

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

DECISION 1640

In the Matter of
Water Right Application 30300,
HOLLAND LIVESTOCK RANCH,
Applicant

**CALIFORNIA DEPARTMENT OF FISH AND GAME and
UNITED STATES BUREAU OF LAND MANAGEMENT,**
Protestants

SOURCE: Smoke Creek

COUNTY: Lassen

DECISION APPROVING APPLICATION

BY THE BOARD:

1.0 BACKGROUND

Water Right Application 30300 requests a permit from the State Water Resources Control Board (SWRCB) to divert 1,300 acre-feet of water per year to storage in an existing reservoir on Smoke Creek in Lassen County, California, near the California/Nevada state line. Applicant, Holland Livestock Ranch, proposes to store the water in the reservoir for release and use for irrigation of alfalfa and pasture downstream of the reservoir. Protests were filed by the California Department of Fish and Game (DFG) and the United States Bureau of Land Management (BLM). The applicant and protestants all stipulated in writing to having the SWRCB reach a decision on the application based on the written record and information obtained during a field investigation of the reservoir site.¹

¹ The parties filed written stipulations with the SWRCB in accordance with the former section 760(a) of Title 23, California Code of Regulations. Under the SWRCB's current regulations, parties may stipulate to the type of
(continued next page)

The field investigation was conducted on September 26, 1996, and SWRCB staff prepared a staff analysis recommending approval of the application subject to specified terms and conditions to protect prior rights and fish and wildlife. This decision authorizes issuance of a permit to divert 1,300 acre-feet per year to storage in the applicant's reservoir. Further information regarding the applicant's project, the SWRCB's findings concerning Application 30300, and the conditions to be included in the water right permit are set forth below.

2.0 DESCRIPTION OF PROJECT

Holland Livestock Ranch filed Application 30300 on October 28, 1993, following a complaint filed with the SWRCB by BLM in 1992. The application requests authorization to store 1,300 acre-feet of water in an existing 980 acre-foot capacity onstream reservoir which was completed in 1947. The reservoir is formed behind a 28-foot high dam and has a surface area of 98 acres. The applicant wants to partially refill the reservoir to capture runoff from summer thunderstorms. The applicant proposes to collect water to storage year round for irrigation, stockwatering and recreation purposes. The reservoir is located on Smoke Creek in California, just upstream of where the stream enters Nevada.

The applicant irrigates pasture and alfalfa with water released from storage in the reservoir and with water directly diverted from Smoke Creek. Applicant claims to have a prior right under Nevada law for direct diversion of water for irrigation. Application 30300 concerns only the water which is diverted to storage in the reservoir. The irrigated area is 1,678 acres of pasture and alfalfa located within Sections 5, 6, 7, 8, 9, 15, 16, and 17 of T31N, R18E, Sections 24, 25, and 26 of T32N, R17E, and Sections 30 and 31 of T32N, R18E, MDB&M. Approximately 275 acres of the irrigated area is located in California and the remainder of the irrigated land is located across the state line in Nevada. The irrigation season is identified as March 1 to October 31.

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procedures followed in this instance, or to other proceedings in lieu of a formal evidentiary hearing, in accordance with section 648.7 of Title 23 of the California Code of Regulations.

3.0 PROTESTS

Two protests were filed against Application 30300 by BLM and DFG as discussed below.

3.1 BLM Protest

The BLM protest alleges that the project results in injury to prior rights and adverse environmental impacts. BLM has water right Certificate 14970 (previously Permit 54489), issued by the State of Nevada. The application for the BLM water right was filed on February 27, 1990. Certificate 14970 allocates 5 cubic-feet per second (cfs) year-round for public recreation and wildlife served by instream flows at BLM's place of use as shown on the map attached as Attachment A. Lower Smoke Creek is used by recreationists for hunting, hiking, sightseeing and camping. BLM claims that the applicant's project will interfere with the exercise of its water right under Certificate 14970.

The BLM protest alleges that aquatic habitat for native fish in Smoke Creek is adversely affected when flows in the stream fall below 5 cfs. BLM states that flows below 5 cfs can result in high water temperatures, low dissolved oxygen, and the complete drying up of the stream. BLM also states that lower Smoke Creek requires periodic flushing provided by high flows which wash out the silt from spawning gravels on the stream bottom. Among the species in the reach of Smoke Creek with which BLM is concerned is the Lahontan tui chub which is a candidate species to be listed under the federal Endangered Species Act. BLM is also concerned that erosion and downcutting of the stream channel are accelerated by past water diversions on the applicant's ranch. Damage to the stream channel results in degraded habitat for terrestrial wildlife which are dependent upon riparian vegetation.²

BLM has offered to withdraw its protest if: (1) the applicant's water right is conditioned upon the maintenance of a minimum of 5 cfs at BLM's place of use throughout the year; (2) the applicant's diversions works are "modified with a locking mechanism" to prevent the discharge of less than 5 cfs discharge through the outlet pipe; (3) the State of California maintains custody of

² The information provided by BLM indicates that terrestrial wildlife that can be adversely affected by damage to the stream and the associated riparian area include pronghorn antelope, mule deer, upland game birds and neo-tropical migrant birds. Water needs of resident wild horses and burros are not met when the stream dries up.

the key to the locking mechanism on applicant's diversion works; and (4) BLM is notified any time that the outflow from the reservoir falls below 5 cfs.

3.2 DFG Protest

DFG filed a protest based on environmental concerns. DFG has not been allowed to survey the reservoir, but has evidence of several species of fish in the stream and an abundance of wildlife in the ranch area. The Lahontan lake tui chub, a DFG Species of Special Concern (Class 3), is a possible resident of the reservoir. DFG is concerned that fully emptying the reservoir would destroy habitat used by fish and wildlife indigenous to the region. DFG bases its protest on sections 1243 and 1257 of the Water Code.

DFG requests that the applicant be required to maintain a minimum pool of at least 100 acre-feet in the reservoir except during an emergency. DFG also asks that the applicant be required to install and maintain a staff gage in the reservoir which is satisfactory to the SWRCB, and that the applicant notify the SWRCB and DFG of the staff gage reading that corresponds to 100 acre-feet. DFG requests that any permit which is issued be conditioned upon the permittee providing reasonable access to DFG for the purpose of verifying staff gauge readings and determining the water level in the reservoir.

4.0 FIELD INVESTIGATION

SWRCB staff initially met with all parties at the BLM office in Susanville on the morning of September 26, 1996. The following were in attendance during the field investigation:

Paul Art, representing the applicant;

George Wingate, Steve Surian, Don Wannebo, and Donald J. Armentrout representing BLM, Protestant;

David Hoopaugh representing DFG, Protestant;

Melanie Collins and Mike Meinz representing the SWRCB; and

Bill Casey, the applicant's brother, who operates the reservoir and who joined the meeting at the diversion site.

Each party presented its concerns regarding the application as summarized below.

4.1 Applicant's Presentation

The applicant's representative, Paul Art, stated the applicant claims to have vested rights to directly divert water from Smoke Creek in Nevada, although that claim was not recorded officially with the state. Mr. Art also distributed copies of a 1917 report of historical use of Smoke Creek, which he obtained from the Nevada Division of Water Resources offices. Mr. Art said that this report shows how prior diversions of the stream by the ranch did not cause any adverse effects downstream. He argued that storage of water with regulated releases helps the canyon below since very little water would flow in the stream during summer in the absence of reservoir releases.

4.2 BLM's Presentation

George Wingate discussed BLM's goal of restoring diverse riparian habitat which was once common along this region of Smoke Creek and which supports a variety of indigenous plant and animal species as well as migratory deer and birds. BLM cited a "Riparian Functional Assessment" which identified irregular streamflow and road maintenance as factors which adversely affect riparian resources along Smoke Creek. Mr. Wingate stated that riparian vegetation provides the shading and woody debris needed by native fish residing in Smoke Creek and that a lack of consistent streamflow and poor road maintenance practices have made stream restoration difficult.³ BLM attributes the irregular streamflows and dry channel conditions to the applicant's irrigation practices. BLM contends that the applicant's irrigation practices have caused the stream to dry up regularly during summer months and have caused a deterioration in the water quality of Smoke Creek in Nevada. The water quality problems cited by BLM include low dissolved oxygen, high water temperature and a probable increase in turbidity and fecal coliforms.

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³ Problems associated with road maintenance have been solved as a result of an agreement between Washoe County and BLM. The County has agreed to alter its road maintenance practices and to relocate a section of the road that frequently washes out.

4.3 DFG's Presentation

Dave Houpaugh stated that DFG has not been allowed access to survey the reservoir but he speculated that Lahontan lake tui chub are present. DFG classifies Lahontan lake tui chub, as a Species of Special Concern (Class 3). They reside and reproduce entirely within lake environments. The 100 acre-foot minimum pool requested in DFG's protest is based on professional judgment of what would be needed to support a fishery given the size and shape of Smoke Creek Reservoir. Other fish species known to inhabit Smoke Creek upstream of the reservoir are rainbow trout, Tahoe sucker, speckle dace, and Lahontan redband. It is possible that these species utilize Smoke Creek Reservoir as well. In addition to its request for a 100 acre-foot minimum pool requirement, DFG supports BLM's request for minimum streamflows to restore native fish habitat and riparian vegetation.

4.4 Site Visit

After the initial meeting at the BLM office, the parties met at the dam and reservoir. The flow in Smoke Creek above the reservoir on September 26, 1996, was estimated to be from 4 to 8 cfs, and the reservoir was near capacity. A crudely constructed spillway is located on the eastern side of the earthen dam. The spillway is composed of horizontal and vertical concrete sections with wooden plank flashboards that lay stacked together on one side. (Photos Nos. 2 and 3.)⁴ A watercourse lined with river rock leads from the spillway down to a streambed below. (Photo No. 4.) There is a large amount of sagebrush on the top and the downstream side of the dam. (Photo No. 5.) There is a valve at each end of the dam which controls the opening and closing of a 30-inch diameter outlet pipe at the base of the dam. (Photos Nos. 6 and 7.) The valve at the east end was open at the time of the site visit, releasing water to a streambed below. Although the pasture land below the dam had been flood irrigated earlier in the season, there was no land being flood irrigated at the time of the site visit.

Immediately downstream of the reservoir, it was difficult to locate the natural course of the streambed. As the water flows downstream, it branches off and meanders in several directions through the meadow before it converging into one streambed on the lower portion of the ranch

⁴ The photos cited in this decision are labeled and contained in the SWRCB Division of Water Rights file on Application 30300.

property. (Photo No. 8.) At the time of the site visit, there were several earthen dikes within the pasture constructed to control movement of irrigation water. (Photo No. 9.) The streambed was not fenced off at any point along the ranch property. This allows cattle to travel over the stream, trampling down the edges of the banks. (Photo No. 10.)

Mr. Casey stated that he has never drained the reservoir completely to irrigate, although it is drained infrequently for any necessary maintenance and repair work. When asked about his irrigation procedure, Mr. Casey said he opens the valves and leaves them open continuously for about two weeks, closes them for another two weeks, then opens them again, repeating the same cycle. There are no flow measuring devices on the outlet pipes, and no staff gauge in the reservoir to measure the water level elevation.

Staff measured a flow of 2.4 cfs in Smoke Creek upstream of the reservoir near the headwaters about 100 yards south of Big Spring. (Measurement Point No. 1 on map included as Attachment A, Photo No. 12.) There is significant accretion along the creek on the way to the reservoir inlet from twelve other perennial streams identified by BLM. There is no road access to the inlet side of the reservoir thereby making it difficult to carry flow measurement equipment to the site. At the time of the site inspection, the inflow to the reservoir at the inlet was estimated at between 4 and 8 cfs. (Measurement Point No. 3 on Attachment A, Photo No. 13.) The flow in Smoke Creek downstream of the reservoir was not measured, but was estimated at more than 5 cfs during the site inspection.

5.0 ANALYSIS OF ISSUES

5.1 Analysis of Issues Raised by BLM

BLM holds Certificate 14970, issued by the State of Nevada, for a water right not to exceed 5 cfs year-round for public recreation and wildlife. The 5 cfs specified in Certificate 14970 is for instream flow uses downstream of the applicant's place of use as shown on the map in Attachment A. Section 1231 of the California Water Code provides in relevant part:

“Upon any stream flowing across the state boundary, a right of appropriation having the point of diversion and the place of use in another state and recognized by the laws of that state shall have the same force and effect as if the point of

diversion and the place of use were in this State if the laws of that state give like force and effect to similar rights acquired in this State”

Nevada law contains a similar provision. BLM's water right under Nevada Certificate 14970 is on an interstate stream which originates in California. In accordance with the provisions of California Water Code section 1231, BLM's prior right should be accorded protection against injury from any junior water rights granted by California and any permit issued should be conditioned to require sufficient bypass of water to satisfy Certificate 14970 at BLM's place of use. If the inflow to the applicant's reservoir, together with accretions to Smoke Creek between the applicant's reservoir and BLM's place of use, is less than the amount required to satisfy Certificate 14970, then the entire amount of inflow to the reservoir should be bypassed. However, the release of previously stored water should not be required to provide water needed for satisfaction of BLM's right under Certificate 14970.

The applicant also claims to hold direct diversion rights under Nevada law and recently submitted documentation filed with the Nevada Division of Water Resources in 1999 in support of that claim. The SWRCB has no authority to resolve issues regarding the validity of the applicant's alleged direct diversion rights in Nevada, nor can the SWRCB resolve issues regarding the impact of applicant's direct diversion of water in Nevada upon the availability of water for use by BLM under Nevada Certificate 14970. Any dispute over those matters must be resolved in Nevada pursuant to Nevada law. The purpose of the bypass flow requirement established by this decision is to ensure that the diversion of water to storage in California under a permit issued pursuant to Application 30300 does not interfere with the exercise of prior rights or unreasonably affect environmental and instream uses.

5.2 Analysis of Issues Raised by the DFG

DFG is the trustee agency with the primary responsibility for protection of fish and wildlife resources in California. DFG is concerned about the possibility of the reservoir being emptied for irrigation purposes, thereby destroying the habitat used by fish and wildlife indigenous to the region. The applicant ordinarily does not draw reservoir storage below 100 acre-feet nor did the applicant present any evidence to dispute DFG's recommendation that a 100 acre-foot minimum pool is needed to protect fish and wildlife at the reservoir. The SWRCB concludes that a

minimum pool of 100 acre-feet should be required unless essential reservoir maintenance or emergency conditions require reducing reservoir storage below 100 acre-feet. Reducing reservoir storage below 100 acre-feet should be allowed only following consultation with DFG.

6.0 AVAILABILITY OF UNAPPROPRIATED WATER

Smoke Creek is not on the list of Fully Appropriated Streams. There are no other known water rights on the Smoke Creek System within the State of California.

The U.S. Geological Survey prepared a Water Resources Investigations Report 93-4043, titled "Hydrogeologic Setting and Hydrologic Data of the Smoke Creek Desert Basin, Washoe County, Nevada, and Lassen County, California, Water Years 1988-90", by Douglas K. Maurer. The report identified 24 measurement sites along the creek. Table 2 of the report (included as Appendix A to the SWRCB staff analysis on this application) lists each measurement site, showing every spring and creek that drains into Smoke Creek, with a measurement value for July and November of 1989. Instantaneous spot measurements of the flow upstream from the reservoir show the flow of Smoke Creek at 5.32 cfs in July and 5.82 cfs in November 1989. (Measurement Point No. 2 as shown on Attachment A.) Smoke Creek Reservoir outflow measured 3.5 cfs in July, and 5.73 cfs in November 1989. (Measurement Point No. 4 as shown on Attachment A.)

DFG presented additional information on historical streamflows upstream of the reservoir as follows: (1) an estimated flow of 10 cfs in May 1948; (2) a metered flow of 9.8 cfs in July 1980; and (3) an estimated flow of 5 cfs in June 1980 near Big Spring.

The record shows that Smoke Creek is fed by several springs and that there is continuous flow in the creek upstream of the reservoir throughout the year. There are several tributaries which flow into Smoke Creek downstream of applicant's reservoir and upstream of BLM's place of use. Inflow from those tributaries contributes a portion of the 5 cfs needed to satisfy BLM's right under Certificate 14970. The total amount of inflow to the reservoir will vary depending upon the year in question. Evidence of past operations indicates that normally there will be sufficient water available to provide 1,300 acre-feet for diversion to storage as requested by the applicant. The

bypass flow requirement discussed in section 5.1 above will protect BLM's prior right under Certificate 14970 and instream uses below the reservoir.

7.0 COMPLIANCE WITH CALIFORNIA ENVIRONMENTAL QUALITY ACT

The applicant's reservoir provides a continuous source of water for fish and wildlife in a relatively arid location. The reservoir has been in existence since 1947. The conditions established in this decision will help protect fish and wildlife at the reservoir and downstream. As lead agency for purposes of the California Environmental Quality Act (California Public Resources Code section 21000 et seq.), the SWRCB has prepared a Notice of Exemption for the project pursuant to section 15307 of Title 14, California Code of Regulations.

8.0 CONCLUSION

Based on the evidence in the record and the findings above, the SWRCB concludes that Application 30300 should be approved and a permit should be issued subject to the terms and conditions specified below. Conditioning the permit to require permittee to bypass inflow to the reservoir as necessary to provide 5 cfs for instream uses under Nevada Certificate 14970 will protect BLM's prior right and help protect the environmental resources with which BLM is concerned. Requiring the permittee to maintain a 100 acre-foot minimum pool in the reservoir will help protect fish and wildlife uses of the reservoir as recommended by DFG. Both BLM and DFG should be allowed reasonable access to monitor reservoir levels, inflow to the reservoir and outflow from the reservoir. Any water rights which the applicant may hold for diversions within Nevada are subject to Nevada law and are not subject to regulation by the SWRCB in this proceeding.

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ORDER

IT IS HEREBY ORDERED that Application 30300 is approved and a permit shall be issued subject to mandatory Standard Permit Terms 5, 6, and 9 through 14⁵ and the following additional terms and conditions:

1. Prior to making a request for license or before license action will be considered by the State Water Resources Control Board, permittee shall consult with the Division of Water Rights and perform an irrigation system evaluation. A report on the evaluation shall be prepared by a person trained or experienced in irrigation system design and management and shall be submitted to the Board for approval. All cost-effective water conservation measures identified in the irrigation system evaluation report shall be implemented prior to issuance of a license. (Permit Term 29C.)
2. Permittee shall maintain an outlet pipe of adequate capacity in the dam as near as practicable to the bottom of the stream channel or provide other means satisfactory to the Chief of the Division of Water Rights in order that water entering the reservoir which is not authorized for appropriation under this permit can be released. (Modified Permit Term 43.)
3. Permittee shall maintain a 100 acre-foot minimum pool of water in the reservoir at all times for the protection of fish and wildlife, unless an emergency condition or essential reservoir maintenance requires reducing reservoir storage below 100 acre-feet. Prior to reducing reservoir storage to less than 100 acre-feet, permittee shall consult with the California Department of Fish and Game. Permittee shall allow the Department of Fish and Game reasonable access to the reservoir for purposes of verifying staff gage readings and to monitor water levels in the reservoir. Reasonable access for the purpose of this permit term may be further defined by agreement between the Department of Fish and Game and Permittee. For the purpose of this permit term, the need for water for irrigation shall not be considered to constitute an emergency condition and permittee shall regulate irrigation releases in order to maintain a 100-foot minimum pool throughout the year.

⁵ Copies of standard permit terms may be obtained upon request.

4. Permittee shall install and properly maintain in the reservoir a staff gage, satisfactory to the Chief of the Division of Water Rights, for the purpose of determining water levels in the reservoir. Permittee shall record sufficient staff gage readings to document compliance with the requirement to maintain a 100 acre-foot minimum pool in the reservoir. Such readings shall be included in permittee's annual progress reports to the State Water Resources Control Board. To ensure proper installation and use of the staff gage, an area-capacity curve must be formulated for the reservoir. The reservoir's area-capacity curve must be prepared by a professional land surveyor or engineer. (Modified Permit Term 47.)

5. This permit is subject to Certificate 14970 issued to the U.S. Bureau of Land Management (BLM) by the State of Nevada. Permittee shall bypass water at the dam which, together with accretions to Smoke Creek between the reservoir and BLM's place of use, is sufficient to provide a minimum flow of 5 cubic feet per second at BLM's place of use on Smoke Creek located South 89° 29' West, 558.44 feet from the SW ¼ of the SE ¼ of Section 15; T31N, R18E, MDB&M. If the inflow to the reservoir, together with accretions to Smoke Creek between the reservoir and BLM's place of use, is less than the amount required to satisfy Certificate 14970, the entire amount of inflow shall be bypassed. Permittee is not required to release previously stored water in order to provide water for satisfaction of BLM's right under Certificate 14970. Permittee shall allow BLM reasonable access to monitor reservoir levels, inflow to the reservoir, and outflow from the reservoir. (Modified Permit Term T.) For the purpose of this permit term, reasonable access means advance notice of between 24 hours and 7 days by BLM of its intent to inspect, unless modified by subsequent agreement between BLM and Permittee.

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6. Permittee shall install or contract to use devices owned by others, which are capable of measuring inflow to the reservoir and the flows needed to satisfy BLM's right under Nevada Certificate 14970. Said measuring devices shall be properly maintained. Within three months of permit issuance, permittee shall submit plans of said measuring devices for approval by the Chief of the Division of Water Rights. Permittee shall have the measuring devices operational within three months of the approval date. (Modified Permit Term 62.)

CERTIFICATION

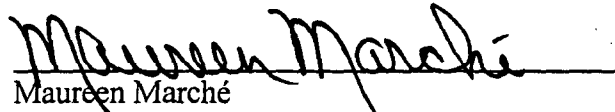
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of a decision duly and regularly adopted at a meeting of the State Water Resources Control Board held on June 17, 1999.

AYE: James M. Stubchaer
Mary Jane Forster
John W. Brown
Arthur G. Baggett, Jr.

NO: None

ABSENT: None

ABSTAIN: None


Maureen Marché
Administrative Assistant to the Board

