

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of
Application 25616,)

EAST YOLO COMMUNITY
SERVICES DISTRICT,)

Applicant,)

CONTRA COSTA COUNTY
WATER DISTRICT, ET AL.,)

Protestants)

Decision: D1559

Source: Sacramento River

County: Yolo

DECISION APPROVING APPLICATION 25616
AND PETITION TO CHANGE POINT
OF DIVERSION

BY BOARD CHAIRWOMAN BARD:

The East Yolo Community Services District (applicant) having filed Application 25616 for a permit to appropriate unappropriated water; protests having been received; a public hearing having been held before the State Water Resources Control Board on June 27, 1979; applicant and protestants having appeared and presented evidence; the evidence at said hearing having been duly considered; the Board finds as follows:

Substance of the Application and Petition to Change Point of Diversion

1. Application 25616 is for a permit to appropriate 62 cubic feet per second (cfs) by direct diversion from September 1 of each year to June 30 of the succeeding year. The source is the Sacramento River. The maximum amount to be diverted under Application 25616 is 18,350 acre-feet per annum (afa). The water will be used for municipal purposes within the applicant's service area.

2. The point of diversion originally named in the application lies on the west bank of the Sacramento River about 3/4 mile south of the Pioneer Memorial Bridge. On March 19, 1980, the applicant filed a petition to change the point of diversion to a point on the west bank of the Sacramento River about 250 feet north of the centerline of the

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Pioneer Memorial Bridge. Said point is in the NW¼ of NE¼ of Section 3, T8N, R4E, MDB&M.

3. Section 741 of Title 23, California Administrative Code, provides that a notice of a petition to change is not required where no injury results to other legal users of water and when no impairment to the supply would occur solely because of the proposed change. Since no diverters exist between the applicant's original point and the point requested in petition, no injury to other legal users of water can occur and no impairment to the supply would occur solely because of the proposed change. Accordingly, the Board concludes that no notice of the petition is required.

Applicant's Project

4. The District was formed in the fall of 1976 because of community dissatisfaction with the quality of municipal supply. The applicant's service area includes the communities of Broderick, Bryte, West Sacramento, and Southport. About 25,000 persons reside in the applicant's service area. The applicant presently provides sewer, garbage, street lighting, and park and recreation services in their service area and proposes to become the water purveyor.

5. Washington Water and Light Co. (WWLC) presently provides water service to the applicant's service area. The existing water supply comes from water extracted by a series of wells located in the applicant's service area. The applicant proposes to purchase the existing water supply, treatment and distribution facilities.

6. After purchasing the existing water supply facilities, the applicant proposes to substitute a river water source for the present well water. The construction of the planned water system improvements and expansion facilities is scheduled to occur in two phases. The first

phase will provide facilities adequate to supply the demand through the year 1990. The second phase facilities are to be implemented in 1990 and will meet water demands through the year 2000.

Background

7. The United States Water and Power Resources Service (Service) and applicant negotiated a contract for water service to the applicant from the Central Valley Project. On November 27, 1979, the Secretary of the Interior approved the contract and authorized its execution upon acquisition by the applicant of an appropriative water right which would constitute the base supply referred to in the contract.

8. The contract provides in part that the applicant may divert up to a maximum of 23,600 afa. The contract also provides that the applicant will pay for twenty percent of all water diverted from the Sacramento River in the month of June, for eighty-eight percent of all water diverted from the Sacramento River in the month of July, and for one hundred percent of the water diverted from the Sacramento River during the months of August and September.

Protests

9. Contra Costa County Water District (Contra Costa), California Department of Fish and Game (DFG) and WWLC filed protests against the approval of Application 25616. The DFG stated in its protest that their protest may be dismissed if the applicant agreed to install an adequate fish screen around its diversion facilities. The applicant agreed to this condition and the DFG protest was dismissed.

10. Protestant WWLC alleged that the approval of Application 25616 would not best conserve the public interest and would have an adverse environmental impact. These allegations will be considered in later portions of this decision. Protestant Contra Costa alleged that the

approval of Application 25616 would injure its prior rights acquired under licensed Application 5941 and under a contract for a water supply from the federal Central Valley Project. Protestant Contra Costa stated that its protest could be dismissed if conditions that will assure there will be no decrease in inflow to the Sacramento-San Joaquin Delta during dry and critical years are included in any permit issued on Application 25616. Contra Costa's protest concerns the availability of unappropriated water to supply the applicant and will be discussed in detail in that portion of the decision.

Availability of Unappropriated Water

11. The Sacramento River has been divided into three reaches for purposes of analyzing the availability of unappropriated water. Reach 3 is that portion of the Sacramento River downstream of the "I" Street Bridge in Sacramento. The applicant's proposed point of diversion is located in Reach 3.

12. The applicant stated that it would rely on the area of origin status of this application to demonstrate that there is water available for appropriation. The applicant is obviously referring to the Watershed Protection Statute (Water Code Sections 11460-11463). Water Code Section 11460 has the effect of reserving to the entire body of inhabitants and property owners in the watershed of origin and in an area immediately adjacent thereto which can conveniently be supplied with water therefrom a priority as against the State Water Project and the federal Central Valley Project in establishing their own water rights. 25 App. Cal. Atty. Gen. 8, 20-21. Protestant Contra Costa responds that that portion of its service area outside the statutory Delta is nonetheless an area immediately adjacent thereto (that is, to the watershed of origin) which can conveniently be supplied with water therefrom. If Protestant Contra Costa is correct,

then its vested appropriative right would also be accorded a priority senior to the State Water Project and the Central Valley Project. This determination need not be made here since the priority relationship between licensed Application 5941 and the State and Federal export projects is not an issue.

13. Based on earlier decisions of the Board such as Decision D990, the months of July and August have been excluded from the season of water availability for applications in Reach 2 of the Sacramento River and applications for inbasin use in Reach 3. However, the Board recognizes that an update of the studies which led to these conclusions is necessary. The present practice of the Board has been to authorize issuance of a permit, consistent with our prior findings, and to reserve jurisdiction to allow the Board to further reduce the diversion season if future study indicates this to be necessary.

14. Protestant Contra Costa is well aware of the past practice of the Board in reserving jurisdiction for the purpose of making later determinations regarding the availability of unappropriated water. The position of Protestant Contra Costa, as we understand it, is that this approach is inadequate to protect their prior rights. They recommend the inclusion of a special condition in any permit issued on Application 25616.

The special condition proposed is as follows:

"The permittee shall not divert water during any time when either of the following conditions exist:

- (1) the 30-day running average of mean daily chloride concentration at the intake of the Contra Costa Canal exceeds 100 mg/l, or
- (2) outflow from the Sacramento-San Joaquin Delta is controlled by releases of water from reservoirs of the federal Central Valley Project or the State Water Project.

Paragraph (1) of the condition is essentially the water quality recommended by Protestant Contra Costa in the proceeding leading up to Decision 1485. Decision 1485 determined, in part, the water quality that would exist in the Sacramento-San Joaquin Delta (Delta) in the absence of the federal

Central Valley Project and of the State Water Project. It did not purport to determine the rights of an in-basin user upstream of the Delta ^{1/} relative to a user within the Delta, assuming Protestant Contra Costa is accorded this status because of the provision of Water Code Section 11460.

15. The Board declines to include the condition proposed by Protestant Contra Costa for two reasons. First, the applicant has executed a contract with the Service to purchase water to supplement its rights to be acquired under Application 25616. This contract assures that whenever water is not available under Application 25616, the applicant will have a supply from the federal Central Valley Project. Protestant Contra Costa recognizes this argument and responds that "...such an arrangement will impair the capability of the federal Central Valley Project to control quality in the Delta and hence will increase the salinity of water furnished to CCCWS." (Opening Brief of Protestant Contra Costa at 4.)

The response of Protestant Contra Costa is insufficient. Protestant Contra Costa identified its basis of right as License 10515 (Application 5941) to divert from San Joaquin River at Mallard Slough and its contract (175r - 3401) with the Service for Central Valley Project water from the Contra Costa Canal. The above cited response by Protestant Contra Costa relates directly to the contract water. The Service has not taken the position that the applicant should cease diversions when either the chloride concentration exceeds 100 mg/l at the intake to the Contra Costa Canal, or when outflow is controlled by the projects. The Board must conclude that the Service is capable of contracting for sale of water in a prudent manner and that it can meet the contract obligations it has undertaken with the applicant and Protestant Contra Costa. The Board expects the Service to honor its commitments under both contracts.

1/ The applicants' service area is completely within the Sacramento River watershed and partially within and partially without the definition of the Delta found in Water Code Section 12220.

Protestant Contra Costa represents in its opening brief that a dispute exists between Contra Costa and the Service regarding the quality of water provided under the contract. Specifically, the dispute concerns the quality of water the Service will provide without additional charges. In effect, Protestant Contra Costa is requesting the Board to declare that Contra Costa is entitled to contract water of 100 mg/l chloride or better at all times. Based on "no project conditions" in San Joaquin River at Antioch, the Board, in Decision 1485 and the 1978 Delta Water Quality Control Plan, required the Service and the Department of Water Resources to protect beneficial uses under rights to divert at Antioch by maintaining at least 150 mg/l chloride at either Antioch or the intake to Contra Costa Canal, for differing number of days in different years based on the current water year type. Based on public health and public interest considerations, D1485 and the Plan require water quality to be maintained at 250 mg/l or better at the intake to the Contra Costa Canal at all times. If Protestant Contra Costa believes that it is entitled to water quality assurances that are not provided by its contract with the Service, that dispute is for the Service and Protestant Contra Costa to resolve.

16. The second reason the Board declines to include conditions proposed by Contra Costa relates to availability of water for in-basin appropriations and water quality conditions in the Delta. The determination of the rights of in-basin users to appropriate water in the Sacramento River watershed relative to the rights of users in the Delta is a complex matter. Other factors may alter the "first in time, first in right" rule contained in Water Code Sections 1450 and 1455. Antioch v. Williams Irrigation District. 118 Cal. 451, 205 p. 688 (1922). The position of Protestant Contra Costa in effect would require us to determine the obligation of in-basin appropriators to protect water quality in the Delta insofar as Board policy is concerned when acting on applications to appropriate water from the Sacramento River watershed.

While a need exists for the Board to make such a policy determination, we believe it inappropriate to do so in a proceeding where users of water other than a specific applicant are not before the Board. Since in paragraphs 7 and 8 above we found that the applicant's contract with the Service provides the applicant with project water whenever water is not available under any rights acquired under Application 25616, we need not attempt to determine the above policy and legal issue here. We express no opinion on these legal or policy issues. A generic hearing scheduled for such a purpose is a much better procedure to develop a policy and determine that legal issue.

17. Protestant Contra Costa holds licensed Application 5941. To the extent that Protestant Contra Costa's exercise of rights under said application is in compliance with Section 2, Article X of the California Constitution, Protestant Contra Costa would have a prior right to those acquired by the applicant under Application 25616.

18. The prior findings of the Board justify a conclusion that unappropriated water is available to supply the applicant. A reservation of jurisdiction to define further the appropriate season of diversion will provide the mechanism to adjust our determination following a comprehensive review of the hydrology of the Sacramento River watershed.

19. The intended use is beneficial.

Environmental Considerations

20. The applicant prepared a Final Environmental Impact Report (EIR) on the proposed project in accordance with the California Environmental Quality Act (Public Resources Code Section 21000 et seq.) and the State Guidelines. The applicant filed a Notice of Determination on August 18, 1978.

21. Protestant WWLC asserts that the Final EIR does not adequately evaluate the adverse impacts resulting from the proposed appropriation. The factual basis for this assertion is not entirely clear. In its opening brief,

Protestant WWLC alleges that detailed studies concerning impingement and entrainment of fish have not been made and that the potential flow reversals in the River which might result in the shutdown of the intake structure has not been evaluated. Here the applicant has agreed to install a fish screen acceptable to the California Department of Fish and Game. That action adequately responds to Protestant WWLC's first concern. While the applicant has not conducted the detailed study on flow reversal contemplated by Protestant WWLC, we fail to comprehend the need for the study now. Given the present operating characteristics of the system, a flow reversal resulting in such shutdown would institute a severe emergency. Even if the study showed that flow reversal occurs which would require the shutdown of the intake facility, that fact would not persuade us to deny the application or to impose some condition in the water right entitlement. The applicant intends to retain some of the groundwater wells currently supplying water to the service area. This alternative source adequately provides a municipal supply in the event an emergency or other circumstance requires shutdown of the river facility.

22. In Resolution No. 78-58 of the Board of Directors of the East Yolo Community Services District, the applicant made findings regarding the environmental impact of the proposed project and regarding the mitigation of said impacts. The Board concurs in the finding of the applicant contained in Resolution No. 78-58.

23. The Board has reviewed and considered the information contained in the Final EIR prior to approval of the proposed project.

Public Interest

24. Protestant WWLC states the basis for its protest on public interest grounds: (1) Since the applicant is not now and may never be a water purveyor, there has been no demonstrated need to acquire an appropriate water right; (2) the applicant seeks to serve an area that can be served adequately with the existing groundwater system; (3) the applicant's use of Sacramento River water will result in a substantial increase in rates and charges.

25. The water users in the service area have expressed a public interest in appropriating water by voting to obtain a good quality of water supply. Applicant is proceeding logically to become a water purveyor. The last two grounds concern what is perceived by persons within the applicant's service area to be in their own best interest. The voters within the applicant's service area are in favor of the project by a three to one margin. The Board finds no public interest basis to deny Application 25616.

Conclusion

26. From the foregoing findings, the Board concludes that Application 25616 should be approved, that the petition to change the point of diversion should be approved and that a permit should be issued to the applicant subject to the conditions in the order following.

ORDER

IT IS HEREBY ORDERED that Application 25616 be approved, that the petition to change the point of diversion be approved, and that a permit be issued to the applicant subject to vested rights. The permit shall contain all applicable standard permit terms (5i, 6, 7, 10, 11, 12 and 13)* in addition to the following conditions:

1. The water appropriated shall be limited to the quantity which can be beneficially used and shall not exceed 62 cubic feet per second to be diverted from January 1 to June 30 and September 1 to December 31 of each year. The maximum amount diverted under this permit shall not exceed 18,350 acre-feet per year.

2. "The total quantity of water diverted under this permit, together with that diverted under contract with the United States shall not exceed 23,600 acre-feet per annum."

*This Board maintains a list of standard permit terms. Copies are available upon request.

3. Construction work shall be commenced within two years from date of permit and shall be completed by December 1, 1995.

4. Complete application of the water to the authorized use shall be made by December 1, 2000.

5. In addition, the following special permit terms should be included:

"In accordance with Section 1603 and/or Section 6100 of the Fish and Game Code, no diversion facility shall be constructed or water diverted under this permit until applicant has consummated a stream or lake alteration agreement with the Department of Fish and Game and/or the Department has determined that measures necessary to protect fishlife have been incorporated into the plans and construction of such diversion facility. The construction, operation, or maintenance costs of any facility required pursuant to this provision shall be borne by the permittee."

6. "The State Water Resources Control Board reserves jurisdiction over this permit to change the season of diversion to conform to the results of a comprehensive analysis of the availability of unappropriated water in the Sacramento River Basin. Action to change the season of diversion will be taken only after notice to interested parties and opportunity for hearing."

7. "This permit (license) is subject to prior rights. Permittee (licensee) is put on notice that during some years water will not be available for diversion during portions or all of the season authorized herein. The annual variations in demands and hydrologic conditions in the Sacramento River Basin are such that in any year of water scarcity the season of diversion authorized herein may be reduced or completely eliminated on order of this Board made after notice to interested parties and opportunity for hearing."

8. "In order to prevent degradation of the quality of water during and after construction of the project, prior to commencement of construction permittee shall file a report pursuant to Water Code Section 13260 and shall comply with any waste discharge requirements

imposed by the California Regional Water Quality Control Board, Central Valley Region, or by the State Water Resources Control Board."

9. The State Water Resources Control Board retains continuing authority over this permit and any license issued pursuant thereto to require permittee to implement a water conservation program to assure that water is not being used in a wasteful or unreasonable manner.

Dated: June 19, 1980

WE CONCUR:

/S/ CARLA M. BARD
Carla M. Bard, Chairwoman

/S/ WILLIAM J. MILLER
William J. Miller, Vice-Chairman

/S/ L. L. MITCHELL
L. L. Mitchell, Member

/S/ JILL B. DUNLAP
Jill B. Dunlap, Member

/S/ F. K. ALJIBURY
F. K. Aljibury, Member