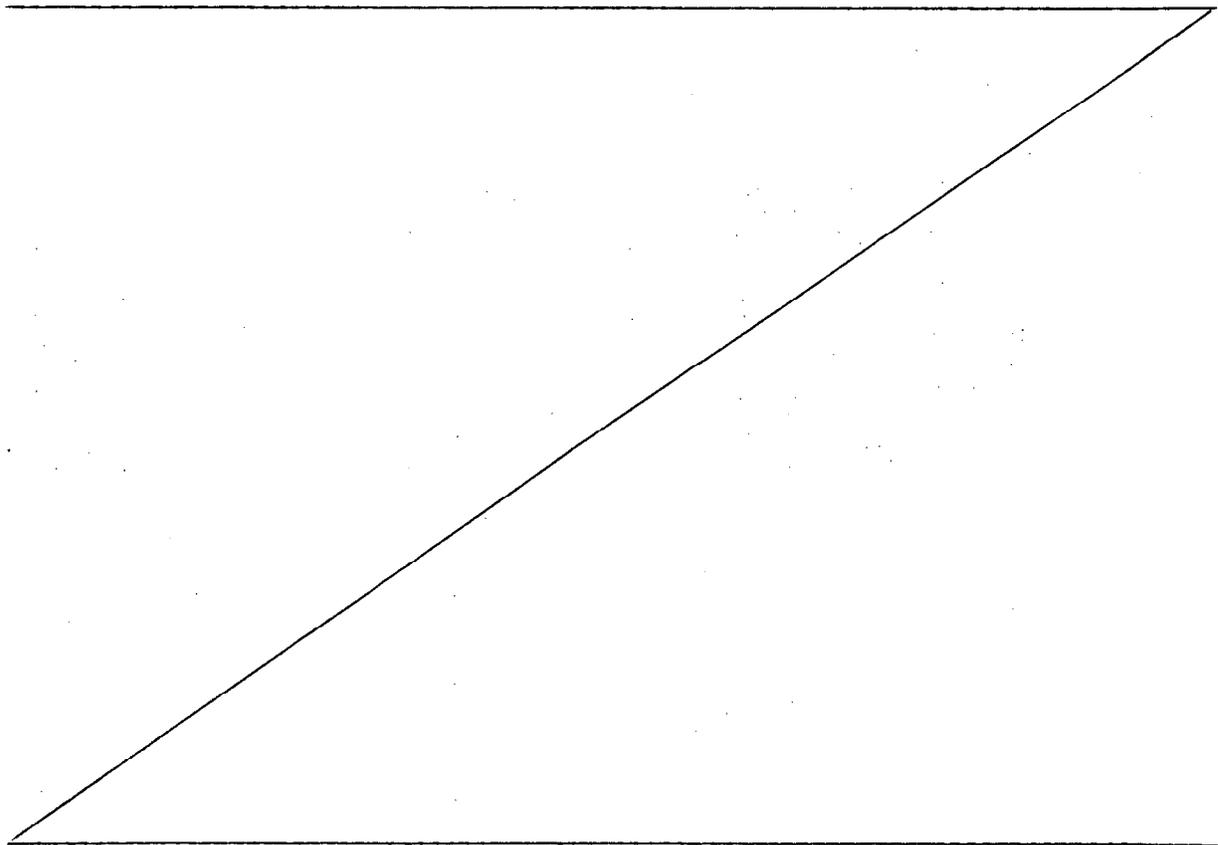
Petitioner fails to provide facts that support the contention (allegation) set forth above. One of the issues of the hearing was whether the damage to the Wilenor ditch was the result of TMID or TID action or inaction. Testimony was received that said ditch was in disrepair due to an earthquake. See Order Section 5.1, p. 8. The petition did not provide evidence regarding damages to the Association nor did petitioner set forth the authority that allows the Board to take action petitioner requested.

- 2.7 The Absence of Inflow or Outflow Gauges at Reservoir Together With the Annual Flushing of the Lake by TID/TMID Causing Injury to Members of the Association. Without Such Gauges, the Public and the Board Are at a Loss to Prove or Disprove the Assertion of Use Given by TID/TMID.

Finding: The issue of the installment of gauges (measuring devices) will be addressed in the hearing on Application 26588 and licensed Application 3040.

- 2.8 The Board Should Require TID/TMID to Maintain a Daily Record of Lake Levels.

Finding: The concerns raised by the petitioners in the above-stated contention will be addressed in the hearing on Application 26588 and licensed Application 3040.



3.0 ORDER

The petition of Golden Feather Community Association for reconsideration of Order WR 85-06 is denied.

CERTIFICATION

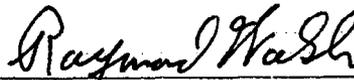
The undersigned, Executive Director of the State Water Resources Control Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on October 17, 1985.

AYE: Raymond V. Stone
Darlene E. Ruiz
E. H. Finster
Eliseo M. Samaniego

NO: None

ABSENT: None

ABSTAIN: None



Raymond Walsh
Interim Executive Director