

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER: WR 98-01

In the Matter of License 11395 (Application 16186) of
MERCED IRRIGATION DISTRICT,
Petitioner

SOURCE: Merced River

COUNTY: Merced

**ORDER DENYING PETITION FOR RECONSIDERATION OF
TEMPORARY CHANGE OF PLACE OF USE
AND PURPOSE OF USE**

BY THE BOARD:

1.0 INTRODUCTION

On October 14, 1997, the Chief of the Division of Water Rights approved, subject to terms and conditions, a temporary change in the water rights of the Merced Irrigation District (MID). The temporary changes facilitated the temporary transfer of up to 7,500 acre-feet (af) of water from MID to the United States Bureau of Reclamation (USBR) under Water Code sections 1707 and 1725 et seq. The purpose of the transfer was to supply the USBR with water to use for fish and wildlife enhancement under the Central Valley Project Improvement Act (CVPIA). (Public Law 102-575, Title 34, section 3406(b)(3).) The temporary change expanded the place of use to include the reach of the Merced River downstream of Lake McClure (New Exchequer Dam) and the reach of the San Joaquin River extending north from the confluence of the Merced River to the U.S. Geological Survey gage at Vernalis. The temporary change also added fish and wildlife enhancement to the purposes of use. The temporary change was in effect from October 19 through October 31, 1997.

On October 17, 1997, South Delta Water Agency (SDWA) filed a request for reconsideration of the October 14, 1997, Order. SDWA requested the SWRCB to reconsider its Order, delay the effective date of the Order, and conduct a noticed hearing on MID's petition¹. SDWA based its request on the following arguments:

1. That the SWRCB did not address the issue of whether, under Water Code section 1732, MID had failed to exercise due diligence by not petitioning for a change under other provisions of the Water Code.
2. That the SWRCB failed to clarify the differences between Water Code sections 1707 and 1725 et seq., and in particular failed to clarify whether the consideration of injury to other legal users of water under section 1727(a)(1) applies to SDWA.
3. That the SWRCB did not comply with section 1727(a)(1) because it has no evidence as to MID's management of the water in the absence of the transfer.
4. That the SWRCB had no operational data from MID to support the petition.
5. That the SWRCB wrongfully concluded that the USBR will mitigate any adverse effects of the transfer through the use of water provided under section 3406(b)(2) of the Central Valley Project Improvement Act.
6. That the SWRCB ignored the possibility that MID might have released the water earlier in the year, to SDWA's benefit, if it was not planning to transfer the water to the USBR.
7. That the SWRCB failed to examine whether the transfer would result in more flow than is examined in the Environmental Report to the 1995 Bay-Delta Plan, and what the effects are of such potentially additional flows.

¹ The transfer was authorized to be conducted from October 19 through 31, 1997. Accordingly, it is no longer ongoing at this time.

8. That the SWRCB is trying to limit SDWA's irrigation season to April through September, even though SDWA diverts water at other times.
9. That the SWRCB did not examine the cumulative effects of the MID transfer as required by its previous rulings.

2.0 BASES FOR RECONSIDERATION

The SWRCB's regulations, at Title 23, California Code of Regulations, section 768, specifies four causes for reconsideration of a decision or order of the SWRCB. These are:

- (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.

SDWA asserts that there is cause for reconsideration because of insufficient evidence to support the Order, abuse of discretion, and failure to examine matters required under the law, all of which SDWA asserts precluded it from having a fair hearing. These allegations fall under subdivisions (a) and (b) of section 768.

3.0 CONSIDERATION OF SDWA'S ALLEGATIONS

1. SDWA argues that under Water Code section 1732, because the SWRCB has authorized previous temporary transfers of water by MID since 1992, the SWRCB is required to decide

whether MID has exercised due diligence in petitioning for a change under other provisions of the Water Code. Section 1732 provides:

“The board shall not approve a temporary change if the board, in its judgment, concludes, if applicable, that the petitioner has not exercised due diligence in petitioning for a change pursuant to provisions of this division other than this article.”

SDWA argues that section 1732 requires the SWRCB to determine whether or not MID has exercised due diligence in petitioning for a temporary change. This section applies to situations in which a water right holder could petition for a long-term or permanent change but instead repeatedly petitions for temporary changes. Section 1732 authorizes the SWRCB to deny an otherwise proper temporary change on the basis that the water right holder should have filed a petition for a longer-term or permanent change and is instead repeatedly seeking the same temporary change. In the SWRCB's judgment, MID's temporary change petitions in the past five years have not been part of a definable long-term change. The amounts, timing, and circumstances of MID's temporary changes have varied, and MID did not make the changes under a long-term agreement to provide water. The petition considered herein differs from MID's past petitions. Further, the type of change that is subject to this Order could be affected by potential long-term actions under the CVPIA and the SWRCB's water right proceeding. With the final outcome of these actions unknown, MID cannot be expected to negotiate a long-term or permanent change. Accordingly, section 1732 does not apply to the petition under consideration.

2. SDWA's second allegation is that the SWRCB failed to explain in its October 14, 1997, Order the relationship between Water Code sections 1707 and 1725 et seq. SDWA is in error. As the Order states, an approval of a petition under sections 1707 and 1725 et seq. must meet the requirements of both provisions. The Order accordingly makes findings for each of the criteria under both provisions. In its request for reconsideration, SDWA asks whether section 1727(a)(1) applies to SDWA. Section 1727(a)(1) requires the SWRCB, before approving a temporary change, to find that the change will not, under various

circumstances, injure any legal user of the water. The SWRCB addressed this question at length in the October 14, 1997, Order. The answer is that section 1727(a)(1) applies to the petition, but SDWA's members are not legal users of the water in question while it is under MID's control. SDWA does not have a right to require MID to either abandon or deliver the water to SDWA at the times when it would benefit SDWA. The water SDWA now seeks is water MID stored during an earlier season, under MID's appropriative rights. When released, this water is foreign in time from water to which SDWA's members could make a claim under their claimed riparian rights. SDWA's appropriative right holders also have no right to compel its continued release into the Delta.

SDWA argues that it does not need a legal right to use the water in order to be injured within the meaning of Water Code sections 1707 and 1725 et seq., and that the common law cases do not apply. We do not agree.² The statutory no-injury rule codifies the common law no-injury rule. (See Water Code section 1706; Code Commission Notes to Water Code section 1700; Final Report, Governor's Commission to Review California Water Rights Law (1978) at 64-65.) Accordingly, the no-injury rules under Water Code sections 1702, 1706, 1707, 1725, and 1727 all should be interpreted consistently with the case law.

As stated in the October 14, 1997, Order:

“The first criterion under section 1725 et seq. is that the temporary change will not injure any legal user of the water. The transfer cannot be approved if available information shows that the transfer will injure any legal user of the water, during any potential hydrologic condition, through resulting significant changes in water quantity, water quality, timing of diversion or use, consumptive use of the water, reduction in return flows, or reduction in the availability of water within the watershed of the transferor. (Water Code section 1727(a)(1).) Additionally, the second criterion under section 1707 is

² We are not suggesting that a right to the use of water, protectable under the no-injury rule, is necessarily limited to proprietary rights. In particular, the public trust doctrine may provide a legally protectable interest in the uses of water for instream beneficial purposes. (See Order WR 95-9, footnote 10.) We conclude, however, that the requirement that a transfer not injure any legal user of water does not extend protection to persons or interest who have no legal right to use of the water.

that the proposed change will not unreasonably affect any legal user of water. (Water Code section 1707(b)(2).)”

* * * *

“If MID were to simply release water from its storage facilities during the irrigation season, the water would be considered abandoned, and if that water reached the southern Delta, SDWA’s members could divert and use the water under any appropriative water rights they may have. By transferring the water to the USBR under section 1707 in October, however, MID will release it outside the irrigation season and will protect it from being appropriated in the reach (Merced River to Vernalis) where the USBR intends to beneficially use it for fish and wildlife enhancement.

“In effect, SDWA wants MID to abandon its excess storage during the irrigation season so that SDWA’s members will have adequate water for their uses without paying for it. SDWA has no claim to MID’s stored water while MID has it under control. Even though SDWA’s members could divert and use water that MID abandoned, pursuant to their appropriative rights, this does not mean that they can require MID to abandon water stored in an earlier season, on a time schedule that would be to SDWA’s benefit. (*Lindblom v. Round Valley Water Co.* (1918) 178 Cal. 450 [173 P. 994, 997].)

“Further, SDWA’s members can neither require nor use abandoned storage releases from MID under their alleged riparian rights. Riparian rights attach only to the natural flow of the stream and do not attach to water that is present because of releases from storage, importing from another watershed or return flows from groundwater pumping. (*Lux v. Haggin* (1884) 69 Cal. 255 [4 P. 919]; *Bloss v. Rahilly* (1940) 16 Cal.2d 70 [104 P.2d 1049].) The natural flows in the San Joaquin River diminish during the irrigation season and riparian right holders generally do not have adequate water available to them during the entire irrigation season.”

3. SDWA’s third allegation is that the SWRCB had not complied with section 1727(a)(1). The SWRCB found that it has no evidence that MID would have released the water any earlier in the year in the absence of the transfer, and further found that MID has discretion under its water rights to release water at the times that provide the greatest benefit to it. The point of this finding is that in the absence of the transfer, MID could have released the water at a time that did not benefit SDWA. Allowing the transfer, at a time after SDWA wished that the water would be abandoned and flow through the southern Delta, did not change the fact that

SDWA had no legal right to require the release of water from MID's reservoir at a time that would benefit SDWA³. Considering that SDWA has no legal right to require MID to release stored water, it would not be reasonable for the SWRCB to require MID to prove that retaining the stored water until October would not, or did not, injure SDWA's members.

SDWA points out that it asked MID for an operational study showing its operations in the absence of the transfer. As discussed above, MID had no obligation to give SDWA such a study, but based on the fact that MID did not produce it, SDWA argues that the SWRCB does not have evidence as to MID's alternative plans. Therefore, SDWA contends the SWRCB cannot make the required finding under section 1727(a)(1). As discussed above, this argument fails because SDWA's members cannot be injured within the meaning of section 1727(a)(1) as a result of this change.

4. SDWA's fourth allegation is that the SWRCB was required to obtain operational studies from MID supporting the temporary change petition before approving the petition. The purpose of reviewing operational studies would be to determine the effects of the temporary change to determine whether mitigation is needed. As the October 14, 1997, Order finds, the Order is conditioned adequately to mitigate for any potential impacts of the temporary change. The conditions take into account the fact that operational studies were not available. Fewer mitigation measures might have been needed if more information had been provided, but with these mitigation measures in place, there is no need for the operational studies SDWA wanted.
5. SDWA's fifth allegation is that the SWRCB wrongfully concluded that the USBR will mitigate any adverse effects of the transfer through the use of water provided under section 3406(b)(2) of the CVPIA. This argument misstates the SWRCB's findings, conclusions, and action. The SWRCB recognized that the USBR had made a commitment to mitigate refill impacts at Lake McClure, but nevertheless ordered the USBR to mitigate any refill impacts.

³ Ordinarily, a party wishing to have stored water delivered for its use enters into a contract with the reservoir operator to buy the stored water. SDWA does not claim to have a contract with MID to buy water.

(See condition 6 of the Order.) The Order does not restrict the USBR's source of water to water provided under section 3406(b)(2).

6. SDWA's sixth allegation is that the SWRCB ignored the possibility that MID might have released the water earlier in the year, to SDWA's benefit, if it was not planning to transfer the water to the USBR. As explained above, under paragraph 3, any withholding of releases during earlier periods was within MID's discretion. SDWA's sixth allegation encourages speculation, since there is no certainty as to MID's alternative actions. In the absence of any evidence showing what MID would have done differently, there is no basis for the SWRCB to fashion terms and conditions in addition to those already in the October 14 Order to prevent or mitigate any adverse effects of the temporary change.
7. SDWA's seventh allegation is that the SWRCB failed to examine whether the transfer would result in more flow than is examined in the Environmental Report (ER) to the 1995 Bay-Delta Plan, and what the effects are of such potentially additional flows. SDWA suggests that the effects of higher flows should be examined. SDWA is attempting to add new requirements. Water Code section 1727(a)(2) requires a finding that the proposed temporary change would not unreasonably affect fish, wildlife, or other instream beneficial uses. Based on the information available in the SWRCB's files, including the ER, an increase in the flow above the levels required in the 1995 Bay-Delta Plan will benefit these uses. This cannot be construed as an unreasonable effect on fish, wildlife, or other instream beneficial uses.
8. SDWA's eighth allegation is that the SWRCB is trying to limit SDWA's irrigation season to April through September, even though SDWA diverts water at other times. The SWRCB recognizes that SDWA's members take water at other times of the year and that at least one of SDWA's members has permits with diversion seasons running from May through October. However, SDWA's protest complained about reductions in the amount of water in the San Joaquin River during the April through September period. Accordingly, the October 14, 1997, Order discusses the April through September time period specified in the protest. The discussion is not intended to limit the irrigation season, but to address SDWA's objection to

the temporary change. Further, since SDWA seems to be saying it can use the water if it is abandoned in October, and since some of SDWA's members are downstream of Vernalis where the water was abandoned, it appears possible that some of SDWA's members may have derived a benefit from the temporary change.

9. SDWA's final allegation is that the SWRCB did not examine the cumulative effects of the MID transfer as required by its previous rulings, including the effect of transferring (b)(2) water for non-fish and wildlife purposes. Cumulative effects on the environment are considered under the California Environmental Quality Act (CEQA). Temporary changes under Water Code section 1725, et seq., are exempt from CEQA. To the extent that the SWRCB has previously examined the cumulative impacts on the environment of the Bay-Delta Estuary of temporary changes, it has done so in connection with the requirement under Water Code section 1727(a)(2), and not independently of this section. This section does not specifically require an analysis of the cumulative effects of the proposed change. The SWRCB previously made this point in connection with a transfer from MID to Westlands Water District via the Delta, in Order WR 94-4. As discussed in Order WR 94-4, the cumulative effects on the environment of transfers of water originating in the San Joaquin River and being exported in the Delta are minimal, and can provide benefits to the environment.

In the October 14, 1997, Order, the SWRCB considered an analysis of the cumulative effects on the environment of temporary changes and other transfers affecting the Delta. These effects are analyzed in the ER for the 1995 Bay-Delta Plan, and the temporary change falls within the analysis in the ER. With respect to SDWA's reference to a transfer of (b)(2) water, the temporary change authorized herein is not identified as a transfer of (b)(2) water and does not require that (b)(2) water be transferred. Further, the transfer for which a change is authorized herein is for the purpose of assisting fish and wildlife, not for other purposes.

4.0 CONCLUSION

Based on the foregoing, the SWRCB concludes that SDWA's request for reconsideration should be denied.

ORDER

IT IS HEREBY ORDERED that the request filed by South Delta Water Agency for reconsideration is denied, and the Order issued on behalf of the State Water Resources Control Board by the Chief of the Division of Water Rights on October 14, 1997, is affirmed.

CERTIFICATION

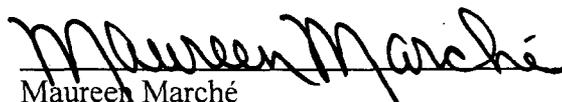
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on January 7, 1998.

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

NO: None

ABSENT: None

ABSTAIN: None



Maureen Marché
Administrative Assistant to the Board