

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of License 11395)	ORDER: WR 94-4
on Application 16186 of)	
)	SOURCE: Merced River
MERCED IRRIGATION DISTRICT,)	
)	COUNTY: Merced
Petitioner)	
_____)	

*ORDER AFFIRMING APPROVAL OF TEMPORARY CHANGES
AND DENYING PETITION FOR RECONSIDERATION*

BY THE BOARD:

1.0 INTRODUCTION

On July 26, 1994, the Chief of the Division of Water Rights issued an order approving temporary changes of place of use and points of rediversion for License 11395 of Merced Irrigation District, under Water Code section 1725 et seq (hereinafter referred to as the "1994 Merced Order"). The temporary changes are due to a temporary transfer of water to Westlands Water District. The Chief of the Division of Water Rights is delegated authority to act for the State Water Resources Control Board (SWRCB) under Resolution No. 93-87, paragraph 3.2.13. On August 9, 1994, the SWRCB received a timely petition for reconsideration from the California Sportfishing Protection Alliance (CSPA). The SWRCB has duly considered the petition, and finds as follows:

2.0 BASIS FOR RECONSIDERATION

Pursuant to the SWRCB's regulation at 23 Cal. Code Regs. section 768, a petition for reconsideration may be made upon any of the following causes:

- a. Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;

- b. The decision or order is not supported by the evidence;
- c. There is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;
- d. Error in law.

CSPA did not specify which of the above causes is the basis of its petition, but the petition can be fairly construed as being based upon the causes listed as a. and b. above.

3.0 THE PETITION

CSPA raises only one issue: whether or not the proposed transfer would unreasonably affect fish, wildlife, or other instream beneficial uses. Apparently, CSPA is alleging that the 1994 Merced Order is an abuse of discretion or is unsupported by the evidence because it was signed by Edward Anton, Chief of the Division of Water Rights. CSPA also questioned the adequacy of the discussion in the order regarding cumulative impacts, apparently on the basis that the finding is unsupported by the evidence. As a remedy, CSPA requests that the SWRCB legally define and determine what constitutes an unreasonable effect on fish, wildlife, or other instream beneficial uses.

Water Code section 1727 requires the SWRCB, before approving a temporary change, to make an evaluation sufficient to determine, among other things, that the proposed temporary change would not unreasonably affect fish, wildlife, or other instream beneficial uses. In this case the Chief of the Division of Water Rights made the evaluation, pursuant to the SWRCB's delegation of authority in Resolution No. 93-87, paragraph 3.2.13.

3.1 Abuse of Discretion

CSPA apparently questions the reliability of Mr. Anton's finding that the temporary change will not have an unreasonable effect on fish, wildlife, and other instream beneficial uses. CSPA points out that a public employee whistleblower organization (PEER) has criticized Mr. Anton. CSPA's reasoning is murky, but it appears that CSPA is alleging that Mr. Anton's finding is an abuse of discretion because PEER has accused him of improperly directing his staff. The fact that someone has made an unproved accusation against Mr. Anton on an unrelated matter does not provide an evidentiary basis for finding that he has abused his discretion with respect to the 1994 Merced Order. If CSPA wishes to challenge the findings in the order based on an abuse of discretion, CSPA should use the information in the record to show why the findings are an abuse of discretion. CSPA has not met its burden in this regard; nor has CSPA offered to introduce any documentary evidence to meet its burden.

3.2 Evidentiary Support for the Findings

CSPA's arguments generally criticize transfers, rather than specifically addressing the merits of this temporary transfer. CSPA's petition fails to explain why the temporary transfer is unreasonable. CSPA may be suggesting that the evidence supports a finding that the temporary transfer will have an unreasonable effect on instream beneficial uses.¹ Also, CSPA may not be taking into account all of the information in the record.

¹ Alternatively, CSPA may be saying that it has information to show that there will be an unreasonable effect, since CSPA stated in the petition for reconsideration that it "has spent a considerable amount of time (hundreds of hours) in developing information and data, and commenting on major water transfers...." If CSPA has information that has not been provided to the SWRCB, however, CSPA should have submitted that information so that it can be considered. CSPA has not indicated there is any information outside the record that could not have been submitted during the comment period and that would support a different outcome.

CSPA argues that the 1994 Merced Order fails "to disclose and consider the 'cumulative impacts' to fish, wildlife, and other instream uses from all water transfers pending" before the SWRCB. CSPA claims that petitions to transfer up to 95,000 acre-feet of water have been filed.

Water Code section 1725 et seq. does not specify that a cumulative effects assessment must be provided by the petitioner. Nevertheless, the SWRCB has made it a practice to consider cumulative effects as part of each determination whether a particular transfer will have an unreasonable effect on fish, wildlife, and other instream beneficial uses. For this transfer, a full cumulative effects assessment was not required of the petitioner. No other temporary transfer before the SWRCB is situated similarly to this transfer. Also, its effects should not be analyzed as if the water were coming from the Sacramento River. The Department of Fish and Game and the U.S. Fish and Wildlife Service specified terms and conditions to avoid unreasonable impacts on fish and wildlife, and these conditions were included in the 1994 Merced Order. Therefore, the Division Chief and Division of Water Right staff evaluated the direct and cumulative effects of this transfer based on the information in the record.

The 1994 Merced Order considers the cumulative effects of this transfer along with the others and discloses those effects to the extent known. Little interaction will occur between this transfer and the others because the water for this transfer, unlike the others, enters the Delta from the San Joaquin River, not the Sacramento River. Because it enters from the San Joaquin River, it does not contribute to reverse flows in the Delta, and it may benefit the fisheries if it is closely managed. The Department of Fish and Game, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service will supervise the transfer on a daily basis and will seek opportunities not only to

minimize adverse effects, but also to enhance fish survival. Because of their supervision, the transfer may have significant benefits for Chinook salmon.

Transfers from the Sacramento River, which traverse the Delta, potentially have a comparatively greater adverse effect than transfers from the San Joaquin River, since the Sacramento River transfers contribute to reverse flows during dry periods and have different effects on the fisheries. The only additive effect of this transfer to the Sacramento River transfers is on the total number of acre-feet pumped. Because of the direction of flow, it can be expected that fewer fish will be entrained per acre-foot with this transfer than with the other transfers. The terms and conditions in the 1994 Merced Order, which require fishery mitigation and enhancement, will minimize any cumulative effects of this transfer.

The evidence, taken as a whole, supports the findings in the 1994 Merced Order. The finding in the 1994 Merced Order that the proposed temporary changes will not unreasonably affect fish, wildlife, or other instream beneficial uses is founded on the entire record including the conditions the order imposes on the transfer. The biological effects are mitigated by the conditions on the transfer, and the findings take into account these conditions. The conditions generally follow the recommendations of the interested parties. The conditions include: (1) limits on the periods, or windows, during which the transfer may be accomplished; (2) a requirement that the transfer water augment the flows being released for instream flow obligations and not be included in the minimum flow releases; (3) specified maximum amounts that may be transferred during each transfer window; (4) a provision for daily management of the amount and timing of releases of transfer water to maximize fishery benefits and minimize adverse effects to the fisheries; (5) ramping requirements for instream flows; (6) provisions for handling the

discovery of winter-run Chinook salmon at the CVP or SWP facilities; (7) drainage management requirements in the added place of use; (8) compliance with all fish and wildlife protections that control or constrain Delta flows and exports, including requirements imposed on the CVP or the SWP; (9) a reservation of jurisdiction to supervise the transfer and to add more terms and conditions if necessary to protect water rights, fish, wildlife, instream beneficial uses, and the public interest.

A finding under section 1727(a)(2) regarding the reasonableness of effects on fish and wildlife requires consideration not only of the effects on fish and wildlife but also of the relative need for water outside the stream, the prevailing hydrologic conditions, and other factors specific to the proposed transfer.. The shortage of water for consumptive uses this year and the need for water help make the effects on fish, wildlife, and instream beneficial uses reasonable, even though there is a potential for significant adverse effects on these resources.

Considering the whole record, including the conditions and the need for additional water in export areas this year, the SWRCB affirms that the temporary transfer will not have an unreasonable effect on fish, wildlife, and other instream beneficial uses, based on the evidence in the record.

3.3 The Reasonableness Doctrine

CSPA insists that the SWRCB should determine what constitutes an unreasonable effect under Water Code section 1727(a)(2). CSPA asserts that the 1994 Merced Order and other temporary transfer orders have an unreasonable effect on fish and wildlife because the SWRCB "has not made a finding and a determination what constitutes unreasonable effects to fish, wildlife, and other instream uses...."

Water Code section 1727(a)(2) requires the SWRCB to make a finding that the temporary change would not unreasonably affect fish, wildlife, or other instream beneficial uses. It does not require the SWRCB to decide how much of an adverse impact on instream beneficial uses the transfer could have before it would be deemed unreasonable.

The SWRCB or its delegated employee makes the required determination individually for every temporary transfer order, including the 1994 Merced Order. Reasonableness is the guiding doctrine in California law, and has been thoroughly discussed by the courts. The value and principle of the reasonableness doctrine is that it is responsive to changing circumstances. The concept of an unreasonable effect in section 1725 is founded on the reasonableness doctrine. The reasonableness doctrine is set forth in California Constitution Article X, section 2.

The following is a summary of the relevant points made in the leading cases. First, the reasonableness doctrine establishes basic rules against which the diversion and use of water must be measured. The reasonableness of a particular use or diversion of water is a question of fact to be determined according to the circumstances of each case. (See People v. Forni (1976) 54 Cal.App.3d 743, 126 Cal.Rptr. 851) Second, the cases construing the reasonableness doctrine emphasize the responsiveness of the doctrine to the circumstances that exist at the time, and they point out that the determination of whether a particular action is reasonable may change over time. In Environmental Defense Fund v. East Bay Mun. Util. Dist. (1980) 26 Cal.3d 183, 194, 161 Cal.Rptr. 466, 471 (EDF II), the California Supreme Court said that "What constitutes reasonable water use is dependent upon not only the entire circumstances presented but varies as the current situation changes." In Tulare Dist. v. Lindsay-Strathmore Dist. (1935) 3 Cal.2d 489, 567, 45 P.2d 972, 1007, the Supreme Court said,

"What may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great scarcity and great need. What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time."

With respect to temporary transfers, the establishment of procedures to avoid or mitigate adverse effects, the active involvement of the Department of Fish and Game and other fishery agencies, the recommendations of the fishery agencies, the ability of the transfer to provide a benefit to fish and wildlife while accomplishing its primary objective, and the commitments of the transferor and transferee all can be taken into account in making a determination whether the transfer will have an unreasonable effect on instream uses. A transfer might have an unreasonable effect if it were not conditioned, but with adequate terms and conditions, the transfer's effects could be made insignificant or even beneficial to instream beneficial uses. The same transfer, made under different conditions, may be reasonable in one case and unreasonable in another case. Numerous factors apply, and each transfer differs from the previous one. Virtually every transfer that is approved is conditioned, and the conditions ensure that a transfer's effects on fish and wildlife will not be unreasonable in light of all the extant circumstances.

4.0 CONCLUSION

The SWRCB concludes that the 1994 Merced Order of the Chief of the Division of Water Rights regarding the Merced transfer was regularly and fairly decided; that the order does not constitute an abuse of discretion; and that it is supported by the evidence in the record.

ORDER

NOW, THEREFORE, IT IS ORDERED that the July 26, 1994 order of the Chief of the Division of Water Rights approving temporary changes

of place of use and points of rediversion is affirmed, and the petition for reconsideration filed by California Sportfishing Protection Alliance is denied.

CERTIFICATION

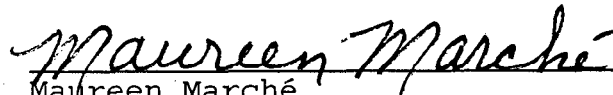
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full and correct copy of a decision duly and regularly adopted at a meeting of the State Water Resources Control Board held on October 20, 1994.

AYE: John P. Caffrey
 Marc Del Piero
 Mary Jane Forster
 John W. Brown

NO: None

ABSENT: James M. Stubchaer

ABSTAIN: None



Maureen Marché
Administrative Assistant to the Board

