

Proposed Revocation Hearing

**Emmerson Investment, Inc.
Shasta River Tributary to Klamath River in
Siskiyou County
Permits 19164 and 19165 (Applications 26306 and 26307)**

scheduled to commence
Monday, July 20, 2009

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Participant State Water Resources Control Board Prosecution Team

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PT 1

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DIVISION OF WATER RIGHTS PROSECUTION TEAM EXHIBIT 1

WRITTEN TESTIMONY OF KATHERINE MROWKA, SENIOR ENGINEER

My name is Katherine Mrowka. I am a Senior Engineer assigned to the Inland Streams Unit of the Permitting Section, Division of Water Rights (Division), State Water Resources Control Board (State Water Board or Board). I have a Bachelors of Science degree in Environmental Resources Engineering, and a Master of Science degree in Civil Engineering. I am a registered civil engineer. I have been employed in the Division for 23 years. A true and correct copy of my resume is attached as Prosecution Team (PT) Exhibit 2.

I am the supervisor in charge of the Inland Streams Unit that processes water right applications, as well as change petitions and petitions for extension of time on applications, permits and licenses. My unit is also responsible for processing both voluntary and statutory revocations of water right permits and licenses. Regarding petitions, the Division's permitting units review all pertinent information and make recommendations on whether specific petitions should be processed for approval or denied. The Division's process is shown on flow charts. (PT 3.) I also make recommendations on whether permits and licenses should be processed for statutory revocation.¹

Petition Processing Procedures

After a water right applicant has been issued a permit, if they are unable to complete construction work or apply the water to full beneficial use within the time provided in the permit, the permittee may request an extension of time pursuant to California Code of Regulations, title 23, section 842. This request must be submitted upon a form supplied by the State Water Board.

After a Petition for Extension of Time is filed, the Division takes the following steps in order to process the petition:

- The petition is noticed in accordance with California Code of Regulations, title 23, section 843.

¹ When it appears that a permittee may have failed to commence or complete construction work or beneficial use of water with due diligence in accordance with terms of the permit, the regulations of the Board and the law, I prepare a Notice of Proposed Revocation to notify the Permittee that the State Water Board is considering revocation of the permit. (Cal. Code Regs., tit. 23, § 850.)

- Division of Water Rights staff evaluates any protests to the petition. If the protest meets the requirements for submittal, the Division will acknowledge receipt and direct the petitioner to respond to the allegations therein.
- Staff reviews the petition to determine whether there is cause for extension of time under California Code of Regulations, title 23, section 844.

Section 844 provides:

"An extension of time within which to complete an application, to commence or complete construction work or apply water to full beneficial use will be granted only 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...."

Based on this review, the Division processes the petition in one of two ways:

- (a) If cause is shown for approval of a time extension, staff commences a preliminary review to determine if the project is subject to the California Environmental Quality Act (CEQA). If it is, staff prepares, or directs the preparation of, an initial study to determine what type of CEQA document is required. After completion of a CEQA document and resolution of all protests, an order granting time extension may be issued.
- (b) If the petitioner is unable to provide the information to show cause for time extension required under California Code of Regulations, title 23, section 844, the Division takes one of two courses of action. For projects that have not been built, a Notice of Proposed Revocation may be issued and the permit revoked by the Board under Water Code section 1410. For projects that have been built, the project is inspected for licensing and a license may be issued for the portion of the water under the permit shown to have been put to beneficial use. The remainder of the permit may be revoked by the Board under Water Code section 1410.

Permits 19164 and 19165

The State Water Board issued Permits 19164 and 19165 on March 23, 1984 to Shasta Springs Cattle Company. The ownership of Permits 19164 and 19165 has changed several times. On June 21, 1969, the ownership changed to Shasta Beef, Inc. On June 29, 1990, ownership changed to Shasta Foods International. On January 18, 1995, ownership changed to Emmerson Investment, Inc. (PT 24.) Throughout my testimony I will refer to these entities together as "Permittee."

Permit 19164 authorizes direct diversion of 5 cubic feet per second (cfs) to be diverted from February 1 to November 1 of each year for irrigation and stockwatering. (PT 4.) The maximum amount diverted under this permit shall not exceed 400 acre-feet per annum (afa).

Permit 19165 authorizes direct diversion of 14 cfs to be diverted from February 1 to November 1 of each year. (PT 5.) The maximum amount diverted under this permit shall not exceed 800 afa.

The permits require that water be applied to the authorized use by December 1, 1988.

Both permits include the following terms:

- Rights under this permit are, and shall be, subject to existing rights determined by the Shasta River Adjudication, (Adjudication) Superior Court, Siskiyou County, No. 7035 insofar as said adjudicated rights are maintained and such other rights as may presently exist.
- The permittee shall request the services of a Department of Water Resources' Watermaster within 90 days of receiving a water right permit. Such services will include the Permittee in the watermaster service provided for the Shasta River water users.
- No water shall be diverted under this permit at any time unless the watermaster has determined that excess water exists in Shasta River and authorizes the permittee to divert water. The amount of water to be diverted shall at all times be controlled by the watermaster.
- For the protection of fish and wildlife, permittee shall during the period from February 1 through November 1 bypass a minimum of 1 cubic foot per second.
- Permittee shall install a device, satisfactory to the State Water Resources Control Board, which is capable of measuring the flows required by the conditions of this permit. Said measuring device shall be properly maintained.

Permits 19164 and 19165 are for water surplus to that distributed in accordance with the Shasta River Adjudication (Adjudication), Superior Court, Siskiyou County, No. 7035. Such surplus water generally consists of excess early season flows resulting from leakage from the dam for Lake Shastina. (PT 7.) Permittee also holds License 4151 (Application 8809) for a spring on the bank of the Shasta River between the Permit 19164 and Permit 19165 points of diversion. Water diverted pursuant to License 4151 is rediverted at the Permit 19165 point of diversion. Each of the separate points of diversion under Permits 19164 and 19165 is also used for diversion pursuant to rights for irrigation water under the Adjudication. Inasmuch as the diversion facilities were originally installed to divert water pursuant to the Adjudication, the facilities have been in place for some time. Similarly, the place of use was developed and water put to use pursuant to the Adjudicated rights. At the time of construction of Lake Shastina, a water right settlement allotted a fixed amount of water to be released each season upon demand and under watermaster supervision from storage in the reservoir for use on specified places of use. Watermaster service is only available between April 1 and September 30, not the entire diversion season under the permits. (PT 25.)

Permits 19164 and 19165 require installation of a flow measuring device to measure the flows required by the permit. Absent measurement of flows, there is no method to determine whether Permittee is in compliance with the permit requirement to bypass water for maintenance of public trust resources. The watermaster uses flow measurement stations 22 and 37 miles downstream from the diversion sites. Data from gages in excess of 20 miles downstream cannot adequately characterize the hydrograph in the vicinity of the diversions or the effect of water withdrawal on the river immediately downstream from the points of diversion. (PT 9.) There is also no method to determine whether and to what extent any water has been diverted pursuant to these permits. As explained above, Permittee holds several other water rights that utilize the same points of diversion as these permits. The responsibility to document water diversion and use and to measure bypass flow is a continual requirement; these are not conditions that can be met through one-time measurements or measurements during only one year.

Time to Develop the Project

The permits require that construction work be completed on December 1, 1988. Permittee submitted petitions for extension of time, dated August 14, 1990, seeking an extension to 1995 for the purpose of keeping records of water use under the permits. (PT 22.) The Division's May 3, 1991 Orders approved extensions to complete beneficial use of water to December 31, 1995. (PT 23.)

Permittee filed petitions for extension of time dated October 13, 2000, but withdrew the petitions on December 16, 2005. Therefore, no new development schedule within which to complete construction work and apply the water to full beneficial use was ever issued. Thus, as the permits currently stand, the Permittee is not authorized to complete any additional construction or make beneficial use of water beyond the levels documented to have occurred by December 31, 1995, absent approval by the State Water Board of a new development schedule. To date Permittee has not provided any documentation of how much water, if any, was diverted pursuant to these permits during the period authorized for putting water to beneficial use.

Lack of Diligent Development in Accordance with Permit Conditions and Failure to Document Beneficial Use of Water

Since the time to complete construction and beneficial use of water under Permits 19164 and 19165 has expired, and Permittee has no pending petitions for extension of time, I reviewed the permits to determine whether water use pursuant to the permits could be licensed.

The Division has conducted three inspections for the project. These occurred on May 7, 1990 (PT 6), June 13, 2000 (PT 7) and August 23, 2002 (PT 8). Separate inspection reports were prepared for each permit. The three inspections yielded essentially the same result. Permittee had not complied with the permit requirement regarding installation of a device to measure flows and had not recorded water diversion and use. Therefore, Division staff was unable to determine how much water, if any, had been diverted pursuant to the permits and could not license the permits. As there are no petitions for extension of time pending, the only alternative to licensing the rights is revocation.

May 7, 1990 Inspection and Related Correspondence

The May 7, 1990 inspection report for Permit 19164 notes that the same point of diversion (Diversion 165 in the Adjudication) is used to divert water under Permit 19164 and 596 afa of water allotted pursuant to the Adjudication from storage in Lake Shastina (formerly Dwinnell Reservoir). The report notes that the watermaster allocates water first under Permit 19164; then water from the storage allotment under the Adjudication is used. The State Water Board, licensing unit, credits water use to the most senior right first, followed by crediting water use to junior rights. It is unclear from the report notes whether the watermaster is crediting water released from storage at Lake Shastina to use under Permit 19164. Since Permit 19164 is for direct diversion only, the State Water Board licensing unit could not credit releases from storage as diversion under Permit 19164. The report also states that the watermaster releases 2 cfs fish flow at Lake Shastina. The watermaster maintains 12 to 20 cfs at Montague-Granada Highway Bridge.

Because Permittee does not monitor its own diversions, there is no assurance that the 2 cfs instream flow released at Lake Shastina is not diverted by others, including Permittee. Moreover, there is no documentation to show that any bypass release is made at Lake Shastina outside of the watermaster season. This method of operation does not meet the bypass requirements of Permits 19164 and 19165, which requires that the bypass condition be met at Permittee's points of diversion throughout Permittee's diversion season.

The May 7, 1990 inspection report for Permit 19165 states that the same point of diversion is used for Permit 19165, License 8809, and rights under the Adjudication. The Adjudicated right is for 924 afa. This is Diversion 166 in the Shasta River Adjudication, and Adjudicated water for diversions 156 and 165 is also diverted at this location.

The watermaster, Les Lighthall, was present during the 1990 inspection. The 1990 inspection reports found that Permittee had not kept any records documenting water diversion and use even though a staff gage, parshall flume and Stevens recorder were installed at the diversion works. In addition, the watermaster did not provide the Division with any records of water diversion and use.

The Division's May 21, 1990 letter advised Permittee that there was not enough information on Permittee's water use to proceed to license. (PT 10.) Permittee was advised to coordinate with the watermaster to keep monthly records of amounts diverted at each diversion and to differentiate amounts taken under Permits 19164 and 19165 from any allotment delivered from Lake Shastina pursuant to the Adjudication.

June 13, 2000 Inspection and Related Correspondence

The Division conducted a licensing inspection on June 13, 2000. The watermaster, Keith Dick, was present during the inspection. The inspection reports for Permits 26306 and 26307 state that the primary irrigation supply is obtained pursuant to the Adjudicated rights. The diversion facilities and place of use were developed years ago, pursuant to Adjudicated rights. The reports could not make any determinations on the quantities of water used pursuant to the permits, due to lack of records. Nonetheless, the reports

make the assumption that beneficial use of water had occurred. However, two issues remained: compliance with the measuring device requirement and keeping of diversion records for licensing purposes. These permits had been deemed in compliance with the 1 cfs fish bypass flow in a 1986 inspection based on the watermaster's control of the diversions and his need to maintain flows in excess of 1 cfs for downstream water rights. However, the permit requires a measuring device and one had not been installed.

Although diversion records had not been kept, some flow measurement equipment had been installed. A Parshall flume with recorder was in place at the head of the ditch used under Permit 19164 and was used by the watermaster. The watermaster advised Division staff that the purpose of the recorder and flume was not to keep diversion records but to ensure that water is not "stolen" by changing the water levels in the diversions. The watermaster indicated that he has been providing service to Permittee, but only to the extent necessary to ensure that diversions under Permits 19164 and 19165 do not injure other users; not to the extent of keeping diversion records. During the inspection, Division staff advised Permittee and watermaster of the need to maintain written records of diversion under the permits separated from the records of water diverted under the Adjudication.

Since the watermaster and Permittee did not provide the Division with any flow records, Division staff was unable to determine whether or how much water had been diverted pursuant to the permits. The 2000 inspection report states that the season of diversion, rates of diversion and annual diversion quantities will have to be determined later after records are submitted.

During an August 2, 1990 telephone call, Division staff advised the Permittee of the need to maintain diversion records because the watermaster only had records of use for the Adjudicated rights. (PT 31.)

The Division's August 29, 2000 letter discusses the field inspection. (PT 11.) The letter notes that the projects are not ready for license because (1) measuring devices required by term 17 of each permit have not been installed, and (2) no records have been kept of water diverted under each permit. The Division needs such records of historical use so it can issue a license for the actual maximum rate of diversion, the actual total quantity diverted during the season of maximum diversion and use, and the actual season of diversion.

The August 29 letter states that any licenses issued on Permits 19164 and 19165 will have to be based on measurements taken in future years. Since the time to complete use of water under each of these permits expired on December 31, 1995, extensions of time would be required. The letter notes that the 1991 extensions of time were granted for the purpose of keeping diversion records for licensing.

Division staff recommended that extensions of time be denied until Permittee complies with the fish bypass measuring device requirement and required submittal of a plan and installation schedule for these measuring devices by October 28, 2000. Permittee was advised that any future diversion under the permits without an approved measuring device at both diversions would be in violation of term 17 of these permits and could result in administrative civil liability of \$500.00 per day.

In addition, the August 29 letter suggested that the Permittee formally request the Watermaster's services for the next few years for making diversion measurements and keeping records for each diversion as follows: (1) the dates surplus water is diverted, (2) the corresponding head on the flumes, and (3) if necessary, a calculation to determine how much of said water is surplus flow and how much is "banked" water released at the Permittee's request from Lake Shastina.

On October 17, 2000, the watermaster agreed to keep diversion records for Permits 19164 and 19165, but only during the watermaster season (April 1 to September 30.) (PT 30.)

Division staff subsequently faxed the new design for the measuring device to the ranch manager. The device was subsequently installed and the ranch manager submitted photographs showing the installed device to the Division. Due to unforeseen field conditions, the devices at the two points of diversion did not work properly. (PT 12.) Therefore, the designs were modified. Permittee indicated that no surplus water was available to divert under the permits at that time. Therefore, on May 2, 2001, Division staff indicated that the modified measuring devices must be installed the next time flashboards are installed in these diversions and water is appropriated under the permits.

August 23, 2002 Inspection and Related Correspondence

The Division conducted a compliance inspection on August 23, 2002. At the time of inspection, no measuring device to monitor compliance with terms 16 and 17 had been installed. The Parshall flume at the points of diversion did not satisfy the measuring device requirement of the permits.

The inspection report states that there are no records of diversion available to determine amounts for licensing. Division staff concluded that the permits cannot be licensed because there has not been any recorded use of water under the permits, nor was there any evidence of non-recorded water use. If records of diversion cannot be produced, the inspection report states that revocation of the permits may be warranted. The inspection reports include Division staff calculations, based on crop water duty, that show there is sufficient water available to irrigate the place of use for both permits solely under Permittee's Adjudicated rights and License 4151.

The Division's October 7, 2003 letter advised Permittee of the results of the August 23, 2002 inspection. (PT 13.) The letter notes that, both at the time of this inspection and during the June 2000 inspection, Permittee had no diversion records to determine the amount of water being beneficially used under these permits. Since there was still no recorded water diversion and use since the last inspection, Division staff informed Permittee that licenses could not be issued. Division staff again reminded Permittee of the need to keep diversion records.

The Division's February 18, 2004 letter reiterated the findings of the 2000 and 2002 inspections regarding lack of record keeping. (PT 14.) Division staff requested information to document the frequency when water is available to serve these permits, and the months when water is available. Permittee was warned of the potential for issuance of a Notice of Proposed Revocation of Permits 19164 and 19165 due to non-use.

On November 16, 2004, Permittee was advised again of the potential for issuance of a Notice of Proposed Revocation due to non-use. (PT 15.)

November 22, 2004 Data Submitted by Permittee and Related Correspondence

In order to show water diversion and use, Permittee submitted information on November 22, 2004 regarding water used in 2003. (PT 27.)

The Division's December 28, 2004 letter reviewed the November 22 submittal and found that it was unclear whether it was showing water used pursuant to Permittee's adjudicated rights or the permits. (PT 16.) Permittee was asked to identify the quantities used pursuant to adjudicated rights. The notes on the data indicate that the Watermaster was reporting releases from Lake Shastina during June, July, August and September. Permittee's adjudicated rights are for water released from Lake Shastina, but Permits 19164 and 19165 are only for direct diversion. Consequently, data regarding releases from Lake Shastina cannot substantiate water use under the permits. Furthermore, water diversion data for 2003 cannot be used for licensing purposes, since it is outside of the development period under the permits.

The December 28 letter reiterated that the Division has no record of water use pursuant to the permits. Therefore, it was unclear to Division staff whether water is available to serve Permits 19164 and 19165 after taking into account adjudicated rights. The Division's December 28 letter requested that Permittee provide monthly data documenting the availability of water to serve the priority of Permits 19164 and 19165. The Division advised Permittee that the analysis should use streamgauge or other relevant records, and identify the quantities of water needed to serve prior rights, and the quantity remaining to serve Permits 19164 and 19165 after taking any required bypass flows into consideration.

Permittee was again advised that failure to provide an adequate response might result in issuance of a Notice of Proposed Revocation for non-use. The Division's letter also noted that Permittee had not provided any time schedule for complying with the permit requirement regarding installation of adequate measuring devices.

Permittee's 2003 data includes water sources that are not authorized under the permits – the notes state that some of the diversions listed include 2 cubic feet per second (cfs) from springs. The data also includes mathematical errors. The columns of flows in cfs are added up to obtain total monthly flows in cfs. For example, the column titled April gravity flow has values of 4.6 cfs, except for two days when 2.3 cfs was available. The monthly total is reported to be 78.2 cfs. Diversion rates must be averaged, not added, to obtain accurate totals, and the monthly diversion should be represented by a total in acre-feet.

February 14, 2005 Submittal by Permittee and Related Correspondence

Permittee's February 14, 2005 response states that there is no single measurement that correlates with the availability of water surplus to the adjudication. (PT 17.) Because of variable real-time river conditions, there is no way to precisely reconstruct when water to serve Permits 19164 and 19165 was available historically. Permittee concluded that water may be available to serve the permits even in "dry" years in March. In years that

might classify on the dry side, but still "normal," surplus water may be available into April or May. Only in "wet" or "very wet" years is there likely to be surplus water through May and possibly into June and July. "Surplus" water may be available in August, September or October, regardless of water year. The Permittee could not provide dates when Emmerson had actually diverted surplus water under the permits, stating that the records are in disarray and there are missing records due to multiple ownership of the property. Permittee could only speculate that water was likely available in roughly 18 of the last 27 years, or in "normal" or wetter hydrologic conditions.

The February 14 letter acknowledges that the fish screens at both diversions are not adequate to prevent fish from potentially getting into the irrigation delivery system.

Division staff evaluated the submittal and responded by letter dated November 21, 2005, finding that Permittee's response was unacceptable. (PT 18.) Permittee has been required to maintain actual diversion records and has not done so. Permittee was repeatedly instructed to comply with this requirement during the 1990, 2000 and 2002 Division inspections and numerous correspondences. Permittee had provided an analysis that attempted to extrapolate that water has been used under the permits and also provided 2003 diversion data, but the 2003 diversion data did not differentiate water diverted under adjudicated rights from water used under the permits, despite Permittee having been requested to do so by the Division. The 2003 diversion data was also untimely, because it did not reflect water diverted during the authorized period within which to complete beneficial use of water under the permits. Permittee's analysis contained the following deficiencies in attempting to show that diversions occurred under the permits:

The analysis did not take bypass flow requirements into consideration:

The analysis did not adequately account for downstream water rights;

The analysis did not show the diversion quantities or available water at the points of diversion authorized under the permits. Specifically, Permittee's analysis omitted the permitted diversion locations, and concluded that water was available to serve the permits based solely on evaluation of water at the gage locations;

The analysis did not reflect the actual water supply situation. The Division's 2002 compliance report documented that no water was available for the permits in 1999, 2000, 2001 and 2002, yet the analysis showed available water during those years;

The analysis was not pro-rated to adjust for different drainage basin sizes at the gages used;

The analysis concluded that water is available under the permits when 35 cfs is available at the Montague gage, when it appears that water is not available unless the gage reading is 50 cfs. Adding the instream loss estimate of 5 to 15 cfs to the 35 cfs required for other rights equals 50 cfs;

And the analysis concluded that the two stream gages used show good data correlation to the authorized points of diversion without providing any substantiation for this conclusion.

The November 21 letter notes that the diversion works have been in place since permit issuance, but that the Division is unable to document that water is available to serve these permits and cannot document the quantity put to beneficial use.

December 16, 2005 Submittal by Permittee and Related Correspondence

Permittee's December 16, 2005 letter requests that licenses be issued, stating that water has been used pursuant to the permits, but without providing substantiation for this claim. Permittee claims that the watermaster is the person responsible for reporting water delivery, not Permittee, and the watermaster has failed to do so². There is no support for this proposition in the permits, the Water Code, or the rules and regulations of the Board. Permittee is responsible for submitting the required monitoring records.

Permits 19164 and 19165 extend beyond the irrigation season when the watermaster is available to measure diversions. Even were the Watermaster recording Permittee's diversions during the season covered by the adjudication, Permittee would nonetheless still have to record its diversions during the rest of the season authorized by the permits.

On December 29, 2005, the Division advised Permittee that the licensing unit would determine whether licenses could be issued for the permits or the permits should be revoked. (PT 28.)

Diversion Records

The Progress Reports submitted by Permittee for the years 1984, 1986, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1997, 1998, 1999, 2000 and 2002 for both permits indicate that water was diverted each month from February through November of each of these years. (see e.g. Progress Report for 1995; PT 19.) Permittee did not provide Progress Reports for any other years. The Progress Reports also indicate that water was used during years when Division staff confirmed during site inspections that no surplus water was available (see e.g. Progress Report for 2001) for diversion pursuant to the permits. (PT 19.) None of the reports list quantities diverted pursuant to the permits.

The Division's Licensing Unit advised Permittee by memorandum dated January 4, 2006 that the permits could not be licensed based on the lack of records documenting water diversion and use, as noted in the Division's June 13, 2000 and August 23, 2002 inspection reports. (PT 29.)

After finding none of the evidence necessary to demonstrate permit compliance and no records of water diversion and use during the development period, I recommended to the Assistant Deputy Director for Water Rights that the permit be revoked. The facts and information on which the proposed revocation is based are highlighted in my testimony, and set forth in the Notice of Proposed Revocation. (PT 20.)

Status of the Watershed

² The Division's June 13, 2000 Inspection Report point out that there have been times early in the irrigation season when diversions have been made under Permit 19164 and watermaster service had not yet begun for the season.

Failure by a permittee to install and regularly maintain a required device to measure flows is a significant issue in this watershed. The Shasta River is habitat for the endangered coho salmon (*Onchorhynchus kisutch*)³. There is suitable coho spawning and rearing habitat in the area of the diversions. (PT 21.) DFG has indicated that there is a high probability of take associated with extending the time to install measuring devices and develop a record of actual beneficial use. (Id.) The Shasta River decree did not set aside flows for the purpose of maintaining coho salmon. Permits 19164 and 19165 have a minimum flow of only 1 cfs, which the watermaster has indicated is needed to serve downstream prior rights. Due to lack of instream flows, fishery resources have declined to the point that the coho salmon in this stream are listed as endangered.

The water resources available to serve both existing water users and public trust resources are limited. In the Shasta River watershed, intense competition for resources led to the Adjudication of all claimed water rights in the system. Mounting environmental concerns and intense competition for water resources increase the need for the State Water Board to require timely project development, and for parties that do not demonstrate timely development, to promptly revoke unused rights. Failure to document beneficial use is tantamount to failure to demonstrate timely development.

Water Policy Supporting Proposed Revocation

Upholding the due diligence requirement supports the State Water Board's policy to apply water to beneficial use to the fullest extent possible. This holds true particularly in watersheds where there is a heavy demand for water and the supply is limited. The Shasta River has intense competition for water resources and the supply is limited to the point of being scarce under certain conditions. The disparity between demand and available supply throughout the State has increased in the last decade.

Permittee has had ample opportunity to document water diversion and use, but has not done so. The record does not contain any evidence of a valid excuse for failing to provide records of water diversion and use, after having been granted a four-year extension of time to do so. Permittee has indicated that the ranch records are in disarray because the property has changed hands in the past. Emmerson Investment became the permit holder of record on January 18, 1995. But changes in ownership of the property are incident to the person, not to the enterprise, and will generally not be accepted as good cause for delay. (Cal. Code Regs., tit. 23, § 844.) Emmerson's acquisition of the property in 1995 does not negate Emmerson's lack of diligence, nor that of the prior owners. Emmerson also did not avail itself of the opportunity to pursue an additional extension of time within which to document diversion and use pursuant to the permits.

If the water is not needed to serve the permits, it may be available for other purposes. Thus, the Division is reviewing whether permittees are exercising due diligence on a periodic basis to ensure that the limited available water resources are assigned to those persons who will timely develop their projects. Despite three inspections, the Division has been unable to document water diversion and use under Permits 19164 and 19165.

³ California Endangered Species Act, Fish and Game Code, §2050 et seq. Coho salmon were listed as threatened under the Federal Endangered Species Act effective June 5, 1997, and as a candidate under the California Endangered Species Act on April 27, 2001.

Cause for Revocation has been Established

Water Code section 1410 states that "[t]here shall be cause for revocation of a permit if the work is not commenced, prosecuted with due diligence, and completed or the water applied to the beneficial use as contemplated in the permit..." In the course of my investigation pursuant to the Permittee's request for licensing, I found that the Permittee has not documented water diversion and use as needed for licensing purposes and as required by Permits 19164 and 19165. The record shows that Permittee has been repeatedly advised of the need to document the quantity of water used under the permits, as distinct from any water used pursuant to other bases of right.

The authorized time period for Permittee to put water to beneficial use under these permits expired December 31, 1995. Permittee filed and then elected to withdraw petitions for extension of time for both permits, rather than (a) address the issues raised by the Department of Fish and Game in its protest of the petitions, and (b) fund preparation of a California Environmental Quality Act document for the petitions. Thus, Permittee is not seeking any additional time to provide the required diversion records and install the bypass flow measurement device. Permittee was aware of the lack of diversion records and the Division's resultant inability to license the project prior to withdrawing the time extension petitions. Permittee was also advised several times by the Division that revocation of the permits due to the failure to document beneficial use of water was likely, should the time extension petitions not be pursued.

As stated previously, when the Division is unable to offer a license for a project and there is no valid time extension petition pending, the alternative is revocation.

Allowing Emmerson to put these water rights in cold storage violates the State Water Board policy to apply water to beneficial use to the fullest extent possible. Therefore, the State Water Board should revoke the permits and declare the water subject to appropriation.