

II. ARGUMENT

A. The District presented substantial evidence that established good cause for granting the extension of time.

An extension of time for beginning construction work, for completion of construction work and for application of water to beneficial use may be extended by the board, for good cause shown. Wat. Code § 1398. Good cause for an extension of time may be demonstrated upon a satisfactory showing that (1) the extension is in the public interest; (2) due diligence has been exercised; (3) failure to comply with previous time requirements has been occasioned by obstacles which could not be reasonably avoided; and (4) that satisfactory progress will be made if an extension of time is granted. 23 Cal. Code Regs. § 844. The District presented substantial evidence at the June 22, 2007 hearing before the State Water Board that good cause exists to grant the District's request for extension of time. The evidence to support such extension is abundant and overwhelming. Such a grant is within the public interest as supported by the evidence presented at the hearing and summarized below.

1. The District Has Pursued Permit 10477 with Due Diligence and District's Need for an Extension of Time Has Been Occasioned By Obstacles That Could Not Be Reasonably Avoided

One might assume that as the District was granted this Permit in 1956, over fifty years ago, the District has not pursued this permit with due diligence; however, upon evaluating the facts and circumstances, it is clear that this District is in fact pursuing with due diligence the placing of this surface water to beneficial use. California Code of Regulations, Title 23, section 841 states in pertinent part "In determining the period of time to be allowed [to build diversion works and apply the water to full beneficial use], the particular conditions surrounding each case will govern. In every case, the matter must be pressed with due diligence considering the size of the project and the

obstacles to overcome” (23 Cal. Code Regs. § 841). The District has incurred and overcome substantial obstacles and is continuing to pursue Permit 10477 with due diligence.

The District diligently pursued the direction given to the District in Decision 858, which was the State decision that granted the District its temporary water right Permit 10477, while granting East Bay Municipal Utility District (“EBMUD”) a permanent and senior water right. In D- 858, the State Engineer directed the District to the American River for a more permanent water right supply. [NSJ-5, p. 2.] After D-858 was issued in 1956, the District did pursue an American River water right and filed an application with the State Board. [NSJ-5, p.2, 3; NSJ-22.] This application for American River water was denied and a water right was granted to the Bureau in D-893. Again as directed by the State Engineer in that Decision, the District pursued negotiations with the Bureau for a water supply contract. [NSJ-5, p.2, 3 4; NSJ-22.] The District signed numerous contracts for a more reliable American River water supply; however, these contracts failed to be executed by the Bureau. [NSJ-4, p.2; NSJ-22, p.1.] These fruitless negotiations by the District, which were directed by the State Decisions of D-858 and D-893, were costly and time consuming, and if they had been successful would have assisted the District to establish facilities and mechanisms to utilize both American River water and Mokelumne River water pursuant to Permit 10477.

Simultaneously with pursuing a more permanent American River water supply, the District negotiated with EBMUD in the 1960s for an agreement to store and utilize its temporary water right for Mokelumne River water pursuant to Permit 10477. An agreement with EBMUD, which was needed in order for the District to store, utilize and receive its water pursuant to Permit 10477, was entered into by the District with EBMUD in 1963. [NSJ-4, p.4., NSJ-20.] This was just seven years after the temporary water right was granted by D- 858. The District was demonstrating due diligence and overcoming obstacles in order to place the water to beneficial use.

In addition the District had lengthy negotiations regarding a proposed agreement with EBMUD to withdraw its Mokelumne River water from EBMUD's existing aqueduct that diverts water from the Mokelumne River and which travels through the District on its way to delivering water to EBMUD customers. This negotiated agreement would have efficiently delivered water to users within the District; however the agreement was prohibited due to objections of environmental groups. [NSJ-4, p.5.]

In order to place its water right to beneficial use the District has installed diversion facilities from the Mokelumne River and distribution facilities. The Mokelumne River diversion facilities involve four pumps on the south side of the River and three pumps on the north side of the River. [NSJ-4, p. 1.]

The District receives Mokelumne River water pursuant to Permit 10477 infrequently as the District's water is surplus water to the needs of EBMUD under Application 13156 and is limited to 20,000 acre feet per annum. The District's water right is also temporary, until such time as it is needed by EBMUD. This intermittent supply, including many years in which the District received no water supply (11 out of 48 years) [NSJ-59], has made it difficult for the District to obtain farmers along the District's distribution system to incur the costs to develop dual water delivery systems to utilize the undependable surface water when it is available and utilize groundwater when surface water is not available. [NSJ-6, p.2; NSJ-7, p.1; NSJ-8, p.1; NSJ-9, p.2.]

Prior to the 1976 drought, within 20 years since the initial Permit for intermittent water was granted to the District and within 13 years since the agreement for storage and use was obtained from EBMUD, approximately 120 landowners relied on surface water as their only source of water. [NSJ-4, p. 2. para. 4.] The State Water Board's and District's records indicate in 1972-73 the District diverted 9,486 acre feet, almost half of its water right. [NSJ-59.] Until the 1976 drought, the District

was successful in developing the infrastructure and identifying willing farmers to receive and utilize its surface water supply. At this time, many of these farmers locked off their groundwater pumping facilities in order to avoid the additional costs of ongoing stand-by charges to PG&E. [NSJ-4., p. 2.] After this two year drought the District's use decreased by approximately 2000 acre feet. This is reasonable given the impact that the farmer's experienced due to their inability to receive surface water, and water their crops, due to the drought years.

The District's ability to utilize its surface water supply, was again impacted by the lengthy drought from 1987-1992. This was six additional years in which no water was available to the District. [NSJ-4, p. 3.] This resulted in additional farmers never returning to surface water irrigation after the drought ended and in addition the District's distribution system, as well as the individual farmer's systems, needed maintenance, repairs and replacement after many years of disuse. [NSJ-8, NSJ-9.]. These drought conditions greatly impacted the District's ability to place its water to beneficial use and were obstacles beyond the District's control.

In 1992 when the 6 year drought ended and the District could have focused its efforts on increasing deliveries to farmers and users within the District, the District was faced with another obstacle and possible limitation on its right to take Mokelumne River water. In 1992 the State Water Board held the Mokelumne River hearing which placed the District's water right at issue. During this proceeding the State Water Board had the authority to reduce or further condition the District's water right. [NSJ-42.] The County and the District were fearful that in fact the District's water right would be impacted and possibly reduced. [NSJ-11, p. 2.]

A formal decision of the 1992 Mokelumne River hearing was never issued by the State Water Board and the matter was not officially dismissed until 2001. [NSJ-43; NSJ-44.] This resulted in another nine year period in which the District's right to water pursuant to its permit was

uncertain. It would have been unreasonable for the District and its farmers to invest substantial financial resources to increase its delivery capacity when at anytime a decision on the Mokelumne River hearing could have further precluded or limited the District's ability to deliver water. This was an obstacle that was beyond the District's control.

2. **District Can Show it Will Make Satisfactory Progress if Extension of Time is Granted**

The District has historically struggled with limited finances and, as the State Water Board is well aware, water projects are expensive. However, the District's finances are going to change. In April of this year, the District successfully held a Proposition 218 election and imposed a groundwater use charge. [NSJ-6, p.3; NSJ-7] As indicated in the record by testimony from District board members the District and its farmers are excited about the ability of the District to do things in the future. "The District's imposition of a groundwater charge has provided life blood back into our community." [NSJ-7, p.2.] This groundwater charge is estimated to generate additional revenue to the District in the amount of approximately \$820,000 a year. [NSJ-2, para. 28.]

The District now has the resources and is prepared to further develop its facilities to utilize the District's surface water. The District purposes utilizing its surface water in two ways: (1) by use of surface water by farmers which will be encouraged by incentive programs offered by the District [NSJ-7, p2; NSJ-8, p2; NSJ- 9, p.2] and by developing recharge projects [NSJ-2, para.30-32; NSJ-7, p.2]. The District and the County have engaged in considerable efforts to develop and participate in recharge projects. [NSJ-1, NSJ-2.] The proposed recharge projects will allow the District to utilize its surface water without the risks and reluctance associated with farmers relying upon this intermittent water supply, which can result in damage to crops and additional operation costs in order to operate dual water delivery systems. Recharge projects will also be of great benefit to the groundwater basin, which is critically overdrafted.

3. Granting the Extension to the District is in the Public Interest.

It is vitally important that the County receive surface water supplies to supplement its significant reliance on groundwater as the County's groundwater basin is critically overdrafted. In 1980, the groundwater basin underlying the eastern part of the County was identified in the California Department of Water Resources Bulletin 118-80 as one subject to "critical conditions of overdraft." [NSJ-14.] The County's historical and continual reliance on groundwater has resulted in significant overdraft of the groundwater basin of up to approximately 150,000 acre-feet annually, and is projected to increase to a deficit of approximately 175,000 acre-feet annually, if nothing is done to correct this problem. Additionally, as a byproduct of the overdraft conditions, salt water has intruded into the groundwater basin from an ancient saline deposit underlying the Delta. Projections indicate that the migration of the saline front is approximately 150 to 250 feet a year. Continued pumping of groundwater and deterioration of water quality in the basin threaten the long-term viability of groundwater use within the County. [NSJ-2, p. 1.]

Curtailing urban development is not a solution to this overdraft problem. As discussed at the public hearing, the County has a policy that new development does not increase the use of groundwater (Transcript p. 74.) The City of Stockton requires development to limit future groundwater use to below the estimated safe yield. [NSJ 12, p. 2.] In addition, the County is essentially fully developed and water use demands are similar for agricultural or urban development purposes. (Transcript p. 74.)

Due to this condition of overdraft every drop of surface water that can be put to beneficial use within the Eastern San Joaquin Basin is critical to the long term recovery and sustainability of the Basin and the County. This includes the surface water right that North San Joaquin has pursuant

to Permit 10477 and for which the District intends to develop provided the State Water Board grants the District an extension of time.

Despite the diligent and numerous attempts by the County and water interests within the County to obtain surface water rights the surface water used within the County is minimal. This is due in part to past decisions by the predecessor to the State Water Board in Decisions 858 and 893, which denied the prior filed applications of San Joaquin County entities in favor of EBMUD and the Bureau of Reclamation. (See NSJ-2, p. 4, NSJ-5, p.2.) The limited surface water that the County is entitled to use is either interim and infrequent (Stanislaus River water)[NSJ-2, p. 4] or temporary and periodic (North San Joaquin's water). This has not assisted with the efforts to reduce the demands on the critically overdrafted groundwater basin. The limited amount of surface water the County does receive needs to be protected and continue so as not to place further demands on the already overdrafted groundwater basin.

The granting of the District's extension of time will not preclude any other interested party from receiving or utilizing its water. If Mokelumne River water is not utilized by the District pursuant to Permit 10477, it is not otherwise being put to beneficial use by others. EBMUD is not injured as the District's water right is junior to EBMUD. In addition, EBMUD has requested a time extension to put to beneficial use its water under its more senior water right. EBMUD's water right permit time extension is pending before the State Water Board. [NSJ-1, para.4.] The current objections by the Department of Fish and Game are misguided and inconsistent with prior, recent State Water Board decisions, as D 1641 and the approval of the FERC agreement satisfied the fish and flow requirements for the Mokelumne River. [NSJ-44; NSJ -45, p. 63.] There are no junior water right holders on the River and the County's pending water right application 29835 would be the only application or junior permit that would benefit from such failure to grant the District's

extension and the County supports the District's request for additional time.

These public interest factors support the issuance of the time extension to the District and the evidence demonstrates that since Permit 10477 was issued the District has been diligent in its efforts to place the water to beneficial use overcoming substantial obstacles. In addition, the District's new groundwater charge provides the financial resources to develop and implement the projects planned by the District to place its full 20,000 acre feet of surface water supply to beneficial use. This evidence supports the granting of the District's time extension for Permit 10477 by the State Water Board

B. WR 2006-0018-DWR should be modified to allow the District an Extension of Time

The County requests that WR 2006-0018 be amended to provide the District ten years from the date of an order by the State Water Board to place its entire amount of water pursuant to Permit 10477 to beneficial use and the order should be amended to allow the District ten years, rather than two years, to add a point of diversion to construct facilities (item 1.a. of the Order regarding Term 2).

Other modifications should be granted to the Permit Terms consistent with the requests of the District.

III. CONCLUSION

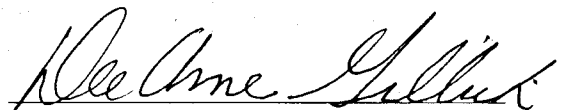
Hearing Officer, Arthur G. Baggett, Jr., as Chair of the State Water Board indicated to the District by letter dated May 14, 2003, that "The SWRCB believes that opportunities exist for NSJWCD to use surface and groundwater conjunctively to alleviate the groundwater overdraft that exists in San Joaquin County." [NSJ-33, p. 3.] **State Water Board Member Baggett's letter concludes as follows: "Because of the significant investments NSJWCD has made in surface water diversion and delivery facilities, as well as in groundwater recharge facilities, it would seem prudent for the district to divert and beneficially use as much water as possible under**

permit 10477 . . .” [NSJ-33, p.4.] The County respectfully requests that the State Water Board allow the District to do just that and grant the District’s extension of time for a period of ten years from the State Water Board’s order in this proceeding.

Dated: August 7, 2007

Respectfully Submitted,

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