

Memorandum

To: Mr. Edward C. Anton, Chief
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, California 95812-2000

Date: December 12, 2005

From: **DONALD B. KOCH**, Regional Manager
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STATE WATER RESOURCES
CONTROL BOARD
2005 DEC 20 AM 11:46
DIV OF WATER RIGHTS
SACRAMENTO

Subject: Protest for Petition for Extension of Time for Applications 26306 and 26307, Shasta River
Located in Siskiyou County

The Department of Fish and Game (Department) has reviewed the State Water Resources Control Board's (Board) letter of 11-21-2005. The Board's letter responded to Emmerson Investment Inc.'s (also known in Board records as Sierra Pacific Industries) (SPI) February 14, 2005, letter. SPI's letter was in response to several requests from the Board asking SPI to respond to the Department's protest dated July 25, 2001. The Department concurs and supports Board staff's recommendation to deny these time extensions for the subject petitions. We agree that SPI's letter did not demonstrate water availability for use under these permits. Additionally, as Board staff noted, the SPI letter does not address Department concerns which were expressed in our original protests for these applications. Following are our comments regarding attempts for protest resolution as well as comments on SPI's February 14, 2005 letter.

On March 30, 2004, Department staff, Ms. Jane Vorpapel and Mr. Jim Whelan, met with SPI representatives, Messrs. Jack Frost and Pete Scala, and water masters, Messrs. Keith Dick and Joe Scott. The purpose of the meeting was to resolve the concerns we expressed in our protest. SPI was not operating its diversions during our March meeting.

Our primary concern is the permit condition that requires a determination by the water master that there is excess water available for appropriation by SPI under these permits. In 1932, Siskiyou County Superior Court adjudicated the rights to the waters of the Shasta River and its tributaries, based on prior appropriations. Based on our field review and subsequent contacts with the water masters, it was determined that the water master considers any water above the amounts allocated in the court's decree to be "excess or surplus water." The Department objects to the water masters' determination of excess water in the Shasta River. The Shasta River is a fully appropriated stream and the court did not consider instream beneficial uses as part of its original adjudication. Any water in excess to the needs of irrigators should be left in

Mr. Edward C. Anton, Chief
December 12, 2005
Page Two

the river to support fish, including Southern Oregon/Northern California Coastal ("SONCC") coho salmon (*Oncorhynchus kisutch*), which is protected under the state and federal Endangered Species Acts.

On November 22, 2004, Mr. Frost responded to a November 16, 2004, letter from the Board. The Board requested SPI to respond to our protest regarding potential impacts to SONCC coho salmon. The Board also asked SPI to document the frequency when water is available to serve the permits for which SPI applied. Mr. Frost's letter discussed our March 30, 2004, meeting; however, he did not address most of the concerns we outlined in our protest dismissal conditions. We would like to correct several statements Mr. Frost made in his letter.

- Neither the upper diversion nor the lower diversion meets requirements for fish passage upstream or downstream for all age classes.
- We did not comment on riparian habitat or the health of the Shasta River.
- The Shasta River has been listed as an impaired water body by the Board. The river has low dissolved oxygen and excessive nutrient loads.

Department staff, Ms. Jane Vorpapel met again with SPI representatives on September 15, 2005. The purpose of the meeting was to view SPI's active diversions and again, resolve the concerns we expressed in our protest. Mr. Jack Frost and Ms. Julie Kelley of SPI and Mr. Pete Scala, ranch manager of the Hole in the Ground Ranch (the place of use for SPI's applications) were present at this field review. Both the upper and lower diversions were in place and were diverting water to flood irrigate the pastures on the ranch. The upper diversion had a series of three screens that do not meet current screening criteria to protect salmonids from being diverted into the irrigation ditches. For example, there was a several inch gap along the first screen which would allow fish to swim unimpeded into the ditch. Also, there were no ladders at either diversion to allow upstream or downstream migration of adults or juvenile salmonids.

The above-referenced applications were filed in 1980. The Department dismissed its protest in 1983 because the water master assured us that the fish bypass flows would be met and records of diversion would be kept. Previous owners and this owner have been granted extensions of time, many times with the promise that the applicant and water master would comply with permit conditions. In a compliance inspection and follow-up letter from the Board to the applicant on August 29, 2000, Board staff stated, "Since the time to complete use of water under each of these permits expired on December 31, 1995, extensions of time will be required. (Incidentally, the last extensions of time were granted in 1991 to former owner Gene Davis, also to keep

Mr. Edward C. Anton, Chief
December 12, 2005
Page Three

diversion records for licensing.)” In that letter, Board staff mentioned that adjudicated water rights belonging to the “Seldom Seen” ranch have been informally transferred to the Hole in the Ground Ranch with the water masters’ knowledge “since no other water uses are adversely affected.”

Information that water master Joe Scott provided to the Department indicated there was not enough water in 2001 and 2002 for any “permit” water to be diverted. Board records indicate, however, that Mr. Pete Scala contacted the Board on February 5, 2001, and told Board staff he would be installing the flashboard dams on February 6, 2001. Existing permit term number 15 states, “No water shall be diverted under this permit at any time unless the water master has determined that excess water exists in the Shasta River and authorizes the permittee to divert water.” The permittee was not complying with the permit term. The water master had determined there was no excess water available yet the permittee was installing the diversion. Similarly progress reports filed by the permittee for 2002 stated that water was used under this permit from February through November even though the water master indicated permit water was not available. As our original protest stated, permit conditions have not been complied with throughout the life of these time extensions.

SPI’s February 14, 2005, letter provided water master records showing that water had been used in 2003 under these permits. The Department contends that this water was used illegally. The protest dismissal conditions have not been met and there is not a current permit which would allow diversion under these applications. SPI’s letter also discussed seasons and years when “excess” water is available for diversion. The Department disagrees that there is excess water in the Shasta River because instream beneficial uses are not included in the determination by the water master. As mentioned above, any water in excess of that needed by irrigators is considered excess water by the water master. Furthermore, these measurements are made at flow stations 22 and 37 miles downstream from the diversion sites. Data from gauges in excess of 20 miles downstream cannot adequately characterize the hydrograph in the vicinity of the diversions or the effect of water withdrawal on the river immediately downstream from the points of diversion.

Hole in the Ground ranch has adjudicated rights to 1,520 acre feet of water per year for 487 acres of pasture. This amount represents more than 3 feet of water for each acre. The ranch also has rights to 2 cubic feet per second (cfs) from a spring. According to Board records, the water master has unofficially given 924 acre feet of adjudicated water rights from the Seldom Seen Ranch to the Hole in the Ground Ranch. The subject permits request an additional 19 cfs to water this place of use. That represents one extra cfs for every 25 acres. The Board’s literature recommends

Mr. Edward C. Anton, Chief
December 12, 2005
Page Four

"Suggested Water Duty for Irrigation" as being, 1 cfs per 80 acres in the Central Valley or areas having similar conditions; 1 cfs per 50 acres on porous, sandy, or gravel-like soils or for irrigation incurring heavy transportation losses in water-abundant areas. For irrigation of land in water-short areas the Board recommends 1 cfs for every 150 acres. The subject permits request an additional 1 cfs for every 25 acres which is almost double the duty recommended for growing rice. The Shasta River watershed is a water short area, as evidenced by its status as a fully appropriated stream. The Department believes the subject permits constitute waste and unreasonable use. We also believe that granting the extensions of time will affect listed SONCC coho salmon.

The applicants have not resolved the issues raised in our protests nor have they complied with previous permit conditions. The latest legal extension of time expired in 1995. Progress reports filed by the permittee show they have taken water without a permit during the months of February to November in 1997, 1998, 1999, 2000, and 2002. We believe that the Board should revoke the subject permits based on a lack of excess water in the Shasta River, waste and unreasonable use of water, and potential impacts to instream resources including SONCC coho salmon.

If you have any questions regarding these comments please contact Staff Environmental Scientist Jane Vorpapel at (530) 225-2124.

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