

STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition )  
for Reconsideration of )  
Permitted Application 30497 )  
 )  
California Sportfishing )  
Protection Alliance, )  
 )  
Petitioner, )  
 )  
Margaret Eastwood Trust, )  
 )  
 )  
Permittee. )  
\_\_\_\_\_ )

ORDER: WR 97-02

SOURCE: Carmel River

COUNTY: Monterey

ORDER AFFIRMING THE ISSUANCE OF  
PERMITTED APPLICATION 30497

BY THE BOARD:

1.0 INTRODUCTION

On March 5, 1997, the Assistant Chief, Division of Water Rights (Division), issued a water right permit to the Margaret Eastwood Trust (Trust) for Application 30497. Permitted Application 30497 authorizes the diversion and use of up to 195.9 acre feet per annum from January 1 to December 31 of each year. Water pumped from the subterranean Carmel River can be used for irrigation. (Permit 20905.)

On April 4, 1997, the California Sportfishing Protection Alliance (CSPA) filed a petition under Water Code section 1122 seeking reconsideration of the decision to issue the permit. Petitioner

requests that: (1) Permitted Application 30497 be revoked,<sup>1</sup> (2) an Environmental Impact Report (EIR) and cumulative impact analysis be prepared, and (3) a condition be adopted which would preclude water being pumped from the subsurface aquifer when surface flow in the Carmel River falls below an unspecified level.<sup>2</sup> On April 22, 1997, counsel for the Trust filed the "Response to CSPA Petition for Reconsideration."

## 2.0 BACKGROUND

On December 4, 1995, the Odello Family filed Application 30497 with the State Water Resources Control Board (SWRCB). The property was subsequently conveyed to the Trust. On August 9, 1996, the application was noticed. Protests to the application were received from the: (1) California Department of Fish and Game, (2) Ventana Chapter of the Sierra Club (Sierra Club), (3) League of Women Voters, (4) John G. Williams, (5) Clive Sanders, (6) Carmel River Steelhead Association (CRSA), and (7) CSPA.

On November 18, 1996, a field investigation was conducted by the staff of the Division. On December 16, 1996, the Chief, Division issued the Staff Analysis of the investigation. On the same day, the Staff Analysis was mailed to the applicant and each

---

<sup>1</sup> CSPA does not expressly request that the permit be revoked; however, such a request is implicit in the request that an EIR and a cumulative impact analysis be prepared and a condition be adopted prohibiting the extraction of water during low or no flow conditions.

<sup>2</sup> Under current conditions, the river is dry during summer and fall months of many years and that is the time when water is most needed for irrigating crops. The SWRCB assumes that CSPA is really seeking a condition which would prohibit the Trust from pumping subsurface water when surface flow in the river falls below an unspecified level. What CSPA actually states is that the permit should be subject to a condition requiring mandatory flow requirements in the river. (Petition, pp. 4-7, 10, 13, and 14.) A person directly diverting water has no means for augmenting water in a source if it falls below a certain level; however, projects which store water can release water from storage and supply water to meet permit conditions calling for downstream flow requirements.

protestant. The cover letter explained that a permit would be issued, unless a hearing is requested. The letter also explained that: (1) a hearing request must identify the element of the underlying protest that was not resolved by the Staff Analysis and (2) the SWRCB would restrict any hearing to the consideration of unresolved protest issues.<sup>3</sup>

Among other matters CSPA's response states: (1) dismissal of the protests by the Staff Analysis violates equal protection and due process rights and (2) the Staff Analysis does not comply with the California Environmental Quality Act<sup>4</sup> (CEQA) because the analysis: (a) does not evaluate the cumulative impacts to steelhead trout and their habitat, and (b) does not recommend prohibiting the pumping of subsurface water when flow in the river is needed to protect steelhead trout and their habitat, and (3) the Staff Analysis violated section 7 of the Federal Endangered Species Act (ESA)<sup>5</sup> when it failed to treat steelhead as an endangered species.

The Division dismissed CSPA's response on various grounds stating, in part: (1) the Division processed the application and protests in conformity with Water Code section 1345 et seq. and, thus, due process or equal protection rights were not violated, (2) the Staff Analysis does not purport to be a CEQA document and

---

<sup>3</sup> Four responses to the letter and Staff Analysis were received. Responses were filed by CRSA, Mr. Williams, Sierra Club, and CSPA. Both CRSA and Mr. Williams requested a hearing for reasons unrelated to their underlying protests and, therefore, the hearing requests were denied. The Sierra Club's response merely states that it concurs with comments in Mr. Williams response and did not request a hearing. The Sierra Club was advised that it would have to file a timely request if it wanted a hearing. No request was subsequently filed by the Sierra Club.

<sup>4</sup> Public Resources Code § 21000 et seq.

<sup>5</sup> 16 USC § 1531 et seq.

that the Division has determined that the project is exempt from CEQA, (3) the response fails to identify the specific portions of the analysis which are inaccurate, and (4) steelhead are not listed as endangered pursuant to the ESA and CSPA did not cite any authority for the proposition that unlisted species must be treated as if steelhead were listed. Thereafter, on February 28, 1997, a notice of exemption was signed and on March 5, 1997, Permitted Application 30497 was issued. On April 4, 1997, CSPA filed its petition seeking reconsideration of the decision to issue the permit.

### 3.0 PROJECT DESCRIPTION

The Odello property is situated on the south bank of the Carmel River, east of state Highway 1, and about 2 miles southeast of the City of Carmel, California. The applicant indicated that the property has been in agricultural production since 1914.<sup>6</sup> Water will be used to irrigate about 104 acres of artichokes and riparian habitat. Irrigation water is pumped from two existing wells adjacent to the Carmel River. Application 30497 was filed to obtain an appropriative water right for an established use of water.

### 4.0 LAW APPLICABLE TO PETITIONS FOR RECONSIDERATION

Petitions for reconsideration of SWRCB decisions must be:

- (a) filed within 30 days following adoption of a decision and
- (b) accepted or denied within 90 days of adoption. (Water Code § 1122.) Reconsideration may be sought for 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;

---

<sup>6</sup> The lower Carmel River Valley, Monterey Peninsula, and surrounding areas were settled and developing before 1800. (SWRCB Order WR 95-10, p. 18.)

- (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; and
- (d) Error in law. (Cal. Code Reg., tit 23, § 768.)

The SWRCB may refuse to reconsider a decision or order if the petition fails to raise substantial issues. In addition, after review of the record, the SWRCB may (a) deny a petition upon finding that a decision or order was appropriate, (b) set aside or modify the decision or order, or (c) take other appropriate action. (§ 770.)

#### 5.0 ISSUES RAISED BY PETITION FOR RECONSIDERATION

##### 5.1 The Federal Endangered Species Act Did Not Require the SWRCB to Consult with U.S. National Marine Fisheries Service.

CSPA contends that the Federal Endangered Species Act (ESA, 16 USC § 1531 et seq.) required the SWRCB to: (1) treat steelhead as an endangered or threatened species and (2) consult with the U.S. National Marine Fisheries Service (NMFS). CSPA argues that because notice has been given in the Federal Register that steelhead are being considered for listing, the SWRCB must treat the steelhead as endangered and consult with NMFS. (Petition, pp. 13-14.)

When species have been declared to be endangered or threatened with extinction under ESA, federal agencies are required to consult with either the Secretary of the Interior or Commerce. (16 USC § 1536.) NMFS is within the Department of Commerce and is responsible for implementing portions of the act. On August 9, 1996, NMFS issued a proposed rule which would list steelhead as an endangered species on California's central and south coast, an area including the Carmel River. (61 Federal

Register 155, p. 41541 et seq.) Nothing in the act, its regulations, or case law interpreting the statute and regulations requires state agencies to consult with federal agencies when species have been listed as threatened or endangered or are candidates for listing under ESA.<sup>7</sup> Thus, we find that the ESA did not require the SWRCB to consult with NMFS.

#### 5.2 A Hearing is Not Required by Either the Due Process or Equal Protection Clauses of the Constitution.

An oft repeated refrain in CSPA's petition is that the SWRCB's failure to hold a hearing is a violation of due process and equal protection. CSPA does not provide any legal argument as to why due process would entitle it to a hearing nor does CSPA identify any property or liberty interest that would entitle it to a hearing (See *Board of Regents v. Roth* (1972) 408 U.S. 564, 569-579 [92 S.Ct. 2701, 2705-2710].) Even assuming that CSPA has such an interest, it has been provided the necessary hearing. Procedural due process cases, which require some type of hearing, allow much less formal proceedings than court proceedings. The fundamental requirement is for notice and an opportunity to be heard. (See generally, *Mathews v. Eldridge* (1976) 424 U.S. 319, 332-335 [96 S.Ct. 893, 901-903].) The opportunity to be heard may be satisfied by written submissions. (See *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 938, [107 Cal.Rptr. 596, 600]; *Friends of the Old Trees v. Cal. Dept. of Forestry & Fire Protection* (1977) 52 Cal.App.4th 1383, [61 Cal.Rptr.2d 297, 304, 305].)

---

<sup>7</sup> A state agency may voluntarily engage in such consultation or as a condition of implementing a federally delegated program or function.

All applications to appropriate water are noticed in accordance with the requirements of the Water Code. (Water Code § 1300 et seq.) Any interested person may file a protest to an application. (Water Code § 1330 et seq.) Application 30497 was processed as a minor protested application under Water Code section 1345 et seq.<sup>8</sup> These provisions require the staff of the Division to conduct a field investigation and to prepare a staff analysis which recommends what actions should be taken on the application and protests. The applicant and protestants must be given prior notice of the field investigation so that they can appear and present evidence in support to their protest. (Cal. Code Regs., tit. 23, § 760(b)(1).) The Staff Analysis is sent by registered mail to the applicant and protestants. Unless a hearing is requested, the SWRCB can act on the staff analysis without a hearing. (Water Code § 1346.) A request for hearing must specify the issues unresolved among the parties, and the SWRCB must restrict any hearing to such issues. (Water Code § 1347.) These procedures are more than adequate to satisfy due process.

The foregoing procedures were followed with Application 30497.<sup>9</sup> When responding to the Staff Analysis for Application 30497, CSPA did not request a hearing. Further, CSPA's petition for reconsideration does not seek a hearing for disputed factual matters. Thus, under these circumstances, we find that a hearing is not required.<sup>10</sup> In addition, we find that the procedures for

---

<sup>8</sup> A minor application means an application which seeks: (1) 3 cfs or less by direct diversion or (2) 200 afa or less by diversion to storage.

<sup>9</sup> Indeed, when CSPA's representative stated he could not appear at the field investigation for health reasons, the Division's staff arranged telephone conference facilities to allow him to participate in a portion of the field investigation.

minor protested applications satisfies due process requirements and a trial type hearing is not required.

### 5.3 The SWRCB Complied With CEQA When Processing and Issuing Permitted Application 30497.

CSPA believes that: (1) the issuance of a notice of exemption for Permitted Application 30497 violates CEQA and (2) the SWRCB should have prepared an EIR, including an assessment of cumulative impacts. (Petition, pp. 3-4, 7-8.)

On December 16, 1996, the Chief of the Division issued the Staff Analysis of the investigation. The analysis dismissed all of the protests to the application. Subsequent requests for hearing were denied. (See Section 2.0 BACKGROUND and fn. 3.)

Thereafter, on February 28, 1997, the SWRCB issued the notice of exemption. The notice states that the project was exempted on the following grounds:

---

<sup>19</sup> We make no findings as to CSPA's equal protection contention. So little information is provided in the petition, the SWRCB cannot even hazard a guess as to how CSPA thinks the equal protection provision of the Constitution has been violated by the issuance of Permitted Application 30497.

CSPA failed to comply with submission requirements. Among other matters, petitions for reconsideration must be accompanied by a statement of points and authorities in support of legal issues raised in the petition. (Cal. Code Reg., tit. 23, § 769(c).) "Points" means distinct propositions of law or chief heads of arguments. "Authorities" means citations to statutes, precedents, judicial decisions, text books on the points or propositions or law or arguments being advanced. (See Black's Law Dictionary.) A memorandum of points and authorities should contain a statement of facts, a concise statement of law, evidence and arguments relied upon, and a discussion of the statutes, cases, and textbooks cited in support of the position advanced. (Code Civ. Proc. § 313(b).)

CSPA's petition for reconsideration attempted to comply with the submission requirement for a statement of points and authorities. The submission, however, is poorly written and legal authorities are poorly cited or missing altogether. (Petition, pp. 2-3, 7-14.) We note that the CSPA representative filing the petition is a lay person. Thus, we find that the points and authorities included with the petition were not sufficient to meet the requirements of section 769(c).



- (a) The project is not a project under CEQA because it does not result in either a direct or reasonably foreseeable indirect physical change in the environment. (Pub. Res. Code § 21065.)
- (b) Class 1 Exemption. This application consists of the operation or maintenance of existing private facilities and topographical features (agricultural operations) involving negligible or no expansion of use beyond that previously existing. (Cal. Code Regs., tit. 14, § 15301.)

CSPA contends that the SWRCB failed to follow its own procedures when the project was exempted. In support of this contention, CSPA provides the following quote:

"A minor project qualifies for an NOE [Notice of Exemption] under a Categorical Exemption Class 4, in accordance with Title 14, California Administrative Code, Section 15304 if it satisfies the following requirement: . . .

2. The project will not cause significant adverse impacts on any sensitive environment and will not result in significant impacts.
3. There are no unresolved protests."

CSPA fails to meaningfully identify the source for this cite and, without more information about the source, it is impossible to fully understand or respond to the contention. (Petition pp. 3-4.) It appears that CSPA is referring to training materials used by the Division's Environmental Section.<sup>11</sup> The materials have never been adopted as regulations, and there does not appear to

---

<sup>11</sup> These materials are loosely titled: *Water Right Application Environmental Review Process and Procedures for: Preliminary Review, Secondary Review, Notice of Exemption, Petition for Change, State Clearinghouse Documents, Certification of Review, Initial Study/Negative Declaration Document, Database Update and Appendices.* February 1993.

be any reason why the existence of protests should necessarily bar use of a Class 4 categorical exemption. In any event, the use of the Class 4 exemption is irrelevant because the Division did not rely on the exemption in this instance.

Although the quoted statement is found among the training materials, nothing in these materials states that a Class 4 exemption is the only exemption which may be used by the SWRCB. Indeed, SWRCB practice has been to use all appropriate statutory exemption and categorical exemptions found within the Guidelines. (Pub. Res. Code § 21065, 21080.01 et seq.; Cal. Code Regs., tit. 14, § 15300 et seq.)

Only undertakings that may cause a direct physical change or a reasonable foreseeable indirect physical change in the environment can be projects within the meaning of CEQA. (Pub. Res. Code § 21065.) Section 15301 of the Guidelines provides for a Class 1 exemption for projects consisting of the operation, repair, maintenance, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving little or no expansion of use beyond that previously existing. The Court of Appeal has upheld the use of the Class 1, section 15301 exemption when issuing a permit for an existing facility. (*Bloom v. McGurk* (1994) 26 Cal.App.4th 1307.)

In the case of Permitted Application 30497, the applicant seeks a permit for an existing use of water; a use that can be maintained under a claim of riparian right irrespective of whether a permit is issued by the SWRCB. The permittee intends to pump water from two wells to irrigate about 104 acres of existing irrigated land. CSPA failed to demonstrate how issuing this permit for an existing project could result in a cumulative effect on the environment. In the absence of such an effect, neither an EIR

nor a cumulative impact assessment is required. Thus, we find that it is appropriate to exempt Permitted Application from CEQA in accordance with sections 15301 and 21065.

**5.4 Neither California Fish and Game Code Section 5937 nor California Code of Regulations, Title 23, Section 782 Are Applicable to Wells Diverting Water From a Subsurface Watercourse.**

CSPA contends that sections 5937 and 782 are violated because Permitted Application 30497 does not prohibit the diversion of water when flow in the stream falls below unspecified minimum levels.

Section 5937 provides, in pertinent part:

"The owner of any dam shall allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam."  
(Emphasis added.)

Fish and Game Code section 5900 provides, in part:

"As used in this chapter: (a) 'Dam' includes all artificial obstructions."

When sections 5900 and 5937 are read together, it is clear that section 5937 applies only to facilities which can obstruct the surface flow of a stream.

Section 782 provides, in pertinent part:

"In compliance with Section 5937 of the Fish and Game Code, all permits for diversion of water from a stream by a dam which do not contain a more specific provision for the protection of fish shall require the permittee

to allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around, or through the dam to keep in good condition any fish that may be planted or exist below the dam; . . . ." (Emphasis added.)

On their face, sections 5937 and 782 apply only to dams. CSPA's petition states that section 5937 applies to dams. (Petition, p. 11.) CSPA's petition also fails to cite any authority or set forth any rationale supporting its contention that these provisions apply to extractions by wells from subsurface water. The SWRCB finds that neither section 5937 nor section 782 are applicable to applications, permits, or licenses which extract water from subsurface water via wells or other facilities which do not obstruct the surface flow of a stream. Permitted Application 30497 is only for the extraction of subsurface water from two wells.<sup>12</sup> Thus, the SWRCB finds that these sections are not applicable to Permitted Application 30497.

#### 5.5 Water Code Section 1243 Does Not Require That the SWRCB Prohibit the Diversion of Water When Flow in the Stream Falls Below a Certain Level.

CSPA contends that the SWRCB abused its discretion when it approved the issuance of Permitted Application 30197 without: (1) determining the amount of water that should remain in the river for the protection of fish and (2) adopting a condition prohibiting the diversion of water when flow in the stream falls below a level necessary for the protection of fish. The only authorities cited for this contention are Water Code sections 1243 and 1243.5.<sup>13</sup>

---

<sup>12</sup> August 9, 1996 notice of the application, p. 1; Staff Analysis, p. 2, 3.0 Project Description.

<sup>13</sup> Section 1243 provides, in pertinent part:

(Continued)

When it is in the public interest, both sections require the SWRCB to take into account the water needed to remain in a source for the protection of fish. Neither section, however, prohibits the SWRCB from approving applications to divert water from a source even though such diversions will have an adverse effect on fish and wildlife resources.

The Staff Analysis, upon which the issuance of the permit is predicated, expressly addressed the requirements of sections 1243 and 1243.5. (Staff Analysis, § 9.2, pp.22-23.) The analysis states, in part:

"This application only seeks to divert water which has been historically diverted and will not result in an expansion over existing uses [diversions]. Continuation of present activities [by the applicant] will not result in any direct or indirect physical change in the environment. The SWRCB has taken into account the amount of water required for public interest concerns and because there is no physical change proposed from the baseline condition, SWRCB staff has determined that no additional findings, beyond those contained in Decision 1632 and Order 95-10, are required for approval of Application 30497." (Words in brackets "[ ]" are added for clarification.)

---

"The use of water for recreation and preservation and enhancement of fish and wildlife resources is a beneficial use of water. In determining the amount of water available for appropriation for other beneficial uses, the board shall take into account, whenever it is in the public interest, the amounts of water required for recreation and the preservation and enhancement of fish and wildlife resources.

Section 1243.5 provides, in pertinent part:

"In determining the amount of water available for appropriation the board shall take into account, whenever it is in the public interest, the amounts of water needed to remain in the source for protection of beneficial uses, including any beneficial uses specified to be protected in any relevant water quality control plan established pursuant to Division 7 (commencing with § 13000) of this code."

In Decision 1632, the SWRCB found that unappropriated water was not available in the Carmel River to supply the proposed New Los Padres Project from July 1 through October 30 of each year. (Decision 1632, 4.0 AVAILABILITY OF UNAPPROPRIATED WATER, pp. 19-34.) The decision also finds that the watershed tributary to the proposed project comprises about 70 percent of the flow in the river. (Decision 1632, p. 28.) It can be inferred from Tables 8 and 11 in the decision that during the months of August, September, and October of most years, the demand for water to satisfy prior water rights<sup>14</sup> is about twice the flow available in the river.

///  
///  
///  
///  
///  
///  
///  
///  
///  
///  
///  
///  
///  
///  
///  
///  
///  
///  
///  
///  
///

---

<sup>14</sup> The quantity of water required to serve prior water rights does not include the proposed New Los Padres Project or unauthorized diversion by Cal-Am.

Mean Monthly Flow and Demand for Flow in the Carmel River (cfs <sup>15</sup> )			
	August	September	October
Flow at Proposed New Los Padres Project <sup>16</sup>	3.6	3.0	5.8
Flow in the Carmel River <sup>17</sup>	5.1	4.3	8.3
Monthly water right demands on the river <sup>18</sup>	523 afa	523 afa	983 afa
Daily water right demand on the river <sup>19</sup>	16.9 afa	17.4 afa	31.7 afa
Daily water right demand <sup>20</sup>	8.5	8.8	16.0

Looking at rows 2 and 5 it is obvious that during the months August, September, and October: (1) the demand for water by prior water rights is about twice the flow available in the river and (2) the surface of the river will be dry during most years. (Decision 1632, p. 23 and p. 33.) Decision 1632 also found that a limited supply of water is available for extraction below the

<sup>15</sup> "Cfs" means cubic feet per second.

<sup>16</sup> The numbers in this row are taken from Decision 1632, Table 8, p. 23.

<sup>17</sup> The watershed tributary to the proposed New Los Padres Project comprises about 70 percent of the flow in the river. Thus, these figures are derived by dividing the flow in the river at the proposed project by .7 to take into account inflow from other tributaries to the river.

<sup>18</sup> These numbers are obtained from Decision 1632, Table 11, p. 33.

<sup>19</sup> Daily afa values are derived by dividing monthly values by the number of days in the month.

<sup>20</sup> One (1) cfs = 1.984 af. Daily cfs demands are derived by dividing daily afa flows by 1.984.

surface of the Carmel River. (Decision 1632, 4.6 Additional Findings On Availability of Water, pp.25-34, 31-32.)<sup>21</sup>

In circumstances such as this where: (1) the applicant has a riparian right and seeks only to divert water which has been historically diverted and (2) the surface watercourse is dry during critical summer months of most years, the SWRCB finds that it is not in the public interest to adopt conditions prohibiting the permittee from pumping subsurface water when the surface watercourse is dry. Thus, we find that section 1243 does not require that the SWRCB prohibit the diversion of water when flow in the stream falls below a certain level and that CSPA's contention is without merit.

#### 5.6 The Public Trust Doctrine Is Not Violated by the Issuance of Permitted Application 30497.

CSPA believes that the public trust doctrine was violated when the SWRCB: (1) failed to balance the beneficial uses [presumably steelhead and consumptive uses]<sup>22</sup> and (2) Permitted Application 30497 was not subjected to a condition prohibiting the diversion of water when flow in the stream falls below a level necessary for the protection of steelhead and their habitat. (Petition, p. 10.) While the petition sets forth CSPA's understanding of the public trust doctrine, the petition is lacking in any analysis which could demonstrate how the Staff Analysis failed to satisfy the requirements of the doctrine. (Petition, pp. 8-10.)

---

<sup>21</sup> Administrative notice is taken of the findings and tables in Decision 1632.

<sup>22</sup> Language in brackets added for clarification.



Steelhead and its habitat is considered in the Staff Analysis. (See pp. 17-24 generally, Staff Analysis, § 6.2.7 CSPA, § 9.1 Evaluation of Instream Flows and Prior Rights, § 9.2 Evaluation of Public Interest Concerns, and § 10.0 Environmental Analysis.) While the Staff Analysis does not include a detailed statement of the effect of the proposed project on steelhead, review of these sections demonstrate that the Division was cognizant of how steelhead and its habitat would be effected.

Clearly, flow in the lower Carmel River is not adequate for steelhead or steelhead habitat during the summer and fall months of most years. As indicated in the Staff Analysis, the SWRCB has considered the flow that can be provided for steelhead. In Decision 1632, the SWRCB approved the New Los Padres Project subject to conditions that water be released from storage for steelhead in the lower Carmel River.<sup>23</sup> The SWRCB also adopted conditions intended to provide for as much flow as possible in the river until such time as the project may be constructed;<sup>24</sup> however, until such time as a comprehensive solution like New Los Padres becomes available, little can be done to improve conditions for steelhead. While these conditions are not desirable, approval of Permitted Application 30497 will not make matters worse.

Fundamentally, the public trust doctrine requires the SWRCB to give consideration to public trust resources and to avoid or mitigate effects of such resources when feasible. The doctrine does not, however, prohibit the issuance of a water right permit even though an application will have foreseeable harm to trust interests. (*Nat. Audubon Soc. v. Super. Ct.* (1983) 33 Cal.3d

---

<sup>23</sup> Decision 1632, Conditions 28 through 32.

<sup>24</sup> Decision 1632, Condition 33; Order 95-10, Conditions 2 through 11.

419, 446-447; [189 Cal.Rptr. 346, 364-365].) Thus, the SWRCB may approve an application which adversely affects public trust uses if the adverse effects are outweighed by the public interest in allowing a diversion. As discussed in the preceding section,<sup>25</sup> this diversion can have little or no effect on instream flow and beneficial uses. On the other hand, approving the application will provide a permit for a long-standing existing agricultural operation. In these circumstances, the public trust doctrine does not require the SWRCB to deny an application or prohibit the diversion of water when flow in the river falls below a certain level.

#### 7.0 CONCLUSIONS

Having considered the entire administrative record for this matter, the CSPA petition for reconsideration, the response filed by applicant's counsel, and the foregoing discussion we conclude as follows:

1. ESA did not require the SWRCB to consult with NMFS.
2. The procedures for minor protested applications satisfies the requirements of the due process protection clause of the Constitution and a trial type hearing is not required.
3. The SWRCB complied with CEQA when processing and issuing Permitted Application 30497.

///

///

///

///

---

<sup>25</sup> (5.6 supra.)

4. Neither California Fish and Game Code section 5937 nor California Code of Regulations, Title 23, section 782 are applicable to wells diverting water from subsurface watercourse.
5. On the facts of this case, Water Code section 1243 does not require that the SWRCB prohibit the diversion of water when flow in a stream falls below a certain level.
6. The public trust doctrine is not violated by the issuance of Permitted Application 30497.

We further conclude that CSPA's petition for reconsideration should be dismissed and that the issuance of Permitted Application 30497 should be affirmed.

///

///

///

///

///.

///

///

///

///

///

///

///

///

///

///

///

///

///

///

ORDER

NOW THEREFORE IT IS ORDERED THAT:

1. The petition for reconsideration by CSPA is dismissed and
2. The issuance of Permitted Application 30497 is affirmed.

CERTIFICATION

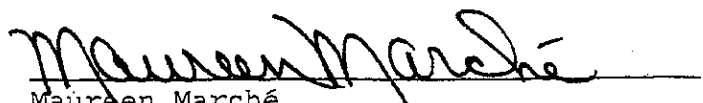
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on May 14, 1997

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