

10/15/95

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Petition for)
Reconsideration of Approval of)
Water Conservation Plans Required)
for Delivery of Water to the)
Central San Joaquin Water)
Conservation District and the)
Stockton East Water District under)
Water Right Permits 16597, 16600,)
and 20245 (Applications 14858A,)
19304, and 14858B) held by:)
)
)
UNITED STATES BUREAU OF)
RECLAMATION)
)

ORDER: WR 95-18

**ORDER DENYING PETITION FOR RECONSIDERATION OF
APPROVAL OF WATER CONSERVATION PLANS FOR
CENTRAL SAN JOAQUIN WATER CONSERVATION DISTRICT
AND STOCKTON EAST WATER DISTRICT**

BY THE BOARD:

1.0 INTRODUCTION

On August 9, 1995, the Chief of the Division of Water Rights of the State Water Resources Control Board (SWRCB) approved a water conservation plan submitted by the United States Bureau of Reclamation (USBR) pursuant to Water Right Decision 1616 (D-1616), Condition 21 and pursuant to Term 26 of Permits 16597 and 16600 (Term 26 is from Condition 3 of Order WR 83-3). The water conservation plan approved on August 9, 1995 involves delivery of water to Central San Joaquin Water Conservation District (CSJWCD). On August 28, 1995, the Chief of the Division of Water Rights approved a second water conservation plan submitted by the USBR pursuant to Condition 21 of D-1616 and pursuant to Term 26 of Permits 16597 and 16600 involving delivery of water to Stockton East Water District (SEWD).

On September 8, 1995, the SWRCB received a timely petition for reconsideration of the approvals of the two water conservation

plans. The petition was filed on behalf of the Stanislaus River Council (SRC).

2.0 BACKGROUND

The permits involved in this petition authorize the USBR to appropriate water for consumptive uses from the Stanislaus River at New Melones Reservoir and at diversion points on the Stanislaus River. The facilities and the operation of these facilities under these permits and under other water right permits that authorize nonconsumptive uses of water are collectively called the New Melones Project. The SWRCB approved the New Melones Project in stages. Water Right Decision 1422 (D-1422), adopted in 1973, authorizes diversion of water from the Stanislaus River only to storage and does not authorize direct diversion of water to beneficial uses. The SWRCB issued Permits 16597 and 16600 pursuant to D-1422. D-1616, adopted in 1988, authorizes direct diversion of water from the Stanislaus River. The SWRCB issued Permit 20245 pursuant to D-1616.

The water right permits for the New Melones Project of the USBR require that water conservation plans or programs be prepared in connection with deliveries of water to water purchasers. The service areas of the CSJWCD and the SEWD, both of which are local water purveyors, are downstream from the New Melones Project and are within the approved place of use of water from the New Melones Project. The CSJWCD and the SEWD have executed contracts with the USBR to purchase water appropriated under the New Melones water right permits. On August 7, 1995, the USBR submitted a water conservation plan for the CSJWCD. The Chief of the Division of Water Rights approved the plan on August 9, 1995. On August 17, 1995, the USBR submitted a water conservation plan for the SEWD. The Chief of the Division of Water Rights approved the plan on August 28, 1995.

SRC objects to the Chief of the Division of Water Rights' approval of the two water conservation plans, arguing that the approval requires notice and hearing and must be made by the SWRCB Members.

SRC's petition states that the two water conservation plans are required by D-1616, Condition 21. D-1616 authorizes the USBR to appropriate water from the Stanislaus River by direct diversion, subject to terms and conditions. Condition 21 provides:

"Prior to any diversion of water for municipal, domestic or irrigation purposes, Permittee shall consult with the Chief of the Division of Water Rights and develop a Water Management Program in conformance with State Water Resources Control Board requirements as appropriate. The proposed program shall be presented to the Board for approval. Board approval of the program shall also fulfill the requirements of Term 26 of Permits 16597 (Application 14858A) and 16600 (Application 19304).

"All cost-effective measures identified in the water management program shall be implemented in accordance with the schedule for implementation found therein."

Water conservation programs or actions also are required under the water storage permits for New Melones Reservoir. The USBR is authorized to divert water to storage at New Melones Reservoir pursuant to D-1422 and Permits 16597 and 16600. In 1983 when the SWRCB amended D-1422 in Order WR 83-3, the SWRCB added Condition 3, requiring water conservation to the permits issued under D-1422 and Permits 16597 and 16600. This condition became Term 26 of Permits 16597 and 16600 and is referenced in Condition 21. Pursuant to Condition 21, satisfaction of Condition 21 will satisfy Term 26 of Permits 16597 and 16600. Condition 21 and Term 26 are both versions of the same standard permit term.

Term 26 provides:

"Permittee shall consult with the Division of Water Rights and the Department of Water Resources and develop and implement a water conservation program or actions. A progress report on development of the program shall be

submitted to the Board within 6 months. The program or proposed actions shall be presented to the Board for approval within one year from the date of this order or such further time as may, for good cause shown, be allowed by the Board."

The Chief of the Division of Water Rights approved the water conservation plans with respect to all three of the consumptive use permits for the New Melones Project, not just for Permit 20245, the direct diversion consumptive use permit issued pursuant to D-1616. D-1616 authorizes direct diversion of water from the Stanislaus River only from November 1 of each year through June 30 of the succeeding year. Therefore, any water delivered to CSJWCD or to SEWD from the New Melones Project between July 1 and October 31 of each year would come from stored water appropriated under Permits 16597 and 16600. Term 26 of these permits governs water conservation plans for water deliveries under these permits, even though a plan prepared under Condition 21 would satisfy Term 26.

Several of the terms and conditions in the above permits for the New Melones Project include language requiring that before the SWRCB takes action under the term or condition, the SWRCB will give notice to interested parties and opportunity for a hearing. (See D-1616, terms 16 and 17 and standard permit terms 12 and 13 (these terms are incorporated by reference in D-1616); and D-1422, terms 13 and 20.) Term 26 and Condition 21, however, do not include such language.

3.0 GROUNDS FOR RECONSIDERATION

The SWRCB may order reconsideration of all or a part of a decision or order adopted by the SWRCB upon petition by affected persons. (Wat. Code § 1357.) The SWRCB's regulations (23 Cal. Code Regs. § 768) list the following causes upon which an interested person may petition the SWRCB for reconsideration:

- 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 substantial evidence;
- c. There is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;
- d. Error in law.

The SRC alleges as grounds for reconsideration that:

(1) approval of the water conservation plans was an approval of a new diversion of water without public notice; (2) the approvals of the water conservation plans were not made by the SWRCB and were not supported by findings or evidence; (3) the SWRCB did not independently review the water conservation plans but relied upon the permittee to determine compliance; (4) the SWRCB unlawfully delegated review and approval authority to the Chief of the Division of Water Rights violating Resolution No. 93-11 (delegating authority to the Chief of the Division of Water Rights) and Condition 21 of D-1616. These allegations could be construed as falling within the causes listed as a., b., and d. above. The SRC requests that the SWRCB vacate the approvals of the water conservation plans, provide a reasonable public notice and comment period, hold an adjudicatory hearing, and prepare a decision or order that contains legal and factual findings based on evidence in the record.

SRC in effect argues that the approvals of the water conservation plans are decisions or orders or are the functional equivalent of decisions or orders authorizing a new appropriation, that these approvals could not be given without the SWRCB providing notice to interested parties and an opportunity for an adjudicatory

hearing, and that the Chief of the Division of Water Rights was not authorized to give these approvals. For the reasons which are discussed below, no notice and opportunity for an adjudicatory hearing was required for these approvals.

4.0 AVAILABILITY OF RECONSIDERATION

4.1 Condition 21 and Term 26 Do Not Require Notice and an Opportunity for a Hearing

SRC contends that approval of a water conservation plan under Condition 21 or under Term 26 is an appropriation of water and that the USBR's request for approval is a water right application. The water right applications for the New Melones Project were approved some time ago. The water conservation plan approvals do not require the notice and opportunity for hearing that is required for approval of a water right application.

Before approving the water rights, the SWRCB gave the required notice and provided an opportunity for a hearing. Hearings were conducted before adoption of both D-1422 and D-1616. Additional hearings have resulted in adoption of Orders WR 80-20 and 83-3. At the hearings, the SWRCB received evidence and heard legal arguments. Both D-1422 and D-1616 were issued subject to various terms and conditions. Further conditions were added in Order WR 83-3. In the decisions and order, the SWRCB determined that the USBR could appropriate the water for specified types of uses, and could use the water anywhere within the authorized place of use. The permits allow the USBR to determine the exact locations of water use and the parties within the place of use to whom the USBR will sell water subject to meeting the terms and conditions in the permits.

By submitting and obtaining approval of the water conservation plans prepared by SEWD and CSJWCD, the USBR satisfied one of a number of conditions of delivering water from the New Melones Project to a purchaser of water for consumptive use. The

submittal of these plans was not the equivalent of an application to appropriate water, and their approval did not create any new water rights. By entering into a contract with the USBR to purchase water, the purchasers acquired a contractual right to purchase water, subject among other things to the terms of their contracts with the USBR and subject to the right of the USBR to appropriate the water.

Neither Condition 21 nor Term 26 provides that the SWRCB must give notice and provide an opportunity for a hearing before approving a water conservation plan. In water right permits and licenses, the SWRCB regularly includes numerous terms or conditions. For this discussion, terms and conditions can be divided into two groups: those that require notice and an opportunity for a hearing, and those that do not require notice and an opportunity for a hearing.¹ Terms and conditions that reserve the SWRCB's authority to make a future undefined change in the water right require notice and an opportunity for hearing before the change is made. In most cases these terms and conditions provide for changes that could reduce or limit the exercise of the water right. An example is the standard permit term reserving the SWRCB's continuing authority to protect public trust uses and to take action under California Constitution Article X, section 2. (See 23 Cal. Code Regs. § 780(a).)

The second type of term or condition puts limits and preconditions on the exercise of the water right. It includes construction requirements, place of use, purpose of use, diversion limits, requirements for measurement devices, and requirements for reports. A violation of one of these terms or

¹ A hearing also is required if a water right holder's petition for a change in a permit or license is protested and the protests are not resolved through negotiation. The request for approval of the plans is not a petition for a change in the permits but rather is a step in satisfying a condition in a previously issued permit.

conditions could result in the SWRCB, through its Division of Water Rights, initiating an enforcement action against the permittee or licensee. Condition 21 and Term 26 are limitations whose violation could result in enforcement action. If the USBR were to deliver water appropriated under the New Melones permits to a purchaser without having obtained approval of a water conservation plan for that purchaser, the USBR could become the subject of an enforcement action.² Based on the foregoing, no notice and opportunity for hearing is required by the New Melones permits before a water conservation plan can be approved.

4.2 Approval of Water Conservation Plans is Properly a Function of the Chief of the Division of Water Rights

The determination of whether a water conservation plan is complete and adequate is not a policy determination requiring the review of the SWRCB. The SWRCB established its policy by adopting the term and condition requiring that water conservation plans shall be prepared and implemented. The staff is required to carry out the policy. This is a technical function in which a staff person reads the plan and compares it to a standard set of criteria. If it meets the criteria, it is approved.

Ample guidance exists to determine whether a water conservation plan is adequate. Urban water management plans, which are plans for water conservation and reclamation, are governed by Water Code section 10610 et seq. The necessary elements of a plan are set forth at Water Code sections 10631, 10632, and 10633. Agricultural water conservation programs are governed by Water Code sections 10520 et seq. and 10800 et seq. The required elements of an agricultural water conservation plan are set forth at Water Code sections 10522 and 10825-10826.

² Condition 21, for direct diversion of water, specifies that the permittee shall develop a Water Management Program before diverting water for municipal, domestic, or irrigation purposes. Term 26, for water stored under D-1422, does not specify that the water conservation program or action be prepared before diversion or delivery of water.

The Chief of the Division of Water Rights is delegated authority under Resolution No. 95-36,³ paragraph 3.1.2, to: "Prepare and sign all correspondence pertaining to the engineering and other technical functions of the Division of Water Rights." Paragraph 3.1.5 further provides that: "The authority herein delegated to prepare a document includes the authority to direct preparation thereof."

The issuance of a letter approving a water conservation plan pertains to a technical function of the Division of Water Rights. As explained above, a determination that a water conservation plan or program is adequate is a technical matter. The policy decisions defining adequacy have been made by the Legislature. If the plan is complete, it can be approved without receiving evidence or legal arguments.

SRC argues that even if the approvals of the water conservation plans are ministerial acts or are not adjudicatory, the approvals violated the delegation of authority because the Chief of the Division of Water Rights is required to bring to the attention of the SWRCB in a public forum matters that: (1) are unique or unusual; (2) involve significant policy questions; or (3) are highly controversial. SRC argues that approval of a water conservation plan for the New Melones Project meets all of these criteria.

The SWRCB finds that a determination to approve these plans does not meet these criteria. First, the SWRCB has been including versions of standard terms requiring water conservation plans or programs in permits at least since the early 1980s, and the Chief of the Division of Water Rights routinely has reviewed them. The fact that the permittee is a federal agency does not make these

³ Resolution No. 93-11, which SRC cites, has been replaced by Resolution No. 95-36.

plans unique. Second, approval of these plans does not involve any significant policy questions. The SWRCB decided in its decisions and orders on the New Melones Project that the USBR can appropriate water from the Stanislaus River for agricultural and urban consumptive uses. The water conservation plans do not change the project and their approval does not relieve the USBR from complying with all the other terms and conditions in the permits. The determination of compliance is a simple matter of comparing the plans with existing criteria. Third, the fact that some past water right decisions regarding the New Melones Project have been controversial does not mean that the water conservation plans are controversial. SRC does not even allege that it will be harmed if the plans are implemented or if water is delivered to SEWD and CSJWCD. Rather, SRC complains only that a different procedure should be used. This does not amount to the plans being highly controversial.

The SWRCB recognizes that the language of Condition 21 and Term 26 speaks of "Board" approval of the water conservation plans. This language is not intended, in the absence of provisions requiring notice and an opportunity for hearing, to mean that approval cannot be delegated to staff. The SWRCB frequently uses the term "Board" in its decisions and orders to refer to the agency as a whole, rather than exclusively to the appointed members of the SWRCB. In Condition 21 and Term 26, "Board" means the agency. This allows the plan to be directed to any part of the agency that is assigned responsibility to review and approve it. An approval, then, is an approval on behalf of the agency.

5.0 APPROVAL OF THE WATER CONSERVATION PLANS

SRC does not cite any specific deficiencies in the two water conservation plans with respect to state law. Instead, SRC's petition is based on the procedure used to approve the plans. Therefore, this order does not examine the contents of the plans.

5.1 The Central San Joaquin Water Conservation District Plan

This plan is an agricultural plan. Therefore, the SWRCB staff reviewed it for adequacy under Water Code sections 10520 et seq. and 10800 et seq. While SRC takes exception to the suggestion in the approval letter that the review was " cursory", it appears that the plan is adequate to satisfy the statutory criteria. If water delivered to CSJWCD by the USBR were in turn delivered to SEWD, SEWD would need to have an approved water conservation plan containing urban conservation measures before SEWD could use the USBR-appropriated water for urban uses. As discussed below, such a plan has been approved for the use of USBR-appropriated water by SEWD.

The letter from the Chief of the Division of Water Rights approving the CSJWCD plan states that the USBR may commence delivery of water to CSJWCD. This authorization should be construed narrowly, because it is made solely with respect to approval of the plan. It does not give the USBR permission to violate any term or condition of its water right permits, nor does it allow violation of any other authorizations which it has received. If the USBR must comply with some other requirement that prevents it from delivering water to CSJWCD, the approval letter does not change that requirement.

5.2 The Stockton East Water Conservation District Plan

This plan contains elements for both agricultural and urban water uses. Therefore, the SWRCB staff reviewed it for adequacy under both Water Code sections 10520 et seq. and 10800 et seq., and Water Code section 10610 et seq. It appears that the plan is adequate to satisfy the statutory criteria.

The letter from the Chief of the Division of Water Rights approving the SEWD plan states that the USBR may commence delivery of water to SEWD. This authorization should be construed narrowly, because it is made solely with respect to

ORDER

IT IS HEREBY ORDERED THAT the petition for reconsideration is denied.

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on November 2, 1995.

AYE: John Caffrey
 Mary Jane Forster
 Marc Del Piero
 James M. Stubchaer

NO: None

ABSENT: John W. Brown

ABSTAIN: None



Maureen Marché
Administrative Assistant to the Board

