

D R A F T

February 1, 2001

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

DECISION #

In the Matter of Application 30532
MONTEREY COUNTY WATER RESOURCES AGENCY,
Applicant

SALINAS VALLEY PROTESTANTS,
Protestant

Tanimura & Antle,
Clark Colony Water Company,
Rosenberg Family Ranch,
East Side Water Alliance,
Salinas Valley Water Coalition,
Interested Parties.

SOURCE: Nacimiento River

COUNTY: San Luis Obispo

DECISION APPROVING APPLICATION 30532

BY THE BOARD:

1.0 BACKGROUND

In 1954, the predecessor of the Monterey County Water Resources Agency (MCWRA) filed Application 16124 to divert 350,000 acre-feet per annum (afa) of water from the Nacimiento River to storage in Nacimiento Reservoir. In 1957, the predecessor of the State Water Resources Control Board (SWRCB) issued Permit 10137. The permit authorized the diversion of 350,000 af of water from the Nacimiento River to storage in Nacimiento Reservoir. Nacimiento Dam and Reservoir were built in 1957. In 1965, License 7543 was issued. The license confirmed the diversion of 350,000 af to storage in Nacimiento Reservoir.

At the time the application was filed and at the time the license was issued, the capacity of Nacimiento Reservoir had been estimated to be 350,000 af at full capacity at 800 feet elevation. (R.T. p. 45; MCWRA 1-1, p. 2.) The estimated capacity of 350,000 af was based on extrapolation from United States Geological Survey (USGS) topographic maps at 800 feet elevation. (*Id.*) In the 1990s, MCWRA commissioned a survey of Nacimiento Reservoir using more sophisticated measuring technology. As a result of that survey, MCWRA found that the actual capacity of the reservoir at 800 feet elevation is 377,900 af. (*Id.*) Therefore, the actual storage of water at full capacity is 27,900 af greater than the amount of water authorized to be stored in Nacimiento Reservoir under License 7543.

On April 23, 1996, MCWRA filed Application 30532 to obtain a water right for the 27,900 af of water stored in Nacimiento Reservoir which is not covered by License 7543. (Staff 2C, p. 1.) The purposes of use and place of use under Application 30532 are the same as those authorized in License 7543. (*Id.*; R.T. p. 46.)

Five protests were filed against Application 30532. The National Marine Fisheries Service (NMFS), the California Department of Fish and Game (DFG), and the California Sportfishing Protection Alliance (CSPA) filed protests that alleged that the project described in Application 30532 would adversely impact public trust resources in Nacimiento Reservoir, the Nacimiento River, and the Salinas River. The City of San Luis Obispo (City) and the “Salinas Valley Protestants”¹ (SVP) filed protests that allege that the project described in Application 30532 may cause injury to prior rights.

In their protest, SVP claim numerous types of water rights that are senior to MCWRA and that diversion to storage of the 27,900 af increment will cause injury to those rights. Neither the Division of Water Rights (Division) nor the (SWRCB) made any finding or final determination regarding the sufficiency of the SVP’s protest prior to the hearing. (R.T. p. 10.) Nor did the Division or the SWRCB make any finding or final determination regarding whether the SVP

¹ The “Salinas Valley Protestants” are represented by Mr. Patrick J. Maloney. Mr. Maloney claims to represent Barbee Ranch, California Orchard Company, Duflock Ranches, Fairview Vineyards, Michel and Mary Orradre, Salinas Land Company, San Bernabe Vineyards, and Scheid Vineyards in this proceeding.

made a prima facie case establishing the existence of water rights and whether there has been injury to any of the claimed rights caused by MCWRA's diversion to storage of the 27,900 af that is the subject of the hearing. (*Id.*) Because there were outstanding protests in addition to the protest filed by SVP that required a hearing on Application 30532, the SWRCB decided to let SVP participate in the hearing. (*Id.*)

2.0 PARTIES TO THE PROCEEDINGS

In a water right proceeding, the parties include the applicant, persons who have filed unresolved protests, and any other persons who are designated as parties in accordance with the procedures set forth in the notice of hearing. (Cal. Code Regs., tit. 23, § 648.1, subd. (b).) Persons presenting non-evidentiary policy statements are not parties. (*Id.*, § 648.1, subd. (d).)

Accordingly, the parties to the hearing on Application 30532 are the applicant, MCWRA; the protestant², SVP; and interested parties recognized by the Hearing Officer at the hearing, which are Tanimura & Antle, Clark Colony Water Company, Rosenberg Family Ranch, East Side Water Alliance (Alliance), and Salinas Valley Water Coalition (Coalition).

Prior to the hearing, the City withdrew its protest against Application 30532. (R.T. p. 8.) The City did not participate in the hearing. Accordingly, the City is not a party to the hearing.

NMFS, DFG, and CSPA did not submit notices of intent to appear, written testimony, or exhibits prior to the hearing and therefore did not comply with the prehearing submittal requirements set forth in the Notice of Hearing. Consequently, the Hearing Officer dismissed NMFS, DFG, and CSPA as parties to the proceeding in accordance with Title 23, California Code of Regulations, section 648.1, subdivision (c), and their protests were dismissed. (R.T. p. 8.)

Tanimura & Antle, Clark Colony Water Company, Rosenberg Family Ranch, and Marina Coast Water District submitted notices of intent to appear, written testimony, and exhibits in accordance with the prehearing submittal requirements set forth in the Notice of Hearing. The

² Although no final determination was made on the sufficiency of the SVP's protest prior to the hearing, in this decision the SVP will be referred to as a protestant. Reference to the SVP as a protestant in this decision does not mean that the protest filed by the SVP complies with statutory and regulatory requirements.

Hearing Officer recognized them as interested parties in accordance with section 648.1, subdivision (b) of Title 23 of the California Code of Regulations. (R.T. pp. 8-9.) However, Marina Coast Water District failed to appear at the hearing. Therefore, Marina Coast Water District is dismissed as an interested party.

The Alliance submitted a notice of intent to appear and requested the opportunity to cross examine witnesses and to rebut evidence presented during the hearing, if necessary. The Coalition submitted a notice of intent to appear and requested the opportunity to rebut evidence presented during the hearing, if necessary. The Hearing Officer recognized the Alliance and the Coalition as interested parties in accordance with section 648.1, subdivision (b) of Title 23 of the California Code of Regulations. (R.T. p. 9.)

3.0 HEARING ISSUES

On May 24, 2000, the SWRCB issued a Notice of Hearing. The Notice of Hearing specified four issues:

- “1. Is unappropriated water available for appropriation to supply the project described in Application 30532?
- “2. Has the additional diversion to storage, which would be authorized by the approval of Application 30532, caused injury to persons with senior water rights downstream of the Nacimiento Reservoir? If so, how? What conditions, if any, should the SWRCB adopt to protect senior water right holders?
- “3. Has the additional diversion to storage, which would be authorized by the approval of Application 30532, caused adverse impacts to public trust resources in the Nacimiento River, the Salinas River, or the Nacimiento Reservoir? If so, what are they? What conditions, if any, should the SWRCB adopt to avoid or mitigate any adverse impacts on public trust resources caused by the proposed project?
- “4. Is the proposed project exempt from the California Environmental Quality Act? If so, which exemption applies to the proposed project and why?”

In response to petitions and objections filed by the parties and issues raised by the parties, the Hearing Officer limited the scope of the hearing to the issues set forth in the Notice of Hearing. Rulings were necessary to respond to the following:

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1. An objection by MCWRA to a notice issued pursuant to Code of Civil Procedure section 1987 by SVP in which the SVP demanded that MCWRA produce the Assessor-Recorder of Monterey County and that the Assessor-Recorder produce all water rights books of Monterey County, all assessor parcel books through 1960, and the grantor and grantee books through 1960. (R.T. p. 18.)
2. A motion filed by SVP to consolidate or coordinate the SWRCB's proceeding on the Petition for Extension of Time regarding Permit 5882 filed by the City of San Luis Obispo with this proceeding on Application 30532 and to take administrative notice of the files regarding the proceeding on Permit 5882. (*Id.*)
3. A petition filed by SVP for a "Section 275 review and for an order to show cause why application should not be dismissed." (R.T. pp. 18-19.)
4. A request by MCWRA for a pre-hearing order regarding the scope of admissible evidence. (R.T. p. 19.)

After considering the written arguments that the parties submitted on the procedural matters described above, the Hearing Officer ruled as follows:

1. MCWRA's objection to the Code of Civil Procedure section 1987 notice filed by SVP was sustained. The notice was quashed as to the production of the Assessor-Recorder, all water rights books of Monterey County, all assessor parcel books through 1960, and the grantor and grantee books through 1960. The Hearing Officer concluded that the records requested by SVP are available for SVP's use in Monterey County. (R.T. p. 19.)
2. SVP's motion to consolidate or coordinate the SWRCB's proceeding regarding Permit 5882 with this proceeding on Application 30532 was denied. SVP's request to take administrative notice of the files regarding the proceeding on Permit 5882 was denied. The Hearing Officer concluded that approval of the motion would expand the scope of the hearing beyond the issues set forth in the Notice of Hearing. Permit 5882 is not the subject of this hearing. A hearing was held on Permit 5882 and the administrative hearing record is closed. The

documents that SVP request be made a part of the administrative record in this proceeding on Application 30532 are not relevant to the issues set forth in the Notice of Hearing. (R.T. pp. 19- 20.)

3. SVP's petition for a "Section 275 review and for an order to show cause why application should not be dismissed" was denied. The Hearing Officer concluded that SVP's request that the SWRCB invoke Water Code section 275 in this hearing on Application 30532 to solve the seawater intrusion problem in the Salinas basin, and to examine the reasonableness of the proposed Salinas Valley Water Project and other water extractions and uses in the Salinas basin would expand the scope of the hearing beyond the purpose set forth in the Notice of Hearing. (R.T. p. 20.)

The Hearing Officer also concluded that SVP's request to have the SWRCB cancel Application 30532 prior to the hearing fails to state any appropriate basis for the SWRCB to do so. SVP argued that MCWRA did not submit a water availability analysis prior to the hearing to demonstrate that unappropriated water is available, and, therefore, that Application 30532 should be canceled pursuant to Water Code section 1276.³ The staff of the Division did not specify a deadline when informing MCWRA that it must submit information to demonstrate water availability, consequently Water Code section 1276 does not apply. Further, MCWRA was not required to submit a document called a "water availability analysis." Submittal of written testimony and exhibits by MCWRA to address the availability of unappropriated water to supply the project described in Application 30532 in accordance with the instructions set forth in the Notice of Hearing was appropriate. (R.T. pp. 20-21.)

4. MCWRA's proposed pre-hearing order regarding the scope of admissible evidence was denied. Rather than enter an order, the Hearing Officer requested the cooperation of the parties in limiting their testimony and exhibits to the issues noticed for hearing. (R.T. p. 21.)

³ Water Code section 1276 states:
[footnote continues on next page]

The Hearing Officer made additional rulings limiting the scope of the hearing. The rulings include:

1. The purpose of the hearing on Application 30532 does not include an adjudication of water rights in the Salinas Valley. The SWRCB will not use this hearing to adjudicate the water rights of any of the parties to this hearing. (R.T. p. 9.)
2. The hearing will not be expanded to include proceedings conducted under Water Code section 275 to take any actions similar to the actions taken by the SWRCB in the Napa Valley regarding reasonableness of diversions in the Salinas Valley. (R.T. p. 10.)
3. The hearing will not be expanded to include any issues regarding the 350,000 af of water that is stored in Nacimiento Reservoir pursuant to License 7543. (*Id.*)

The SWRCB finds that all of the Hearing Officer's rulings are appropriate.

4.0 SVP'S REQUEST FOR ADMINISTRATIVE NOTICE AND INCORPORATION INTO RECORD

On September 14, 2000, SVP submitted a "Request for Administrative Notice and Incorporation into Record" to take notice and include in the administrative hearing record a memorandum dated June 16, 2000 from Harry M. Schueller to Ed Anton and Board Members regarding groundwater problems in the Salinas Valley, and a letter dated August 25, 2000 from Patrick J. Maloney to Edward Anton regarding the August 3, 2000 letter to Curtis Weeks of MCWRA. The "Zone 2B Water Conservation Plan" of MCWRA is included as an attachment to the August 25, 2000 letter.

Section 648.2 of Title 23, California Code of Regulations provides that the SWRCB may take official notice of such facts as may be judicially noticed by courts of this state. Evidence Code sections 451 and 452 govern facts or documents that must be and that may be judicially noticed,

"If within the period provided, the applicant does not provide the information requested under Section 1275, the application shall be canceled, unless for good cause shown the board allows additional time in which to submit the requested information."

respectively. Neither of the documents that SVP request be noticed is required to be officially noticed.

The June 16, 2000 memorandum discusses groundwater problems in the Salinas Valley. It includes a discussion of seawater intrusion and nitrate contamination in the aquifers underlying the Salinas Valley, the actions taken by governmental agencies to address the problems, alternatives available to the SWRCB to address the seawater intrusion problem, and a recommendation to redirect SWRCB resources to MCWRA and provide oversight and assistance to MCWRA in its efforts to implement an effective solution. In its request, SVP states that the June 16, 2000 memorandum “at page 8, reflects that the Board has concluded in a non-biased setting that the SVP’s Napa derived permit conditions for regulating pumping is viable.” SVP’s request does not define “Napa derived permit conditions.”

SVP mischaracterize the June 16, 2000 memorandum. Neither the staff of the SWRCB nor the Board Members made any conclusion that “the SVP’s Napa derived permit conditions for regulating pumping is viable.” SWRCB actions in the Napa Valley and “Napa derived permit conditions” were not discussed in the memorandum, directly or indirectly. Regardless of whether the memorandum addresses “Napa derived permit conditions,” however, nothing in the memorandum is relevant to the issues noticed for hearing.

SVP state that their August 25, 2000 letter “reflects that the SVP are ready to follow and assist with crafting appropriate conditions for the subject permit once the Board determines conditions must be imposed.” Again, SVP mischaracterize their letter. In their letter, SVP offer their database and unspecified assistance to address the seawater intrusion problem in the northern Salinas Valley. Regardless of whether the letter is properly described by SVP, however, it is not relevant to the issues noticed for hearing nor is it timely.

As stated in Section 3.0, supra, the Hearing Officer previously ruled that solving the seawater intrusion problem in the Salinas basin is beyond the scope of this proceeding and the hearing on Application 30532 will not serve as a mechanism for the development of a solution to the seawater intrusion problem in the basin. Accordingly, the August 25, 2000 letter is not relevant.

As set forth in the Notice of Hearing, key issues two and three clearly state, as part of each issue “What conditions, if any, should the SWRCB adopt . . .” The appropriate time to submit written testimony and exhibits addressing conditions to protect prior rights or public trust resources was prior to the hearing, or with the Hearing Officer’s permission, at the hearing. Although SVP may want to “assist with crafting appropriate conditions for the subject permit,” it is inappropriate and untimely to attempt to offer evidence on permit conditions after the hearing.

The SWRCB finds that approval of SVP’s request for administrative notice and including the June 16, 2000 memorandum and the August 25, 2000 letter in the administrative hearing record would circumvent the Hearing Officer’s rulings limiting the scope of the hearing to the issues set forth in the Notice of Hearing. We find that the documents are not relevant nor are they timely. Therefore, the request by SVP is denied.

5.0 AVAILABILITY OF UNAPPROPRIATED WATER

When considering whether to approve an application to appropriate water, the SWRCB must determine whether unappropriated water is available to supply the project described in an application. (Wat. Code, § 1375, subd. (d).) Unappropriated water includes water that has not been either previously appropriated or diverted for riparian use. (Wat. Code, §§ 1201, 1202.)

MCWRA contends that unappropriated water is available to supply the project described in Application 30532. The 27,900 af increment sought by MCWRA in Application 30532 has been diverted to storage during wet years and has been integrated into the operation of Nacimiento Reservoir and used in conjunctively managing the Salinas Valley groundwater basin for over 43 years.

MCWRA analyzed historic data to determine the frequency and quantity of water, and the timing and availability of water affected by Application 30532. (MCWRA 3-1, p. 5.) MCWRA also performed two computer modeling studies using the Salinas Valley Integrated Ground and Surface Water Model (SVIGSM), one assuming that the reservoir is at current permitted capacity (350,000 af) and the other assuming that the reservoir is at the enlarged capacity (377,900 af).

(MCWRA 3-1, pp. 2-13; MCWRA 3-10; MCWRA 3-11.) MCWRA concluded that unappropriated water is available for the project described in Application 30532.

Storage in Nacimiento Reservoir exceeded 350,000 af during eight of the 43 years the reservoir has been in operation (1967, 1969, 1974, 1978, 1982, 1983, 1995, and 1998). During those eight years, there were 611 days in which storage in the reservoir exceeded 350,000 af.⁴ (R.T. p. 63; MCWRA 3-1, pp. 7-8; MCWRA 3-7; MCWRA 3-8.)

MCWRA stores all or part of the 27,900 af of incremental storage during years of above normal rainfall⁵ when there is ample runoff occurring from all tributaries in the Salinas River. (R.T. p. 63; MCWRA 3-1, p. 8.) Because diversion of the 27,900 af increment to storage occurs during wet years, if the water is bypassed instead of diverted to storage, it would flow to Monterey Bay as Salinas River outflow. (MCWRA 3-1, p. 8.) Therefore, groundwater recharge will not be significantly affected by storage of the 27,900 af increment.

Simulation of groundwater levels for each hydrologic subarea based on long-term average hydrologic conditions that would result from not utilizing the 27,900 af of storage show that storage and release of the additional 27,900 af has had no significant effect on groundwater levels in the Salinas Valley groundwater basin. (MCWRA 3-1, p. 10.) However, during some below normal rainfall years (such as during the 1987-1991 drought), storage and release of the additional 27,900 af has resulted in an increase in groundwater levels due to the carry-over effects of storing the water in earlier years. (*Id.*; MCWRA 3-13; R.T. p. 63.)

SVP contend that MCWRA failed to account for senior rights in its analysis of water availability. It appears that SVP believe that the only way to account for senior rights is to adjudicate or otherwise evaluate and quantify the water rights in the Salinas Valley. The Hearing Officer appropriately limited the scope of the hearing to avoid adjudicating the water rights of any of the parties to this hearing. A determination of whether water is available pursuant to

⁴ 611 days out of a total of 14,611 days of operation is four percent of the time that storage exceeded 350,000 af.

⁵ A year with above normal rainfall is defined as a year when rainfall totals more than one standard deviation above the mean annual precipitation. (MCWRA 2-1, p. 6; R.T. p. 120.)

Application 30532, including a determination of whether senior rights are harmed, can be accomplished without adjudicating water rights.

There are relatively few users of surface water downstream of Nacimiento Reservoir. Since diversion to storage of the 27,900 af increment would occur in years of above normal rainfall, it is unlikely that users of surface flows would be injured because the increment, if bypassed, would flow to Monterey Bay as Salinas River outflow. (MCWRA 3-1, p. 8.)

Almost all users of water in the Salinas basin rely on groundwater.⁶ Because any injury to senior rights caused by storage of the 27,900 af increment would most likely be shown as lowered groundwater elevations, the analysis performed by MCWRA, which considered the water uses in the Salinas Valley groundwater basin regardless of right, (R.T. pp. 150-156) is appropriate for the facts and circumstances of this case. MCWRA's analysis is sufficient for the SWRCB to make a finding regarding whether there is unappropriated water available for appropriation and whether there is any injury to senior rights.

SVP contend that no surplus water exists that can be stored in Nacimiento Reservoir by MCWRA pursuant to Application 30532. SVP contend that between 50,000 and 150,000 acres of land will be developed into vineyards in the Upper Valley and the Forebay in the future. (R.T. pp. 415, 488.) SVP contend that the proposed future uses will consume any water that may be currently available for the pending application. SVP relied upon their Exhibit 50 in concluding that potential future demand exceeds the available supply of water.

SVP Exhibit 50 consists of two pages. Page one is part of a draft memorandum dated June 18, 1996, from Martin Liu to File regarding "Salinas River Basin – Hydrologic Condition." Page two is a table titled "Surplus Flow Available for Storage" prepared by SVP.

⁶ In this decision, "groundwater" is defined as water beneath the surface of the earth. No distinction is made regarding the legal classification of groundwater as either "percolating groundwater" or a "subterranean stream flowing through known and definite channels."

Regarding the draft memorandum on page one of SVP Exhibit 50, there is no evidence in the record to establish who Martin Liu is, the purpose of the draft memorandum, or the source of the information. Therefore, the SWRCB finds that the draft memorandum is unreliable for use in this decision.

Regarding the calculations on page two of Exhibit 50, they show “surplus flow” available for storage in Nacimiento Reservoir between 1959 and 1992, calculated as the difference between monthly inflow to and releases from Nacimiento Reservoir. The releases are calculated based on the flow bypassed at the Soledad gauge under unregulated conditions. (R.T. p. 608.) The calculations are based on an estimated demand of 440,000 afa of applied water for irrigation of 110,000 acres in the Upper Valley and Forebay areas of the Salinas Valley. (R.T. pp. 612-613.) It is assumed that the same amount of water is pumped every year regardless of conditions or crop type. (R.T. p. 613.) The calculations are an attempt to simulate potential future, not current, water use (R.T. p. 616), yet SVP use what they claim is the current irrigated acreage in their simulation of future use. SVP claim that 110,000 acres in the Upper Valley and Forebay are currently irrigated based on Monterey County Assessor’s rolls. (R.T. pp. 653-654.) The assumed water duty of four afa is an estimate of applied water based on the maximum amount of water possibly pumped or used by the SVP for whatever crop they choose to grow. (R.T. p. 654.) SVP used a high figure for applied water duty to build in “flexibility” to account for not knowing what the future development would be. (R.T. p. 622.) The SWRCB finds that these assumptions are not valid and the conclusions reached by SVP should not be relied on in any conclusion by the SWRCB regarding water availability.

SVP’s assumption that an additional 50,000-150,000 acres will be planted in vineyards is speculative. Currently, there are approximately 40,000 acres of vineyards in the Salinas Valley. (R.T. p. 413.) Only two specific examples of future vineyard growth in the Salinas Valley, totaling no more than 3500 acres (R.T. pp. 393-394, 417-418), were cited by SVP and not all of this growth would occur on lands owned by SVP (R. T. p. 462). Some of the acreage which SVP claim will be planted in vineyards is on land that is currently planted in row crops (there would be some conversion from row crops to vineyards). (R.T. pp. 415-416.) Some of the land that SVP claims would be planted in vineyards does not have a water supply underlying the land.

(R.T. p. 417.) Finally, many variables influence whether to plant new vineyards or replant existing vineyards such as the cyclical nature of the wine industry, the economy, the price of wine, the reliability of the water supply, the suitability of the land for cultivation, vine health, and vine age. (R.T. pp. 411-417.) Therefore, the SWRCB finds that the amount of future growth in acreage planted in vineyards claimed by SVP is not reliable, is speculative, and should not be used in this analysis.

SVP's assumed water duty of four afa is high. SVP assumed that all irrigated lands could be converted to row crops and built in "flexibility" to account for landowners growing any crop they choose at any time. (R.T. pp. 620-622.) This assumption contradicts SVP's claim that more acreage will be planted in vineyards, which use much less water than row crops. Actual demand for vineyards is 1.5 afa (applied), which includes water for both irrigation and frost protection. (R.T. pp. 456-457.) MCWRA's estimate of average applied water for all crops grown in the Forebay and Upper Valley is 2.0-2.5 afa. (R.T. p. 620.) If more accurate figures are used, SVP's calculations using the methodology used in Exhibit 50 would show there is surplus water available for storage during years with above normal rainfall.⁷ Therefore, the SWRCB finds that SVP's conclusion that there is no surplus flow available for storage is not reliable.

The SWRCB finds that reliance on SVP Exhibit 50 to support SVP's contention that no surplus water exists that can be stored in Nacimiento Reservoir by MCWRA pursuant to Application 50532 is inappropriate. The assumptions used by the SVP in calculating the surplus flow available for storage are of questionable validity. The conclusion reached by SVP based on Exhibit 50 is not reliable and is contradicted by other, more persuasive evidence in the record described above. The SWRCB finds that there is water available for appropriation to supply the project described in Application 30532.

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⁷ Using the MCWRA's definition of above normal rainfall.

6.0 EFFECT ON SENIOR RIGHTS

SVP contend that approval of Application 30532 will cause injury to senior rights. However, SVP failed to show injury due to the unavailability of water at any time when the 27,900 af increment was diverted to storage in Nacimiento Reservoir.

SVP claimed that during the drought that occurred during 1990-1992, diversions to storage by MCWRA resulted in “interference” to San Bernabe Vineyards. (R.T. pp. 399-401.) SVP admitted that they did not perform any hydrologic analysis to determine whether diversions of water by MCWRA resulted in any “interference” with water use by San Bernabe Vineyards. (R.T. pp. 404-405.) The evidence shows that MCWRA did not store any water over the 350,000 af level during 1990-1992 and that fact was acknowledged by SVP. (R.T. pp. 406-407; MCWRA 3-8.) Between 1988 and 1992, Nacimiento Reservoir never stored more than 150,000 af.⁸ (MCWRA 3-7, 3-8.) Further, during 1990-1992, there was no damage to any vineyard owned by San Bernabe Vineyard as a result of inadequate water supply for irrigation or frost protection. (R.T. p. 407.) Therefore, SVP failed to provide any evidence of injury caused by storage of the 27,900 af increment. Accordingly, the SWRCB finds that there has been no injury to SVP caused by storage of the 27,900 af increment. Further, there is no evidence of injury to any other water users, regardless of whether they have a legal right to divert and use water. Therefore, no special terms or conditions are necessary to protect any senior water right holders downstream of Nacimiento Reservoir.

SVP’s lands in the Upper Valley benefit from increased groundwater levels in drought years due to MCWRA diverting to storage all or part of the 27,900 af increment during prior years of above normal rainfall. Modeling results show that average groundwater elevations in the Upper Valley were 2.29 feet higher under 1990 drought conditions with maximum storage at 377,900 af than they would have been if storage had been limited to 350,000 af during prior years of above normal rainfall. (R.T. pp. 58-59, 63; MCWRA 3-1, p.10; MCWRA 3-13.) In an extended drought period, carryover storage of 27,900 af recharges the groundwater basin downstream of

⁸ Any diversion of water to storage in Nacimiento Reservoir by MCWRA during that period was made pursuant to License 7543.

the reservoir. (R.T. p. 59.) Therefore, the SWRCB finds that the diversion to storage of the 27,900 af increment may provide a modest benefit to the SVP with lands in the Upper Valley due to the recharge of the groundwater basin resulting from carryover storage of the water.

7.0 EFFECT ON PUBLIC TRUST RESOURCES

The Salinas River basin supports a remnant run of steelhead trout (*Oncorhynchus mykiss*). (MCWRA 4-1, p. 2.) The most extensive and pristine steelhead habitat in the Salinas River basin is in the Arroyo Seco, tributary to the Salinas River. (*Supra*, at pp. 2, 7; R. T. p. 65.) The Arroyo Seco tributary is not affected by storage of water in Nacimiento Reservoir. The upper Salinas River basin has very little suitable habitat for steelhead and the habitat that exists is of lower quality and less extensive than the habitat in the Arroyo Seco. (*Id.*) There are very few steelhead in Arroyo Seco and stray fish sometimes appear in other tributaries. (MCWRA 4-1, p. 7.) In recent years, there have been no verified reports of a steelhead run in the Nacimiento River below Nacimiento Dam. (MCWRA 4-1, pp. 2, 8.)

Historically, steelhead spawned in the Arroyo Seco and in tributaries upstream of Atascadero. (MCWRA 4-1, p. 7.) The main stem Salinas River did not provide spawning or rearing habitat. (*Id.*; R. T. p. 66.) The main stem Salinas River served as a migration corridor to these areas and continues to do so. (*Id.*)

To determine whether diversion of 27,900 af to storage in Nacimiento Reservoir pursuant to Application 30532 would reduce the frequency and magnitude of passage opportunities for migrating steelhead, MCWRA analyzed available hydrological records, existing Salinas River field studies, and well established scientific criteria to determine the estimated flow needed for steelhead passage. MCWRA identified the flow-related depths necessary for passage at critical sites along the Salinas River using the Thompson methodology. (MCWRA 4-1, pp. 3-4, 12-14.)

MCWRA determined that the minimum flow required for upstream passage of adult steelhead occurs when a depth of 0.6 feet exists for at least 25 percent of the channel width and is continuous for at least 10 percent of the channel width. (MCWRA 4-1, p. 13; MCWRA 4-4.) The flow in the main stem of the Salinas River which is required to meet the channel depth

necessary for upstream steelhead passage is approximately 70 cubic feet per second (cfs) downstream of the mouth of Arroyo Seco and approximately 150 cfs upstream of Arroyo Seco to the mouth of the Nacimiento River. (MCWRA 4-1, p. 14.) Less flow is required downstream of the mouth of Arroyo Seco because the Salinas River channel is narrower and more confined in this area.

Storage in Nacimiento Reservoir exceeded 350,000 af during eight of the 43 years the reservoir has been in operation.⁹ (MCWRA 4-1, pp. 4, 17-23; MCWRA 3-1, p. 7; MCWRA 3-7; MCWRA 3-8.) Above normal rainfall and runoff occurred during the eight years in which the additional increment of storage occurred. (MCWRA 4-1, p. 18.)

The number of days that flow in the Salinas River satisfied the requirements for adult steelhead migration would have increased in only three of the eight years if the flow comprising the incremental storage above 350,000 af was bypassed¹⁰ instead of stored. This conclusion assumes that none of the water bypassed infiltrates to underlying aquifers. The condition where all of the bypassed water would stay in the river channel is most likely to occur during winter months when flow in the river exceeds the rate at which surface flow infiltrates the underlying aquifer. (MCWRA 4-1, pp. 4, 17-23; MCWRA 4-6 – 4-16.)

In each of the three years (1974, 1978, and 1982), flows would have increased above migration thresholds in the Upper Salinas River by 1, 11, and 16 days, respectively, and in the reach downstream of Arroyo Seco by 8, 2, and 1 day, respectively. (MCWRA 4-1, pp. 4, 19; MCWRA 4-17 – 4-24.) The years in which these few days would have occurred already had better than average migration conditions. (MCWRA 4-1, pp. 4, 19.) Therefore, the few extra days of enhanced migration conditions would not have increased significantly the success of steelhead migration.

⁹ The eight years during which storage exceeded 350,000 af were 1967, 1969, 1974, 1978, 1982, 1983, 1995, and 1998. Storage exceeded 350,000 af 611 days out of 14,611 days of operation.

¹⁰ In this decision, the term “release” is used only in reference to water stored in the reservoir. The term “bypass” is used only in reference to water not stored in the reservoir.

The evidence in the hearing record addressing the impacts to public trust resources of the additional diversion to storage that would be authorized by the approval of Application 30532 is uncontroverted. The SWRCB finds that the increase in storage of 27,900 af in Nacimiento Reservoir has not caused and would not cause any adverse impact to steelhead abundance or population viability in the Salinas River basin. Consequently, no special terms or conditions are required to protect steelhead.

8.0 COMPLIANCE WITH CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

In general, CEQA applies to discretionary projects which are proposed to be carried out or approved by public agencies. (Pub. Resources Code, § 21080, subd. (a).) In CEQA, a “project” is defined as:

“[A]n activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is any of the following:

“(c) An activity that involves the issuance to a person of a . . . permit . . . by one or more public agencies.” (Pub. Resources Code, § 21065.)

Application 30532 is a project as that term is used in section 21065 of the Public Resources Code. Therefore, unless an exemption applies, the SWRCB must either complete an analysis of the environmental effects of the project or review an analysis prepared by another agency acting as lead agency to comply with CEQA.

MCWRA claims that the project described in Application 30532 is both statutorily exempt as an ongoing project (Pub. Resources Code, § 21169; Cal. Code Regs., tit. 14, § 15261, subd. (a).) and categorically exempt as an existing facility (Cal. Code Regs., tit. 14, § 15301).

8.1 Ongoing Project Exemption

Section 15261 (a) of Title 14, California Code of Regulations states:

“If a project being carried out by a public agency was approved prior to November 23, 1970, the project shall be exempt from CEQA unless either of the following conditions exists:

- (1) A substantial portion of public funds allocated for the project have not been spent, and it is still feasible to modify the project to mitigate potentially adverse

environmental effects, or to choose feasible alternatives to the project, including the alternative of “no project” or halting the project. . . .

- (2) A public agency proposes to modify the project in such a way that the project might have a new significant effect on the environment.”

The SWRCB approved diversion of water to storage in Nacimiento Reservoir in 1957, long before the November 23, 1970 cutoff for a statutory exemption for ongoing projects. The reservoir was constructed and began operations in 1957 pursuant to Permit 10137. License 7543 was issued in 1964. As a result of the surveying error regarding actual capacity of the reservoir at 800 feet elevation, the historical operation of the reservoir includes storage of some or all of the 27,900 af that is the subject of Application 30532.

Neither of the exceptions set forth in subdivision (a) of section 15261 applies here. The public funds allocated to the project have already been spent and MCWRA does not propose to modify the project. Therefore, Application 30532 is statutorily exempt from CEQA as an ongoing project pursuant to section 15261.

8.2 Existing Facilities Exemption

Section 15301 of Title 14, California Code of Regulations describes existing facilities that are exempt from CEQA as:

“[T]he operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographic features, involving negligible or no expansion of use beyond that existing at the time of the lead agency’s determination.”

The baseline for determining whether the existing facilities exemption applies is the time the SWRCB determines CEQA applicability to Application 30532, not the effective date of CEQA. (*Bloom v. McGurk* (1994) 26 Cal.App.4th 1370 [31 Cal.Rptr.2d 914, 918]; Cal. Code Regs., tit. 14, § 15301.)

Nacimiento Reservoir has been in existence since 1957; consequently, it is an existing facility. The action of the SWRCB is to authorize and issue a permit for storage in an existing reservoir. The amount of water applied for by MCWRA in Application 30532 is the amount of water that

has been used historically. There will be no change or expansion of use. Due to the surveying error regarding the actual capacity of the reservoir at 800 feet elevation, MCWRA did not know that a permit was required for the storage of the 27,900 af increment.¹¹ Application 30532 simply corrects a surveying error regarding the actual capacity of the reservoir at 800 feet elevation. Therefore, Application 30532 is categorically exempt from CEQA as an existing facility pursuant to section 15301.

8.3 Exceptions to the Categorical Exemption

The CEQA Guidelines contain exceptions to the categorical exemptions to CEQA. (Cal. Code Regs., tit. 14, §15300.2.) An exception to the exemption applies where “there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.” (Cal. Code Regs., tit. 14, § 15300.2, subd. (c).)

According to CEQA, a “significant effect on the environment” is defined as “a substantial, or potentially substantial, adverse change in the environment.” (Pub. Resources Code, § 21068 (emphasis added). See also Cal. Code Regs., tit. 14, § 15382.) “Environment” is defined in CEQA and the Guidelines as “the physical conditions which exist within the area which will be affected by a proposed project.” (Pub. Resources Code, § 21060.5; Cal. Code Regs., tit. 14, § 15360.) According to *Bloom, supra*, the baseline for analyzing change in the environment is the time of the SWRCB’s determination. Here, there is no evidence in the record that reservoir operations will be altered in a manner that could adversely affect the environment. There is considerable evidence in the record to show that reservoir operations will not change if Application 30532 is approved. In this case, there cannot be a significant effect on the environment because there is no change in the environment.

¹¹ The test cited on page 31 of Decision 1639 (In the Matter of Application 29664 of Garrapata Water Company) has clearly been met in this case. The project was completed, and used to store amounts in excess of 350,000 af, before CEQA was enacted. The applicant did not know it was storing more than its authorized amount and, therefore, did not know that a permit was required to divert the additional water to storage. Applying the existing facilities exemption to this case does not provide any incentive for appropriators to initiate new diversions or increase existing diversions in the hopes of circumventing environmental review or undermining the SWRCB’s ability to require modifications to the project to avoid adverse affects on water resources.

The mere existence of an “unusual circumstance” does not necessarily preclude the applicability of a categorical exemption. Rather, there must be a reasonable possibility of a significant effect as a result of the unusual circumstance. Thus the presence of a threatened species does not preclude use of a categorical exemption if there will be no effect on the species or its habitat, or any potential effect would be beneficial. In this case, there is no evidence of any change in the environment caused by unusual circumstances because both the threatened species and MCWRA’s diversions of the 27,900 af to storage in Nacimiento Reservoir are part of the existing environment. Therefore, the exception to the exemption would not apply, and the SWRCB’s action on Application 30532 is categorically exempt from CEQA.

9.0 CONCLUSION

The SWRCB finds and concludes that the 27,900 af increment of water to be diverted to storage pursuant to Application 30532 is available for appropriation, and that the storage of that increment neither injures senior water rights nor harms public trust resources. The SWRCB finds and concludes that approval of application 30532 is statutorily exempt and categorically exempt from CEQA. The SWRCB further finds and concludes that Application 30532 should be approved and a permit should be issued subject to the terms specified in the order that follows.

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D R A F T

Revised
February 6, 2001

ORDER

IT IS HEREBY ORDERED THAT Application 30532 be approved and a permit be issued subject to prior rights and subject to standard permit terms 1, 2, 3, 4, 5c, 5i, 5l, 5n, 6, 9, 10-15, and 29b, ~~and 90~~.¹²

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 February 15, 2001.

AYE:

NO:

ABSENT:

ABSTAIN:

Maureen Marché
Administrative Assistant to the Board

¹² A copy of the standard permit terms is available upon request.