



**Order on Reconsideration Upholding Revocation of
Permit 15012 (Application 11792A)
of Calaveras County Water District**

and

**Establishing Policy for Future Applications for Water from
the Calaveras River Watershed above New Hogan Dam**

B Order No. 97-06

Calaveras River

Calaveras County

September 1997

**STATE WATER RESOURCES CONTROL BOARD
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY**



STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Permit 15012)	ORDER:	WR 97-06
on Application 11792A of)		
)	SOURCE:	Calaveras River
CALAVERAS COUNTY WATER DISTRICT)		
)	COUNTIES:	Calaveras
and State-Filed Application 5648C.)		
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ORDER CONFIRMING REVOCATION OF PERMIT 15012
AND ESTABLISHING POLICY FOR FUTURE APPLICATIONS
FOR WATER FROM THE CALAVERAS RIVER
WATERSHED ABOVE NEW HOGAN DAM

BY THE BOARD:

1.0 INTRODUCTION

On September 21, 1994, the Chief of the Division of Water Rights (Division) issued an order revoking Water Right Permit 15012 of Calaveras County Water District (CCWD). CCWD filed a timely petition for reconsideration on October 7, 1994, and the State Water Resources Control Board (SWRCB) granted reconsideration on December 13, 1994, in Order WR 94-6. The SWRCB has considered all of the information in the administrative record. The SWRCB previously considered adopting this order on October 17, 1996, but delayed its consideration to accommodate CCWD's request for a one-year delay. CCWD now has advised the SWRCB that Permit 15012 can be revoked pursuant to the provisions in this order. The SWRCB finds as follows:

2.0 BACKGROUND

Application 11792A was filed on March 24, 1947, and Permit 15012 was issued on March 18, 1966. On June 29, 1994, the Division issued a Notice of Proposed Revocation of Permit 15012 due to

lack of due diligence in: (1) developing the authorized diversion facilities and (2) using the water for beneficial purposes.

The reasons for the proposed revocation were that CCWD has not constructed any of the authorized diversion facilities, no water has been diverted at the points of diversion authorized by Permit 15012, and CCWD has not put the water to beneficial use. The permittee has had 49 years to develop project plans and 30 years since the permit was issued to construct the project and put water to beneficial use. To date, no facilities have been constructed and CCWD has not put its water under Permit 15012 to beneficial use. In a petition for extension of time filed on May 28, 1993, CCWD stated that it will not begin project construction until the year 2000. CCWD did not request, in its petition for reconsideration, an opportunity to present evidence regarding due diligence pursuant to Title 23, California Code of Regulations, section 769(b). Based on the record, the SWRCB finds that CCWD has not exercised due diligence.

Nevertheless, CCWD objects to revocation of its permit absent a substitute procedure for individual applicants to obtain water rights from the Calaveras River.¹ New water right holders have been taking water allocations from Permit 15012. In the absence of a substitute procedure, new water right holders in the county of origin probably would not be able to obtain a reliable water supply. In Order WR 94-6, the SWRCB directed the Chief of the Division to seek resolution of CCWD's objections, including proposing any needed changes in the SWRCB's approach with respect

¹ See September 20, 1994, letter from CCWD to the Division in the file of Application 11792A.

to new applications for use of water within Calaveras County and other appropriate SWRCB actions to resolve the issues.

3.0 PREVIOUS SWRCB ACTIONS ON CALAVERAS RIVER APPROPRIATIONS

In Water Right Decision 1179 (D-1179) adopted in 1964, the SWRCB approved Water Right Applications: (1) 11792 of CCWD, (2) 18812 of the United States Bureau of Reclamation (USBR), and (3) 12839 of Stockton East Water District (SEWD). Permit 15012 was issued to CCWD on Application 11792 and authorizes the appropriation of 30 cubic feet per second (cfs) by direct diversion and 51,200 acre-feet per annum (afa) by storage above the USBR's point of diversion under Application 18812 at New Hogan Reservoir. The USBR's permit is subject to future appropriations of reasonable quantities of water for stockwatering. SEWD's permit on Application 12839, for up to 200,000 afa by underground storage, has been revoked; but the revocation does not make water reliably available, since water was not available every year for the SEWD permit. When Permit 15012 was approved, CCWD was granted a release from priority of state-filed Application 5648C,² making Permit 15012 on Application 11792 senior to both Application 5648C and the USBR's New Hogan water right under Permit 14434, issued on Application 18812. When the SWRCB adopted D-1179, the SWRCB found that the Calaveras River already was fully appropriated from May 1 through October 31 of each year. D-1179 approved appropriation of the balance of the water

² Application 5648 was filed by the State of California on July 30, 1927, for potential projects on the Mokelumne, Stanislaus, and Calaveras rivers. The Calaveras portion of the application, designated as Application 5648C to facilitate record keeping, is for a permit to appropriate water for irrigation and domestic uses year-round in amounts up to 800 cfs by direct diversion and up to 100,000 afa by storage. The designated point of diversion and location of storage is within Section 31, T4N, R11E, MDB&M, which is now the location of New Hogan Dam and Reservoir of the USBR. The place of use is 310,000 acres within T1S, R10E to 12E, inclusive, and T1N to 6N, inclusive, R9E to 15E, inclusive.

and stated that no additional water would be available. With the SEWD permit having been revoked, it is unclear whether there would be some water available for appropriation in some years between November 1 and April 30. If requested appropriations from the Calaveras River watershed exceed the amount approved under Permit 15012, the applicants for the additional appropriations will be required to establish through hydrological evidence that water is available for appropriation.

The USBR's Permit 14434 for New Hogan Reservoir is not subordinate to new in-county permits unless they are for stockwatering. While Permit 14434 is subject to the watershed of origin protections under Water Code section 11460 et seq., it is not subject to the county-of-origin protections because it was not issued pursuant to a state-filed application and there has been no release of priority of a state-filed application in favor of Permit 14434.

During the time since D-1179 was adopted, a number of small water users in the watershed above New Hogan Reservoir have sought water rights. In 1976, the SWRCB announced a policy that future appropriations should be requested as partial assignments of Application 5648C. Since 1976, the SWRCB has issued Water Right Decisions 1581 (D-1581), 1601 (D-1601), and 1603 (D-1603), all of which affect appropriations of water from the Calaveras River watershed above New Hogan Reservoir.

D-1581, adopted in 1982, initiated a practice by the SWRCB of approving partial assignments of state-filed Application 5648C. In D-1581, the SWRCB approved eleven partial assignments of Application 5648C. Each of these projects is small, and each is on a tributary of the Calaveras River above New Hogan Dam within

Calaveras County. The USBR objected to these appropriations, arguing that they, when added to CCWD's approved appropriation under Permit 15012, could deplete the yield of New Hogan Reservoir. In response to the USBR's objections to these appropriations, the SWRCB stated in D-1581 that the new permits would be junior to: (1) permitted and licensed water rights for which applications were filed between July 30, 1927, and the date of the request for assignment³ and (2) Permit 15012 of CCWD. To ensure that water was available for appropriation for the new permits, the amounts of the new appropriations plus appropriations under Permit 15012 were limited to the amount of water authorized in Permit 15012, with CCWD's concurrence. D-1581 finds that the new appropriations all are for use within the county of origin, which is Calaveras County, and that this satisfies the county-of-origin protection statute at Water Code section 10500 et seq., under which Application 5648 originally was filed.

In D-1601, the SWRCB approved Application 5648C-13, but in response to the contentions of the USBR, changed the method used in D-1581 to set the water right's priority. D-1601 (1) subordinated the new permit to previously appropriated water that is used within Calaveras County, including water appropriated under the New Hogan permit, but (2) retained the seniority of the new permit on Application 5648C over out-of-county water uses filed after June 30, 1927. This continued the protection of Calaveras County as the county of origin of the water supply and avoided giving the new permits seniority over previous in-county water uses from New Hogan Reservoir. D-1601

³ The permit term in the Order portion of D-1581, however, specifies that the new permits are senior to the New Hogan appropriation under Application 18812.

provides that the amount of water available for permits issued on Application 5648C plus any water appropriated under Permit 15012 is limited to the maximum appropriation allowed under Permit 15012, i.e., 51,200 afa by storage and 30 cfs by direct diversion. Thus, approval of these permits did not interfere with the USBR's appropriation at New Hogan Reservoir even though the Calaveras River watershed is fully appropriated. (See Order WR 89-25.)

D-1601 went on to announce that future appropriations in Calaveras County, after two remaining petitions for partial assignment were processed, would be accomplished by filing regular applications and by deducting the amounts of water in the new permits from Permit 15012, except in cases where an application would fulfill the purposes of Application 5648C.⁴ The procedure announced in D-1601 for subsequent applications apparently was intended to allow new uses of water in the county by subtracting the amounts of the new permits from Permit 15012, but it did not give them seniority over earlier out-of-county water rights.

In D-1603, the SWRCB approved the remaining two unapproved petitions for partial assignment of Application 5648C, setting

⁴ D-1601 states that assigning portions of Application 5648C for small projects in Calaveras County is unnecessarily cumbersome, does not fulfill the purposes of Application 5648C, and is not in accordance with the intent of the Legislature. Nothing in D-1601 explains these statements or provides any legislative or administrative authority upon which they can be based. Additionally, these statements are inconsistent with findings in D-1581, D-1601, and D-1603 that say the approvals of the various partial assignments of Application 5648C comply with Water Code section 10500 et seq. While processing a partial assignment of a state-filed application requires a hearing (Wat. Code § 10504.1), a hearing on an unprotested assignment petition can be extremely brief and can be conducted in conjunction with a regularly scheduled Board meeting. A protested application would require a longer hearing regardless of whether the application were filed by the State or by an individual.

the priority of the new rights by using the same terms and conditions as were added to the permit on Application 5648C-13 in D-1601.

After adopting D-1603, the SWRCB approved several new applications to appropriate water in Calaveras County. To make water available for appropriation, the new permits rely on Calaveras County not constructing its full project under Permit 15012. When the new permits are issued, the SWRCB issues orders reducing the amount of water that can be appropriated under Permit 15012. The approach announced in D-1601 and D-1603 makes the new in-county permits issued after D-1603 junior to earlier out-of-county water rights.

4.0 OPTIONS FOR SWRCB ACTION

To resolve CCWD's objection to revoking Permit 15012, new water users within its service area must be able reliably to obtain the water needed for growth and development. If Permit 15012 were revoked and partial assignments of Application 5648C remained unavailable, only in-county stockwatering uses would get reliably senior water right permits in the future.⁵ Stated another way, if the SWRCB revokes Permit 15012, water may become available for appropriation during the November 1 through April 30 diversion season, but there is no assurance that new uses within the county would have enough seniority to benefit. During a drought or if additional water is needed for endangered species or for other public trust uses, the new permits could lack water in their priority.

⁵ A condition in USBR's Permit 14434 subordinates the USBR permit to new permits for stockwatering in Calaveras County. This order does not change that condition.

To allow Calaveras County water users to obtain seniority over out-of-county uses of this newly unappropriated water, the SWRCB can resume accepting small petitions for partial assignment of Application 5648C. The partial assignments of Application 5648C could be conditioned so that they would be junior to pre-existing in-county water right holders, as was done in the permits issued pursuant to D-1601 and D-1603. If small partial assignments of Application 5648C are accepted, future permits, insofar as they are used within the county, will remain senior to out-of-county uses commenced after July 30, 1927.

Alternatively, the SWRCB could reinstate Permit 15012 and allow CCWD to make partial assignments of Permit 15012, subject to the SWRCB's approval of changes in the place of use, purpose of use, and point of diversion, as needed. This approach could give the new permits seniority equal to Permit 15012.

Yet another approach would be to reinstate Permit 15012 in anticipation that CCWD will construct a project in the next five years and will make water available for delivery to the new water users.

No legal basis exists for the approach announced in D-1601 and D-1603 of restricting Application 5648 to large permits. Water Code section 10504 specifically provides that the SWRCB may assign any portion of any application filed under Part 2 of Division 6 of the Water Code, i.e., a state-filed application, unless such assignment is inconsistent with the purpose of the original state-filed application or another legal requirement.

Further, an Attorney General's Opinion issued in 1956 addressed Applications 5647 and 5648. (See 28 Ops.Cal.Atty.Gen. 307

(1956).) Among other things, the Attorney General said that partial assignments of these applications can legally be made to persons in Calaveras and Amador Counties to meet the counties' development needs when they are ready to proceed with a project that does not conflict with a general or coordinated plan for water development. (Id., at 313.) The Attorney General noted that Application 5648 was one of seven initial state-filed applications that were for smaller quantities of water, contemplated relatively small projects, and had places of use close to the source of supply. Application 5648 was filed on thirteen streams and had places of use in five counties. (Id., at 308-309.)

Based on the foregoing discussion, this order overrules⁶ the approach announced in D-1601 and D-1603. The approval of small as well as large petitions for partial assignment and authorization of appropriations under Application 5648C for use within Calaveras County will comply with the intent of the Legislature in enacting Water Code sections 10500 et seq. and will fulfill the purposes of Application 5648.

Previous decisions approving partial assignments of Application 5648C have imposed permit terms and conditions on the new permits that limit the amount of water that can be diverted under all permits issued under Application 5648C and Permit 15012 to 51,200 afa by storage and 30 cfs by direct diversion. (See D-1581, D-1601, and D-1603.) This practice will be continued until the 51,200 afa of storage and the 30 cfs of direct diversion rights

⁶ The SWRCB's decisions are precedent unless otherwise specified. (See footnote 11, page 17, Order WR 96-1.) Precedents in past decisions can be overruled for good cause. This order overrules the precedent established in D-1601 and D-1603 of withholding partial assignments of Application 5648C for small projects.

have been allocated. New water uses under Application 5648C within the county will be senior to water uses outside the county initiated after July 30, 1927. The SWRCB will accept petitions for partial assignment of Application 5648C from Calaveras County permittees who received their permits on regular applications after the SWRCB announced its approach in D-1601, if such permittees agree to the revocation of their existing post D-1601 permits in exchange for a new permit under Application 5648C.

The proposed revocation of Permit 15012 exposed the fundamental error in the approach announced by D-1601 and D-1603. This order reverses the D-1601/D-1603 approach and allows new water users in Calaveras County to obtain senior water rights. This resolves CCWD's objection to revocation of Permit 15012. Accordingly, Permit 15012 will be revoked due to CCWD's lack of due diligence in developing the authorized diversion facilities and putting the water to beneficial use.

6.0 CONCLUSIONS

1. Permit 15012 was issued on March 18, 1966. Notwithstanding the passage of 30 years, CCWD has not constructed any of the diversion facilities authorized under Permit 15012, has not diverted water at the points of diversion authorized by Permit 15012, and has not itself put water to beneficial use under the permit.
2. Previous SWRCB decisions establish that there is no water available for appropriation from the Calaveras River watershed during the months of May through October each year. For the other months, D-1179 approved permits to appropriate more water than would be available in most years between November 1 and April 30.

3. Between 1982 and 1984, the SWRCB issued 15 permits based on partial assignments of state-filed Application 5648C, which is senior to most existing permits. The priority of each permit was adjusted to ensure that it would not deprive existing in-county water right holders, while leaving it senior to out-of-county appropriators of the water. The quantity of each partial assignment plus any water appropriated under Permit 15012 was limited to the maximum appropriation authorized under Permit 15012.

4. Since 1984, the SWRCB has issued five additional permits and has one outstanding application, all based on new applications. The SWRCB made water available for appropriation under these permits by issuing orders reducing the amount of water that can be appropriated under Permit 15012, but these permits are junior in priority to all pre-existing water rights from the Calaveras River watershed. Consequently, the rights under these permits lack security during water shortages, even though they are in the county of origin.

5. After Permit 15012 is revoked, there may be water available for appropriation from the Calaveras River in some amount, but new permits, if they are based on new applications, will be able to take water only after the USBR has fully satisfied its rights at New Hogan Reservoir, including rights to water that may be used outside the county. If new permits are based on partial or full assignment of Application 5648C, however, such permits can be made senior to out-of-county uses and junior to existing in-county uses.

ORDER

IT IS HEREBY ORDERED THAT:

1. Permit 15012 is revoked.
2. The SWRCB will accept either petitions for partial assignment and approval of Application 5648C or new applications to appropriate water from the Calaveras River or its tributaries.
3. Future permits issued on partial assignments of Application 5648C will include the following condition:

This permit shall be junior in priority to, and subject to rights evidenced by, permits and licenses for water diversion and use within Calaveras County for which applications were filed between July 30, 1927, and [filing date of petition for partial assignment of application]. To the extent that water under this permit is used within Calaveras County, this permit shall be senior to all water uses outside of Calaveras County with priority dates after July 30, 1927. The combined amount diverted under this permit and all other permits and licenses issued on Application 5648C for use within Calaveras County shall not exceed 51,200 acre-feet per annum by storage and 30 cubic feet per second by direct diversion.

Before making any change in the project determined by the State Water Resources Control Board to be substantial, permittee shall submit

such change to the Board for its approval under
Water Code section 10504.5(a).

4. Future permits issued on new applications for water from the Calaveras River for use outside Calaveras County shall contain the following condition:

This permit shall be junior in priority to, and subject to rights evidenced by, permits and licenses for water diversions for use in Calaveras County pursuant to Application 5648C.

CERTIFICATION

The undersigned, Administrative Assistant to the 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 September 18, 1997.

AYE: John Caffrey
John W. Brown
Mary Jane Forster
Marc Del Piero

NO: None

ABSENT: James M. Stubchaer

ABSTAIN: None


Maureen Marché
Administrative Assistant to the Board

