

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

DIVISION OF WATER RIGHTS

DIVISION DECISION 2013-0001

In the Matter of License 7979 (Application 20301) of

Irv Leen

SOURCE: Unnamed Stream tributary to Dry Creek

COUNTY: Butte

**DECISION APPROVING PETITION TO CHANGE POINT OF DIVERSION AND PLACE OF
USE FOR LICENSE 7979**

BY THE DEPUTY DIRECTOR FOR WATER RIGHTS:

1.0 INTRODUCTION

Irv Leen (Licensee or Mr. Leen) seeks to change the place of use and point of diversion for water right License 7979 (Project). The petition to change the place of use and point of diversion was noticed by the State Water Resources Control Board (State Water Board or Board) Division of Water Rights (Division) and protested by the Department of Fish and Wildlife¹ (DFW) and the Butte County District Attorney (District Attorney). The parties were unable to resolve their differences related to the requested change.

The Division held a field investigation on September 11, 2012. All interested parties attended the field investigation and submitted evidence in support of their arguments. Based on the evidence obtained at the field investigation and all other evidence submitted into the

¹ At the time the protest was filed, the California Department of Fish and Wildlife was called the California Department of Fish and Game. Effective January 1, 2013, the California Department of Fish and Game's name was changed to Department of Fish and Wildlife. For clarity, the agency will be referred to as the Department of Fish and Wildlife throughout this document. Until the California Water Code and Fish and Game code are updated to reflect the change, references to code continue to refer to the Department of Fish and Game.

record, the Division approves Mr. Leen's petition to change License 7979 subject to the terms and conditions of this Decision.

2.0 LEGAL BACKGROUND

An appropriative water right authorizes a specific diversion and use of water. (Wat. Code § 1700.) In order to change the point of diversion, place of use, or purpose of use from that which is specified in the permit or license, a petition for change must be filed. (Wat. Code §§ 1701-1701.1.) A petition for change must meet certain requirements, and the Board may request additional information from the petitioner in conjunction with the requested change(s). (Wat. Code § 1701.3.) The Board cannot approve the change without first determining whether the change will result in injury to any other legal user of the water involved. (Wat. Code § 1702.) The Board may also consider information necessary to show that the change will comply with any applicable requirements of the Fish and Game Code the federal Endangered Species Act, and the California Environmental Quality Act (CEQA). (Wat. Code § 1701.3.) In all cases, notice of the requested change must be provided to the Department of Fish and Game. (Wat. Code § 1703.)

After the Board provides notice of the petition, any interested person may file a written protest against approval of the petition. (Wat. Code § 1703.1.) If the protest meets the stated requirements in Water Code section 1703.2, it is considered an active protest. The Water Code provides that the protestant(s) and petitioner make a good faith effort to resolve the protest. (Wat. Code § 1703.4.) If the protest issues cannot be resolved, for minor requested changes that involve diversions of less than 3 cubic feet per second (cfs) or storage amounts of less than 200 acre-feet, the Division must hold a field investigation to resolve the protested issues. (Wat. Code § 1704.1.) The parties may submit information before, during or after the investigation to support their positions. Following the investigation, the Division issues an order on the petition for change unless the Board determines additional adjudicative proceedings should be conducted. (Wat. Code § 1704.3.)

3.0 FACTUAL BACKGROUND

License 7979 was issued in 1967 and authorizes direct diversion of 0.38 cubic foot per second from about March 1 to about November 1 of each year. The license authorizes use of water from an unnamed stream to irrigate 22 acres, 17 acres within NW ¼ of NE ¼ of Section 10 and 5 acres within NE ¼ of NE ¼ of Section 10, T20N, R3W, MDB&M. The point of diversion described in the license is located South 800 feet and West 1,250 feet from NE corner of Section 10, T20N, R3E, MDB&M. The present owner of the license is Irv Leen. The last Report of Licensee on file that documents use of water under the license was submitted by a prior owner in 1985. In that report, which covers years 1982, 1983 and 1984, the prior owner listed uses as pasture irrigation, stockwatering and fishing. The report indicated presence of a reservoir. The previous report, filed by the same owner for years 1979, 1980 and 1981 also indicated a reservoir and listed uses as pasture irrigation, stockwatering, and fishing. The prior reports filed up to 1975 indicated there was not a reservoir on the property. The reports stated that water was used for pasture irrigation and stockwatering. The most recent report was filed electronically by Mr. Leen in 2011 to document water use for 2008. In that report, Mr. Leen reports that no water has been used and that no water has been diverted due to legal action. Mr. Leen states that this has been an issue for the last eight years.

On February 6, 2007, at the request of Mr. Leen, the Division conducted a licensing compliance inspection. Based on assertions and data collected at the inspection, the Division recommended a correction to the license to change the point of diversion and place of use. Based on its determination that the original license incorrectly described the place of use and point of diversion, the Division issued a corrected license on January 8, 2008. The Division included standard terms related to the continuing authority of the State Water Board, the protection of endangered species, and the need for a DFW stream alteration agreement if stream alteration work occurred. After issuance of the corrected license, the Division was contacted by the District Attorney who asserted that the point of diversion and place of use were correctly described in the original license and should not have been subject to a ministerial amendment. On February 14, 2008, the Division contacted Mr. Leen via letter to describe the photographic and other evidence that suggested the correction may not have been warranted. Mr. Leen was provided 30 days to show that the point of diversion had not moved, and to support the claimed irrigation use on the property. In a follow-up letter sent by Mr. Leen's

attorney, she asserted that the Division's correction to the license should stand, but in the event that it did not, Mr. Leen was ready to submit a petition to change the license terms and would comply with all CEQA requirements.

On April 14, 2008, the Division determined that based on a review of historical records and photographs, both those provided by the District Attorney and independently obtained from CalTrans, that the irrigation works identified by Mr. Leen did not exist at the time the license was issued in 1967. The Division determined the corrections to the license were made in error, the point of diversion and place of use were correctly described in the 1967 license and to change the point of diversion and place of use Mr. Leen would have to file a change petition. The Division did not recommend revocation of the license for non-use.

On June 9, 2008, Mr. Leen filed a petition to change the license to move the 22 acre authorized place of use to a different location: 5.7 acre within the NW ¼ of NE ¼ within Section 10, and 16.3 acres within the NE ¼ of NE ¼ of Section 10, T20N, R3W, MDB&M. Mr. Leen also requested a change in the location of the point of diversion. The requested diversion point would change to California Coordinate System of 1983, Zone 2, North 2,347,523 feet and East 6,670,067 feet, being within NE ¼ of NE ¼ of Section 10, T20N, R3E, MDB&M.

The Division accepted the petition to change the licensed point of diversion and place of use on June 16, 2008. In its reply to Mr. Leen, the Division noted that approval was a discretionary action which could result in modifications to the license and could require substantial time and cost, due in part, to the public notice and protest process and any necessary compliance with CEQA.

The Division publicly noticed the petition on June 4, 2009. Protests were filed by DFW and the District Attorney on July 6, 2009. The protests were in compliance with Water Code section 1703.2 and were accepted by the Division on July 9, 2009. On August 6, 2009, Mr. Leen's attorney responded to the protests submitted by DFW and the District Attorney. The Division sent a letter to the protestants on August 13, 2009 to inquire whether the response by Mr. Leen resolved the protestants concerns. On August 27, 2009, by letter, the District Attorney stated its core protest issue was unresolved. On September 10, 2009, DFW responded by letter and stated that none of its protest issues were resolved.

On December 17, 2009, the Division contacted Mr. Leen, to inform him that the protest issues were unresolved and requested that Mr. Leen provide any information that was pertinent to the protestants' claims. On February 15, 2010, Mr. Leen's attorney responded confirming that the Division had granted his request to extend the deadline to respond to the protest issues. Mr. Leen's attorney advised the Division that Mr. Leen was involved in litigation relating to the stream on the Leen property and charges brought by the District Attorney against Mr. Leen were pending in Butte County Superior Court. Mr. Leen's attorney advised the Division that a response would be submitted to the Division by June 11, 2010.²

By letter dated February 18, 2011, Mr. Leen's attorney informed the Division that a trial date for March 7, 2011, was set in Butte County for the charges brought by the District Attorney against Mr. Leen. The State Water Board was not a party to, or participant in the trial. Mr. Leen's attorney did issue a subpoena for State Water Board staff to be available to testify at Mr. Leen's trial. When staff appeared, Mr. Leen's attorney informed him his testimony was unnecessary and he was dismissed. On March 11, 2011, Mr. Leen's attorney, by letter, informed the Division that a jury had acquitted Mr. Leen of all charges.

The Division was copied on a May 5, 2011, letter sent from Mr. Leen's attorney to the District Attorney. The letter states that Mr. Leen intends to continue with the change petition and requests that the District Attorney reconsider its protest. By email, on May 9, 2011, the District Attorney contacted the Division to respond to the May 5, 2011 letter. The District Attorney disagreed with the characterization of the discussion with Mr. Leen's attorney and reiterated his interest in continuing as a protestant in the petition process. The Division is unaware of any further negotiations or attempts at negotiation that may have occurred between Mr. Leen and the District Attorney. On November 17, 2011, the Division issued a notice to the Leen's notifying him that a Report of Licensee had not been received in many years and a current report was due. (Cal. Code Regs. tit. 23, § 847.)³ Mr. Leen filed a Report of Licensee for 2008 on December 9, 2011.

On June 20, 2012, the Division contacted Mr. Leen's attorney to schedule a field investigation in order to respond to the unresolved protests and continue to process the change

² The record does not indicate activity between June 2010 and February 2011.

³ The notice was first mailed to Mr. Leen on February 28, 2011.

petition. A field investigation was scheduled for September 11, 2012. Prior to the investigation, the District Attorney contacted the Division. By email, the District Attorney stated that an operator working for Mr. Leen was convicted of a Fish and Game Code section 1603 violation for alteration of the stream that is the subject of the change petition and District Attorney's protest. The District Attorney requested that the Division's "baseline evaluation" of the Project reflect this prior alteration. On September 10, 2012, a representative for the District Attorney's office submitted a letter to the Division describing the site and the existing license terms. Also included were aerial maps showing the point of diversion identified in the license and the proposed point of diversion. The letter restated the District Attorney's opposition to the requested changes absent Mr. Leen meeting certain requirements.

4.0 PROTEST ISSUES

4.1 DFW:

In its July 2009 protest, DFW raised the following issues in response to the Leens' requested changes:

- a. Approving the change would not best serve the public interest and would be counter to the Board's public trust responsibilities;
 - b. Approving the change may be contrary to law in that approval of the petition may prevent a remedy pursuant to a Butte County Superior Court proceeding;
 - c. Concerns over the protection of riparian habitat and riparian habitat dependent species. The Project may result in direct and cumulative impacts to the resources of the Dry Creek watershed by affecting instream flow, water quality, temperature, and availability that is required to maintain resources in the stream and watershed; and
 - d. Concerns related to how the Leens described baseline conditions for CEQA purposes in the change petition. DFW stated that the baseline condition for analysis of potential impacts of the proposed Project under CEQA is not an illegal condition, but must instead be the recognized environmental setting as it existed prior to violations of the Water Code and
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Fish and Game Code. DFW asserted that the State Water Board's discretionary approval of the petition would have significant impacts if the Board approves the Project "as it exists". DFW asserted that accepting existing conditions as the baseline for CEQA could result in inadequate CEQA review and associated environmental mitigation. DFW asserted that the "baseline" for CEQA review should be pre-Project conditions (the conditions of the existing license).

4.2 District Attorney:

The District Attorney alleged in its protest that approval of the change petition was contrary to law because the water right lapsed as a matter of law after March 1990 due to five or more years of non-use. The District Attorney points out that the last report of use was filed in March 1985, and that any unpermitted use of water could not be the basis for continued beneficial use of a water right. The District Attorney raised additional issues in its September 10, 2012 correspondence to the Division. The letter referenced effects on groundwater recharge and requested additional studies to protect environmental resources prior to any Division approval of the requested change.

5.0 FIELD INVESTIGATION

On August 20, 2012 the Division contacted all parties and issued an electronic notice of a field investigation. A field investigation took place on September 11, 2012. The following parties participated in the field investigation:

Representing Licensee: Irv Leen, Marsha Burch (counsel), Juna Kim (counsel)

Representing DFW: Mary Lisa Lynch, Lauren Mulloy

Representing District Attorney: John Lane

Representing Division: Katherine Mrowka, Kathryn Gaffney, Jane Ling

Representing State Water Board, Office of Chief Counsel: Nathan Jacobsen

The primary difference between the project as licensed, and Project that is the subject of the petition, is that all facilities (diversion point and irrigated area) for which authorization is sought are located upstream of the originally authorized locations. The revised point of diversion is also at a higher elevation and would utilize water from an onstream reservoir.

Although not part of the original license, a reservoir currently exists near the petitioned point of diversion. The construction date of the reservoir is unknown, but as mentioned above, based on progress reports submitted by the prior owners, it appears to have been in existence since at least 1979. The reservoir has an outlet valve and spillway- although it appears both have been unused for many years and are not operational. Under the proposed Project, water would be diverted from the unnamed stream, regulated through the reservoir, and directed into the "Highline Ditch". The Highline Ditch is a manmade ditch running along the hill contours above the natural stream. Water entering the Highline Ditch would be distributed for passive flood irrigation of fields via existing 4-inch pipe outlets located along the ditch. The 22-acre revised place of use is downslope of the pipe outlets and is situated where it could receive the irrigation water via gravity.

According to Mr. Leen, and based on staff observations and evidence submitted, flow in the unnamed stream during the license diversion period (May-October) largely results from irrigation tailwater from upstream properties that obtain imported Feather River water from the Miocene Canal. Mr. Leen indicated that a spring on the North branch of the unnamed stream contributes flow to the stream through the Leen's property.⁴ When upstream irrigation is not occurring, Mr. Leen indicated that the flow in the unnamed stream lessens. After flowing in the unnamed stream through the Leen property, the water continues downstream to Dry Creek during certain wetter portions of the year when the stream collects additional precipitation runoff. Mr. Leen indicated that during the summer months, the unnamed stream flow percolates into the ground and surface flow does not continue to Dry Creek. This was documented by an August 1988 aerial map viewed during the field investigation. It is unknown whether the stream flows in an underground channel and reaches Dry creek during these periods.

In its current configuration, water is diverted from the unnamed stream into an onstream reservoir. Mr. Leen indicated that the dam was built in the 1970s and the reservoir deepened in the early 1980s. The capacity of the reservoir is unknown, but Mr. Leen indicated the capacity has been substantially lessened since 2002 due to siltation. Water exits the reservoir either through an outlet valve or a spillway. The outlet valve, if operational, can direct water into the Highline Ditch, which follows a higher elevation pathway, or a lower elevation ditch called the

⁴ Significant flow was observed entering the stream from a side channel located just downstream from the onstream reservoir. The source of this flow was not determined.

main ditch. During the field investigation, native riparian habitat was absent from the Highline Ditch. Minimal habitat consisting of three trees was observed near the lower ditch. Other than the trees near the lower ditch, the habitat near both the Highline Ditch and the lower ditch was grassland. A culvert that originally served as the spillway at the dam had washed out and is now located in the unnamed stream downstream of the dam. The culvert is about 20 feet long and 4 feet wide. Mr. Leen indicated that the dam and culvert washed out in 2002. Visible evidence of the prior dam breach was observed. Mr. Leen indicated that he had initiated dam repairs, but ceased work in the stream when the District Attorney filed charges. Repairs are incomplete and the spillway has not been restored.

Mr. Leen indicated that during rainfall events, the Highline Ditch intercepts sheet flow from upslope lands, the ditch contains visible flow, and the water eventually discharges through the existing 4-inch pipelines or existing breeches in the ditch. The prior owner breeched the ditch in places to provide water to the pasturage downslope of the ditch. Division staff observed that any water used for flood irrigation of fields downslope of the Highline Ditch that does not percolate into the ground would return to the unnamed stream.

Mr. Lane, the District Attorney's representative, commented that the natural stream course is in a groundwater recharge area and he expressed concern over how the Project may impact recharge in the area. Field investigation participants discussed whether there has been a loss of riparian vegetation due to movement of the point of diversion to the reservoir site and historical work that occurred in the stream channel to channelize its flow. The discussion involved the width of riparian vegetation between the licensed point of diversion and the proposed revised point of diversion. DFW indicated that based on photographic evidence, from 1998 to 2011, the width of the unnamed stream channel became more confined resulting in a decrease in the width of the riparian vegetation corridor. DFW's November 13, 2012 letter, submitted after the investigation, included two aerial photos of the Project site. The 1998 aerial photo shows a more expansive riparian area than the 2011 aerial photo.

Mr. Leen indicated that there had been beaver dams in the unnamed stream in the past, which resulted in water spilling over the land and supporting a larger riparian zone. During the field investigation, participants observed what appeared to be evidence of beaver marks on a tree. Mr. Leen produced aerial photographs from 1947, 1984, 1988, and 1999 for the group to view and stated that the photos document that in: (a) 1947 – the lateral extent of riparian

vegetation was less than in the 1999 aerial; (b) 1984 – the unnamed stream did not flow into Dry Creek at the time the photo was taken, the watercourse was narrow, with limited riparian vegetation; (c) August 1988, the watercourse did not flow into Dry Creek. The riparian area was relatively narrow, and (d) the 1999 aerial showed the largest riparian area. Mr. Leen stated that a past fire destroyed some of the riparian trees, but did not indicate when the fire occurred.

Ms. Burch responded to DFW's assertion that the riparian area contracted from 2003 to 2011, stating that the earlier, wider channel vegetation area may have been assisted by irrigation water. According to Ms. Burch, no irrigation has occurred since 2003.

During the field investigation, Mr. Leen discussed his operational plans if the change petition is approved. Mr. Leen stated that he wanted to correctly size the spillway pipe to prevent another "blow out" and to repair the spillway. He also stated that he wanted to dredge the reservoir to restore its original capacity. The reservoir diversion works are also old and may require replacement. During the winter months, Mr. Leen indicated that all flow into the reservoir would be bypassed through the spillway because he is not authorized to divert during the winter months. DFW staff inquired whether reservoir water would be channeled into the pasture area during the winter. Mr. Leen stated that water from the reservoir would not be diverted to the pasture because the pasture area is already very wet in winter. Division staff noted that uncontrolled winter sheet flow runoff that enters the Highline Ditch currently flows out of the 4-inch ditch pipes and through breaches in the ditch onto the pasture. DFW staff inquired what type of maintenance Mr. Leen envisioned when the Project became operational. Mr. Leen indicated that he would have to clean out the facilities periodically.

6.0 COMMENTS FILED AFTER FIELD INVESTIGATION

At the conclusion of the field investigation, parties were afforded a 60-day period to submit additional information for the Division's consideration. Parties were also encouraged to negotiate resolution of the protests. Division staff committed to providing information regarding the status of its CEQA determination related to the petition.

6.1 DFW:

On November 13, 2012, DFW informed the Division that its protest could be considered dismissed if the following conditions were included in any approval of the petition:

- a. Licensee shall take all necessary actions to ensure that water is not diverted from the unnamed stream outside the licensed season of diversion and the reservoir is not used for storage, including modifying the dam to allow water to flow from the reservoir to the unnamed stream below the dam.
- b. Licensee shall have a licensed engineer confirm to the Division that the dam is safe in accordance with recognized engineering standards before again diverting water into Highline Ditch, and if it is not safe, take all necessary actions to make it safe.
- c. Within 30 days of a decision by the Division to approve the change petition, Licensee shall comply with Fish and Game Code Section 1602 by submitting a notification to DFW that covers the diversion of water from the unnamed stream into Highline Ditch during the licensed season of diversion.
- d. Licensee shall comply with Fish and Game Code Section 1602 before undertaking any other activity subject to Section 1602. Such activities include work to repair the dam or control valve.
- e. Licensee shall allow sufficient water at all times to pass over, around, or through the dam to protect fish and other public trust resources below the dam.
- f. Licensee shall not prune, trim, cut, remove or otherwise take any actions that adversely affect any vegetation that exists or might emerge within the riparian corridor of the unnamed stream above and below the reservoir, which also includes the stream segment known as "Tailwater Ditch" without first obtaining all necessary permits.

6.2 District Attorney:

On October 10, 2012, the District Attorney's office requested that the following analyses be performed for the Project:

- a. biological assessment with surveys for botany, giant garter snake, and valley elderberry longhorn beetle;
- b. cultural resource survey;
- c. wetland delineation;
- d. hydrology study with analysis of how the Project will impact groundwater recharge and groundwater quality; and
- e. water availability analysis.

7.0 DISCUSSION AND FINDINGS

The purpose of the field investigation was to evaluate the requested changes to the Leen license and to determine if the change should be approved in light of the protests received. Based on the evidence submitted, and result of the investigation, the Division finds that the change should be approved subject to conditions.

The evidence suggests that the riparian corridor along the unnamed stream has alternately expanded and contracted over time. In addition to the aerial photos referenced above that were presented during the field investigation, the Division's files include aerial photos provided by the District Attorney's office in February of 2008 and September 2012, and photographs obtained from CalTrans. Based on the aerial photos from the file and from the field investigation, the Division concludes that in general, the riparian corridor was smaller in the 1940s, more expansive in the 1970s, smaller in the 1980s, more expansive in the 1990s and smaller in the 2000s. DFW and the District Attorney maintain that recent changes in the riparian belt are due to manmade forces, such as vegetative removal and activities in and around the stream. Conflicting evidence was presented to explain the change in riparian vegetation and stream conditions. Mr. Leen claimed a fire had destroyed riparian vegetation and his attorney claimed a lack of irrigation may have led to decline of the riparian belt. DFW and the District Attorney assert that activities by Mr. Leen and others altered the stream and riparian corridor.

The causes of the stream alteration and riparian changes need not be fully resolved in this Decision, the issue before the Division is whether to approve the change and if so, with

what conditions. In its approval of the change, the Division has evaluated the Project operations, the protestants' claims and the expected impacts of approving the change.

During the field investigation, Mr. Leen indicated that he may dredge the reservoir, repair the spillway and replace the reservoir outlet valve. This Decision does not address reservoir dredging, spillway repair or work on the reservoir outlet valve. Prior to any construction activity in or around the stream, it is Mr. Leen's responsibility to consult with agencies having regulatory authority over activities not specifically authorized by this Decision. Entities which would need to be contacted for the above-mentioned activities include, but are not limited to, DFW and the Central Valley Regional Water Quality Control Board (Central Valley Water Board) to ensure that any dredging project or reservoir work does not adversely affect stream resources or result in unregulated sediment discharge to a waterway. As directed by the agencies, Mr. Leen may need to obtain any necessary permits, including but not limited to: 1) a Streambed Alteration Agreement from DFW; (2) Clean Water Act section 401 Certification from the Central Valley Water Board; and (3) a Clean Water Act section 404 Permit from the United States Army Corps of Engineers.

Although the reservoir was not in existence at the time of licensing, the reservoir may be used for purposes of regulating flow during the authorized diversion season for License 7979. The license does not authorize seasonal storage of water. Should the Licensee plan to use the reservoir for seasonal storage, the Licensee would have to request and receive the Division's approval for an appropriative water right for storage, or request that a quantity of direct diversion sufficient to cover the requested seasonal storage of water be converted to storage. Conversion of direct diversion to storage can be requested by filing a petition for change with the Division.

Licensee is required by the conditions of License 7979 to comply with diversion season limits and operate the Project in a manner which precludes seasonal storage. As a condition of any new or amended water right, the Division requires a compliance plan to document how the Licensee will operate in accordance with the water right. The following term will be included in the amended license:

Within 60 days of issuance of the amended license, Licensee shall submit a compliance plan, subject to review, amendment and approval of the Deputy Director for Water

Rights, documenting how the Licensee's facilities will be operated to comply with the conditions of the license. Licensee is not authorized to divert water unless a timely, acceptable compliance plan is submitted and approved. Licensee shall comply with the approved compliance plan.

DFW requests that the Licensee have a licensed engineer confirm to the Division that the dam is safe in accordance with recognized engineering standards before diverting water into Highline Ditch, and if it is not safe, take all necessary actions to make it safe. Based on the size of the dam, the issue of dam safety is subject to County regulation. The State Water Board has regulatory oversight over water quality issues, but lacks regulatory oversight regarding dam safety. Accordingly, this issue is outside the State Water Board's permitting authority. As noted above, Licensee will be required to determine whether any additional permits from other agencies (including a County grading permit) are required for this Project.

With respect to Fish and Game Code section 1602, and the need to obtain a streambed alteration agreement prior to taking action subject to section 1602, the following condition reflects the Licensee's responsibility to comply with statutory requirements contained in the Fish and Game Code. This includes work to repair the dam, spillway or control valve (point of diversion). As noted above, rehabilitation of Project facilities may also trigger the need for Licensee to obtain authorization from other governmental agencies with regulatory authority over such actions. For instance, dam repair may require a Water Quality section 401 permit and federal Army Corps of Engineers (Army Corps) section 404 permit. To ensure that Licensee is aware of the need to obtain all necessary approvals, the following condition will be included in the amended license. This condition is included in all new and amended water rights currently issued:

No water shall be diverted under this right, and no construction related to such diversion shall commence, until right holder obtains all necessary permits or other approvals required by other agencies. If an amended right is issued, no new facilities shall be utilized, nor shall the amount of water diverted increase beyond the maximum amount diverted during the previously authorized development schedule, until right holder complies with the requirements of this term.

Within 90 days of the issuance of this right or any subsequent amendment, right holder shall prepare and submit to the Division of Water Rights a list of, or provide information that shows proof of attempts to solicit information regarding the need for, permits or approvals that may be required for the project. At a minimum, right holder shall provide a list or other information pertaining to whether any of the following permits or approvals are required: (1) lake or streambed alteration agreement with the Department of Fish and Wildlife (Fish & G. Code, § 1600 et seq.); (2) Department of Water Resources, Division of Safety of Dams approval (Wat. Code, § 6002.); (3) Regional Water Quality Control Board Waste Discharge Requirements (Wat. Code, § 13260 et seq.); (4) U.S. Army Corps of Engineers Clean Water Act section 404 permit (33 U.S.C. § 1344.); or, (5) local grading permits.

Right holder shall, within 30 days of issuance of all permits, approvals or waivers, transmit copies to the Division of Water Rights.

Both during the field investigation and prior to the investigation, DFW expressed concern about fish and other public trust resources that may be located downstream of the dam. At the field investigation staff noted the presence of fish in the stream below the reservoir and breached spillway. Compliance with Fish and Game Code section 5937 is a standard condition included in all water rights for projects which may dam, obstruct, or otherwise impede the natural streamflow. Accordingly, the following condition will be included in the amended license:

In compliance with section 5937 of the Fish and Game Code, if storage or diversion of water authorized by this license is by means of a dam, licensee shall allow sufficient water at all times to pass through a fishway or, in the absence of a fishway, allow sufficient water to pass over, around, or through the dam to keep in good condition any fish that may be planted or exist below the dam; provided that, during a period of low flow in the stream, upon approval of the California Department of Fish and Wildlife, this requirement will be satisfied if sufficient water is passed through a culvert, waste gate, or over or around the dam to keep in good condition any fish that may be planted or exist below the dam if it is impracticable or detrimental to pass the water through a

fishway. In the case of a reservoir, this provision shall not require the passage or release of water at a greater rate than the unimpaired natural inflow into the reservoir.

The requirements of CEQA were evaluated for this Project, which entails diverting water from the proposed point of diversion and applying it to use on a different parcel. As previously discussed, existing structures are in place, including the proposed point of diversion, reservoir, and ditch to convey the diverted water. The District Attorney requested that additional environmental studies be completed prior to approval of the change petition. On October 19, 2012, the Division advised the parties that the petition to change the place of use and point of diversion was exempt from further environmental review under CEQA pursuant to a Class 1 exemption. (Cal. Code Regs., tit. 14, § 15301.) This exemption applies to minor alterations to existing facilities. The Division determined that approval of this Project will result in only minor alterations to the existing point of diversion, and to the lands irrigated. It is the responsibility of Mr. Leen to comply with CEQA as it pertains to obtaining any additional permits required for the proposed Project.

The Division finds that by including the conditions listed above in the amended license, diversion of water under the amended license will not adversely impact public trust resources.

FINDINGS

7.1 No injury to other legal users of water:

Before approving a change, the State Water Board must find that the change would not injure any other legal user of water. The Division finds no evidence to suggest that other legal users of water would be injured by the requested change. The Licensee owns the lands where the original point of diversion is located; where the proposed revised point of diversion is located; where the original place of use is located; and where the proposed revised place of use is located. There are no intervening land owners. Water diversion and use is not authorized beyond the licensed quantities as a result of the change. Accordingly, there is no evidence to suggest that approval of the change will result in injury to any other legal water user.

7.2 Public Trust:

The State Water Board has an obligation to consider the public trust when conditioning or approving any diversion of water. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419.) The Division finds that the conditions of approval sufficiently address public trust considerations. With the requirement to release sufficient water downstream of the dam to maintain any fishery resources that are present, the change should not result in injury to fish and wildlife. Other standard conditions, such as the requirement to obtain any approvals from DFW, the Regional Board and the Army Corp before altering the stream channel will assist in protection of public trust resources. Finally, the requirement that Licensee submit a compliance plan for operation of the Project will ensure conformance with the license terms that serve to protect public trust values. In addition, the Division determines that the proposed operation of the Project, using flood irrigation via the Highline Ditch may provide additional summer water to the riparian corridor between the Highline Ditch and the stream channel. The requested changes, as approved in this decision, are not expected to result in injury to fish and wildlife resources.

7.3 The Project is Exempt from further Review under CEQA:

For CEQA purposes, the environmental setting at the time the environmental analysis commences (in this case, when a change petition is submitted to the Board) constitutes the baseline conditions by which the impacts of the project will be evaluated. (See Cal Code Reg. tit. 14, § 15125; *Fat v. County of Sacramento* (2002) 97 Cal. App. 4th 1270.) The Division has determined that the Project as proposed, involves minor alterations to land when compared to the existing conditions when the petition was submitted in 2008. Because the Division has determined that Project is exempt from further CEQA review pursuant to California Code of Regulations, title 23, section 15301, the studies that DFW and the District Attorney references are not required as part of the Board's discretionary approval of this Project. As mentioned above, Mr. Leen is responsible for complying with CEQA prior to the issuance of other permits and approvals that are needed for Project operations.

7.4 Approval is not contrary to law:

The District Attorney asserts that the water right was lost due to non-use. The allegation that a water right has lapsed due to non-use may be investigated by the Division of Water Rights. The issue of revocation was evaluated and addressed by the Division in 2008. The Division evaluated the claims of non-use prior to the field investigation and determined in its April 14, 2008 letter to Mr. Leen that it did not intend to pursue revocation of License 7979. Revocation proceedings are an action distinct from the matter before the Division here, which is whether to approve a change in place of use and point of diversion to License 7979. The Division has not initiated revocation proceedings against Mr. Leen, and the alleged grounds for revocation are not evaluated in this decision which solely addresses whether to approve the requested changes in the Leen's license.

8.0 CONCLUSION

The State Water Board, based on all evidence in the record, finds that the proposed change will not injure any legal user of water, the change as conditioned by this Decision will not adversely affect public trust resources, and that the approval of the requested license change is exempt from CEQA. Licensee will be responsible for obtaining any and all necessary approvals and permits incidental to this change petition to legally operate the Project.

ORDER

IT IS HEREBY ORDERED THAT the change petition for License 7979 is approved, subject to the conditions listed below and included in the attached amended license.

1. *Within 60 days of issuance of the amended license, Licensee shall submit a compliance plan, subject to review, amendment and approval of the Deputy Director for Water Rights, documenting how the Licensee's facilities will be operated to comply with the conditions of the license. Licensee is not authorized to divert water unless a timely, acceptable compliance plan is submitted and approved. Licensee shall comply with the approved compliance plan.*
2. *No water shall be diverted under this right, and no construction related to such diversion shall commence, until right holder obtains all necessary permits or other approvals required by other agencies. If an amended right is issued, no new facilities shall be utilized, nor shall the amount of water diverted increase beyond the maximum amount diverted during the previously authorized development schedule, until right holder complies with the requirements of this term.*

Within 90 days of the issuance of this right or any subsequent amendment, right holder shall prepare and submit to the Division of Water Rights a list of, or provide information that shows proof of attempts to solicit information regarding the need for, permits or approvals that may be required for the project. At a minimum, right holder shall provide a list or other information pertaining to whether any of the following permits or approvals are required: (1) lake or streambed alteration agreement with the Department of Fish and Wildlife (Fish & G. Code, § 1600 et seq.); (2) Department of Water Resources, Division of Safety of Dams approval (Wat. Code, § 6002.); (3) Regional Water Quality Control Board Waste Discharge Requirements (Wat. Code, § 13260 et seq.); (4) U.S. Army Corps of Engineers Clean Water Act section 404 permit (33 U.S.C. § 1344.); or, (5) local grading permits.

Right holder shall, within 30 days of issuance of all permits, approvals or waivers, transmit copies to the Division of Water Rights.

3. *In compliance with section 5937 of the Fish and Game Code, if storage or diversion of water authorized by this license is by means of a dam, licensee shall allow sufficient water at all times to pass through a fishway or, in the absence of a fishway, allow sufficient water to pass over, around, or through the dam to keep in good condition any fish that may be planted or exist below the dam; provided that, during a period of low flow in the stream, upon approval of the California Department of Fish and Wildlife, this requirement will be satisfied if sufficient water is passed through a culvert, waste gate, or over or around the dam to keep in good condition any fish that may be planted or exist below the dam if it is impracticable or detrimental to pass the water through a fishway. In the case of a reservoir, this provision shall not require the passage or release of water at a greater rate than the unimpaired natural inflow into the reservoir.*

STATE WATER RESOURCES CONTROL BOARD



*Barbara Evoy, Deputy Director
Division of Water Rights*

Dated:

FEB 06 2013