

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

In the Matter of	)	DECISION: 1628
Application 29047 of	)	
JOHN and MAYLA CLARK.	)	SOURCE: Turnback Creek
	)	COUNTY: Tuolumne County

DECISION APPROVING APPLICATION 29047 BY THE BOARD:

1.0 INTRODUCTION

An application to appropriate water having been filed by John and Mayla Clark; protests having been received; a public hearing having been held on November 15, 1989; an earlier draft combining a decision on this application and on a change petition filed by Merced Irrigation District (MID) on Licensed Application 16186 having been discussed at State Water Resources Control Board (State Water Board) meetings on December 12, 1991, and May 18, 1992; the State Water Board having considered all the evidence in the record pertaining to Application 29047; the State Water Board finds and concludes as follows:

2.0 BACKGROUND

The Clark application is one of many water rights applications or petitions on the San Joaquin River or its tributaries which have been protested by the Delta

Water Users Association. The protestants, who have joined in a single protest, include the Delta Water Users Association; South Delta Water Agency; Lafayette Ranch, a California Corporation; Alexander Hildebrand; Edwin E. Hagemann; and I. N. Robinson, Jr.

Collectively, they are referred to herein as "Association". In Order WR 89-8, the State Water Board decided to accept the Association's protests against the applications and petitions in the San Joaquin River watershed, subject to the Association's meeting the protest requirements in the State Water Board's regulations. The State Water Board decided to group the cases for hearing, to the extent feasible, because the bases for the Association's protests are essentially identical. The Clark application was heard concurrently with a petition for change of place of use filed by MID on Licensed Application 16186 (License 11395). Considerable controversy has developed regarding the MID petition and additional time will be required to resolve the issues therein. Therefore, this decision addresses only the Clark application.

### **3.0 SUBSTANCE OF THE APPLICATION AND PETITION**

Application 29047 was filed June 9, 1987. At the hearing, the application before the State Water Board

was for a permit to appropriate 24,150 gallons per day by direct diversion from March 15 through June 15 and September 1 through December 15 of each year for irrigation, 120 gallons per day by direct diversion from January 1 through December 31 of each year for stockwatering, and 6.1 acre-feet per annum (afa) by storage from October 1 through June 1 of each year for irrigation and stockwatering. After the hearing, the Clarks withdrew the portions of their application which requested direct diversion, leaving only the request for a permit to appropriate 6.1 afa by storage. (The Clarks claim a riparian right, which they believe will satisfy their need for direct diversion.) The proposed point of diversion from Turnback Creek, tributary to the Tuolumne River, is within the SE 1/4 of the NE 1/4 of Section 18, T1N, R16E, MDB&M.<sup>1</sup> The place of use is within the same quarter-quarter section, and totals 3 acres.

#### 4.0 PROTESTS

Two protests, by the Department of Fish and Game and by the Association, were filed against Application 29047. The Department of Fish and Game withdrew its protest subject to inclusion of the following permit terms and conditions in the permit:

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<sup>1</sup> References to Township and Range are to the Mount Diablo Base and Meridian.

- a. "For the protection of fish and wildlife, permittee shall during the period from January 1 through June 15 and September 1 through December 31 bypass a minimum of 0.5 cubic feet per second. The total streamflow shall be bypassed whenever it is less than the designated amount."
  
- b. "Permittee shall allow representatives of the State Water Resources Control Board, Department of Fish and Game and others, as may be authorized from time to time by said Board, reasonable access to project works to determine compliance with terms of the permit."
  
- c. "Permittee shall keep the removal of riparian vegetation at a minimum during the construction of the project and native vegetation shall be planted around the perimeter of the reservoir to replace habitat lost through inundation."

The Association protested on behalf of four of its members--Lafayette Ranch, Alexander Hildebrand, Edwin E. Hagemann and I. N. Robinson, Jr.--and South Delta Water Agency. Association claims on behalf of its members riparian and appropriative rights in the Delta and in the lower San Joaquin River for irrigation use.

Association also claims that its members use San Joaquin River water for recreation, navigation, fishing, and aesthetic enjoyment.

Association alleges that its members are being injured by reduced water flows in the San Joaquin River, and that the proposed appropriation will further injure its members by further reducing the flows. Association alleges that low flows cause stagnation, shallow water depth, and poor water quality. Association explains that at times of low flow, the water in the San Joaquin River may become unfit for irrigation because of (1) salt-laden drainage water from upstream lands, which accumulates when there is no net downstream flow through the Delta, and (2) incursion of salt water from San Francisco Bay. Use of water with a high concentration of salt results in reduced crop yields and increases in leaching and pumping costs to rid the land of excess salts.

Because of the water quality and supply effects of stagnation or reverse flows on Association's members, Association urges that whenever the downstream flow at Vernalis on the San Joaquin River does not exceed the channel depletions in the southern Delta, no further diversions for consumptive use should be authorized.

Association alleges that the standard permit terms routinely applied to new permits in the San Joaquin River watershed are not adequate to protect water users in the southern Delta and in the lower San Joaquin River. Association argues that these terms allow diversion by upstream appropriators when there is no net downstream flow in the channels of the southern Delta and there is either surface or subsurface hydraulic continuity between the point of diversion and the southern Delta.

Association's attorney stated in his letter dated June 15, 1989 that Association

"would withdraw its Protest on the condition that no diversions be allowed when the USBR is making any New Melones Vernalis water quality or flow releases and no diversions be allowed when a 14-day running average at Mossdale on the San Joaquin of 0.7 mean daily EC [electrical conductivity] during April through August or 1.0 mean daily EC during September through March is exceeded, provided that an adequate system of measurement and enforcement for these terms is established and utilized."

The permit term Association requests would set a standard for salinity in the southern Delta which differs from the standard the Board adopted on May 1, 1991 after receiving extensive evidence in the Bay-Delta Proceedings. It also would establish a

monitoring requirement at a new location in the southern Delta. The Board has given consideration to the salinity levels, length of the period for averaging the salinity levels, and monitoring and reporting requirements for the southern Delta, in the Bay-Delta Proceedings. The Board is considering implementation of the standards in the water right phase of the Bay-Delta Proceedings. The proceeding herein is narrow, and only the Clarks would find an implementation term in their permit or license if we imposed it at this time. Nevertheless, our evaluation of the evidence presented in this case may affect our evaluation of the same evidence when it is presented in future cases. For example, water users who were not included in this proceeding, but are included in the Bay-Delta Proceedings, may be affected if the Board adopts an implementing permit term. These water users may have information and insights not available in this proceeding. The standard permit terms and conditions which currently protect water users such as Association's members were developed in a broad proceeding with notice to all parties who might be affected. The wording of those terms and conditions resulted from a complex balancing of diverse interests. Because our adoption of the requested term could

potentially affect many of the same water users, who are not participating in this proceeding, we want to consider the term in a broader proceeding, such as the Bay-Delta Proceeding, before adding it to the permits or licenses of individual water right holders in narrowly noticed cases. Therefore, we will reserve jurisdiction and retain continuing authority to conform License 11395 and the permit issued on Application 29047 to future Board findings concerning the availability of water and the protection of beneficial uses of water in the Sacramento-San Joaquin Delta and San Francisco Bay.

**5.0**

**MOTION TO SUMMARILY DENY APPLICATION 29047**

At the beginning of the hearing, Association's attorney made a motion for the equivalent of a summary judgment to deny Application 29047. The motion was based on the fact that the Clarks made no advance submittal of evidence in support of the application, as required by the Board's hearing notice. The motion was denied and Mr. Clark testified briefly and was cross-examined. He submitted his case on the facts stated in his application and on his testimony. At the end of the hearing, Association's attorney asserted that Mr. Clark had submitted no evidence. Association made no showing that it had been injured by Mr. Clark's brief



testimony. We find that for purposes of this proceeding, Mr. Clark did present evidence, including sworn testimony and his application papers, which he verified are true. In the absence of any showing by Association that it was prejudiced by Mr. Clark's failure to presubmit his testimony, we have no reason to disregard Mr. Clark's testimony.

**6.0 AVAILABILITY OF WATER FOR CLARK APPLICATION**

**6.1 Hydrological Characteristics of the Watershed**

The watershed of Turnback Creek upstream from the Clarks' point of diversion consists of 12 square miles of grass- and tree-covered hilly topography. The watershed elevation is between 2400 feet and 4200 feet above sea level. Turnback Creek flows year-round and has hydraulic continuity with the Tuolumne River. The average precipitation in the watershed is between 30 and 40 inches annually. Assuming 10 percent runoff in the area, the watershed above applicant's project contributes approximately 2304 acre-feet to Turnback Creek.

**6.2 Previous Decisions to Protect Prior Rights**

Two previous State Water Board determinations limit the availability of water for the Clarks' appropriation. These decisions are (1) Water Right Decision 1594 and

Order WR 84-2 (D-1594), and (2) the Declaration of Fully Appropriated Streams adopted by the State Water Board on November 16, 1989 as Order WR 89-25, and amended on August 22, 1991 by Order WR 91-07. Both of these determinations serve to prevent appropriations in excess of the amount of water available for appropriation, thereby protecting prior water right holders and other beneficial uses of water.

D-1594 as it applies to the Clark project (1) requires that the State Water Board reserve jurisdiction under Standard Permit Term 80 over the permit, to change the season of diversion to conform to later findings of the Board concerning availability of water and protection of beneficial uses of water in the Sacramento-San Joaquin Delta and San Francisco Bay, (2) requires that the permit be given a fixed season of diversion which excludes at least the period from June 16 to August 31 of each year, (3) requires that Standard Permit Term 93 be included in the permit.<sup>2</sup> These

<sup>2</sup> *Standard Permit Term 93 provides as follows:*

*"No diversion is authorized by this permit under the following conditions: (1) when in order to maintain water quality in the San Joaquin River at Vernalis at a level of 500 parts per million (ppm) Total Dissolved Solids (TDS), the Bureau of Reclamation is releasing stored water from New Melones Reservoir or is curtailing the collection of water to storage, or (2) during any time of low flows then TDS levels at Vernalis exceed 500 ppm. These restrictions shall not apply when, in the judgment of the State Water Resources Control Board, curtailment of diversion under this permit will not be effective in lowering the TDS at Vernalis, or when in the absence of the permittee's diversion, hydraulic continuity would not exist between the permittee's point of diversion and Vernalis. The Board shall notify the permittee at any time curtailment of diversion is required under this term."*

requirements will be incorporated into the permit issued on Application 29047.

The Declaration of Fully Appropriated Streams, which was adopted pursuant to Water Code Section 1205, limits the season of availability of water for appropriation from Turnback Creek to the period from November 2 through May 14. In accordance with the Declaration, the season of diversion requested in the application will be reduced to November 2 through May 14.

6.3 Statutory Protection for the Lower San Joaquin River and the Delta

Association in its protest argues that approval of this application would violate the Delta Protection Act (Water Code Section 12200 et seq.) and the San Joaquin River Act (Water Code Section 12230 et seq.). In Order WR 89-8, we discussed the effect of the Delta Protection Act on applications to divert and use water within the watershed upstream of the Delta, and concluded that it does not preclude reasonable new development of water uses in the areas of origin. See Order WR 89-8, pages 28-29 and 34-35. As we previously explained, the Delta Protection Act applies to the effects of diversion and export of water from the Delta by the State Water Project and the Central Valley

Project. It makes Delta protection subject to the two projects' satisfaction of the reasonable and beneficial uses of the areas of origin, under Water Code Sections 10505 and 11460-11463. Thus, the purpose of the Act is to protect the Delta from export effects, not to restrain upstream development.

In Order WR 89-8, we briefly discussed the San Joaquin River Protection Act. We decided to address the issue of compliance with the Act as an issue for each of the evidentiary hearings to be held on the individual protested applications and petitions. The Act forbids State agencies, including the Board, to do anything in connection with their responsibilities to cause further significant degradation of the quality of water in the reach of the San Joaquin River between the Merced River and the Middle River. It also declares state policy that no person, corporation, or public or private agency of the State or the United States should divert water from the San Joaquin River and its tributaries to which the users along the protected reach are entitled. The declaration of state policy reiterates the fundamental water right principle that nobody may take water to which someone else is entitled. A standard permit term will be included in the permit issued on this application to protect prior water rights.

The prohibition in Water Code Section 12230 et seq. against causing further significant degradation is unique to this reach of the San Joaquin River. The issue herein is whether the diversion to storage of 6.1 acre-feet of water during the period from November 2 through May 14 will cause a significant degradation of the water quality in the protected reach. The removal of 6.1 acre-feet during the diversion season would not have a measurable effect on the water quality in the protected reach. Consequently, we find that it will not, in itself, cause a significant degradation of the water quality in the protected reach. However, we may find after future proceedings that this diversion, together with other diversions, causes a cumulatively significant degradation of the water quality in the protected reach. Consequently, we will reserve jurisdiction in the permit issued on Application 29047 to review this authorization in the future.

6.4 Association's Claim to the Water

Association asserts that at times during the period from November 2 through May 14, no water is available for appropriation in the San Joaquin River watershed. Consequently, Association argues that the Clark application should be denied or restricted more than it

the extent of the water rights of Association's members, assuming that Association's members have valid senior appropriative or riparian rights? These are complicated questions with many parts.

To fully address these three questions, we need evidence that will help us decide what salinity level is adequate to protect the beneficial uses of Association's members; the salinity of water that can be tolerated without harm to other beneficial uses; whether it is reasonable under California Constitution Article X, Section 2 to withdraw all remaining flow from appropriation, declaring that Association's members have the first claim to it; whether it is reasonable to devote the remaining freshwater to diluting the salts and repelling seawater. We lack adequate evidence in the hearing record for this case to fully explore these issues.<sup>3</sup> Moreover, these issues affect far more water users and interests than are represented by just the parties before us in this proceeding.<sup>4</sup> It would not be appropriate in a

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*3 Association provided minimal evidence intended to show that approximately all of the annual unimpaired flow of the San Joaquin watershed is consumed under current water rights. Association did not support its assertion by studies offered in evidence or by detailed calculations showing how the evidence was derived. Consequently, we are unable to confirm its accuracy.*

*4 Association proposes that we halt or severely restrict all further appropriations from the San Joaquin River watershed to solve the salinity problem in the southern Delta and lower San Joaquin River. This solution could have widespread effects which are not addressed in the limited record before us.*

will be restricted by D-1594 and the Declaration of Fully Appropriated Streams. Association believes that almost all of the currently unappropriated water is needed to maintain the quality of water used by Association's members from the channels of the southern Delta and the lower San Joaquin River, and that further appropriation of water, even during the months when water use is minimal, may deprive Association's members of their prior right to water of adequate quality for their uses. Association asserts that the 500 ppm total dissolved solids standard at Vernalis is inadequate, and that the prior rights of Association's members are not fully protected. Association is asking that virtually all of the unclaimed water in the San Joaquin River watershed be used to dilute saline discharges into the San Joaquin River upstream of Association's members' diversions, to repel seawater intrusion into the southern Delta, and to promote a net downstream flow through the southern Delta.

6.4.1 Issues Raised

Association's position raises several questions. First, how much unclaimed water exists in the San Joaquin system, including imported water that returns to the river after being put to use? Second, what are the needs of instream uses? Third, what is

proceeding as limited as this to establish precedent on the availability of water in the entire San Joaquin River watershed. We are addressing these issues in the Bay-Delta Estuary Proceedings. Since a more comprehensive proceeding is addressing the same issues, a determination on these issues in this proceeding would be premature. Consequently, we will reserve jurisdiction in the permit issued herein, to revise the permit in accordance with the results of the Bay-Delta Estuary Proceedings. Such revisions could limit time or quantity of diversion of water authorized herein, or could go so far as to revoke the permit, if we find that no water is available for the permittee's priority.

6.4.2 The Sources of Salinity

The use of water to dilute pollutants other than ocean derived salts may be unreasonable. The Board prefers to control pollution at its source. The Board's regulations provide that the quantity of water diverted under a permit or license is subject to modification if necessary to meet water quality objectives, but the regulations also provide that the Board will not modify a permit or license if water quality objectives can be achieved through the control of waste discharges.

23 Cal. Code Regs. Section 780(b). We have requested



the Central Valley Regional Water Quality Control Board (Regional Board) to develop and adopt a salt-load reduction program for the San Joaquin River, and the Regional Board is working on the program. Association should consult with the Regional Board regarding control of the salt loads in the river.

6.4.3 Protest Dismissal Term

Association has suggested a permit term that would, if included, satisfy its concerns regarding salinity levels. The suggested term is quoted and discussed in Part 4.1, above. The Bay-Delta Estuary Proceedings are addressing the issues the requested term would affect, as well as other issues important to the Estuary.

While the Bay-Delta Estuary Proceedings are lengthy and complicated, they are designed to reach an overall determination on the issues affecting the Estuary, including the southern Delta. The proceeding herein, on the other hand, is not as broad as we would prefer to have before adopting a term such as Association requests. We will reserve jurisdiction over the permit issued herein, to conform it to our future determinations in the Bay-Delta Proceedings. Also, we will reserve jurisdiction under Standard Permit Term 80 to revise the season and amount of diversion to conform to our findings in the Bay-Delta Proceedings. We will

also include standard terms 90 and 93 in the permit, to restrict the season of diversion in accordance with Water Right Decision 1594.

## **7.0 ENVIRONMENTAL CONSIDERATIONS**

This decision authorizes appropriation to storage of up to 6.1 afa, for irrigation and stockwatering. The project involves only minor alterations to land, water, and vegetation. The applicant has agreed to accept the permit terms and conditions requested by the Department of Fish and Game, set forth in Part 4.1 above. We will adopt the agreed upon permit terms and conditions. With the permit terms and conditions, no reasonable possibility exists that the project will have a significant effect on the environment. Consequently, this project is exempt from the provisions of the California Environmental Quality Act (CEQA) (Public Resources Code Section 21000 et seq.) in accordance with Title 14, Cal. Code of Regs., Section 15304.

## **8.0 CONCLUSIONS**

1. Water is usually available for Application 29047 during the period November 2 through May 14, except as provided in Standard Permit Term 90 and 93. This finding is subject to further consideration in the Bay-Delta Estuary proceedings, and we will reserve

jurisdiction to revise this permit after a further determination as to the availability of water in the watershed.

2. We will approve Application 29047, subject to standard permit terms and conditions and the terms and conditions requested by the Department of Fish and Game.
3. Approval of Application 29047 alone will not cause further significant degradation of the quality of water in the reach of the San Joaquin River between the Merced River and the Middle River. More information is needed to determine if it, in conjunction with other diversions, will have a cumulative effect on water quality in the protected reach. That information should be provided in the Bay-Delta water right proceeding.
4. In the Bay-Delta water right proceeding, we will consider whether water users upstream of the Delta have a responsibility to release or bypass water to meet water quality and flow requirements in the Bay-Delta Estuary. Necessarily, this will involve the broad questions inherent in considering Association's claim that no more water is available

in the San Joaquin River watershed for appropriation. In that proceeding, we will include all entities who may have an interest in future water development in the area. Such a far-reaching determination would not be appropriate in a proceeding with the limited scope herein and without notice to the persons who may have an interest in the availability of water.

5. The Association should contact the Regional Water Quality Control Board for the Central Valley regarding the sources of salts in the San Joaquin River.

ORDER

IT IS HEREBY ORDERED that Application 29047 is approved and that a permit be issued, subject to prior rights and the following terms and conditions:

1. This permit is subject to standard permit terms 6 through 13, 80, 90, and 93.
2. The water appropriated shall be limited to the quantity which can be beneficially used and shall not exceed 6.1 acre-feet per annum to be collected from November 2 of each year through May 14 of the succeeding year.

3. This permit does not authorize collection of water to storage outside of the specified season to offset evaporation and seepage losses or for other purposes.
4. For the protection of fish and wildlife, permittee shall during the period from November 2 through May 14 bypass a minimum of 0.5 cubic feet per second. The total streamflow shall be bypassed whenever it is less than the designated amount.
5. Permittee shall allow representatives of the State Water Resources Control Board, Department of Fish and Game and others, as may be authorized from time to time by the Board, reasonable access to project works to determine compliance with terms of the permit.
6. Permittee shall keep the removal of riparian vegetation at a minimum during the construction of the project and shall plant native vegetation around the perimeter of the reservoir to replace habitat lost through inundation.
7. No water shall be diverted under this permit until permittee has installed a device, satisfactory to the State Water Resources Control Board, which is capable of measuring the bypass flow required by the conditions of the permit. Said measuring device shall be properly maintained.

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 of waste discharge pursuant to Water Code Section 13260 and shall comply with all waste discharge requirements or other orders issued by the California Regional Water Quality Control Board, Central Valley Region.

9. The State Water Resources Control Board reserves jurisdiction and retains continuing authority over this permit to amend or revoke it if, after future proceedings regarding the San Francisco Bay/Sacramento-San Joaquin Delta Estuary, or regarding the availability of water, or regarding degradation

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in the San Joaquin River between the Merced River and the Middle River, the Board finds that water is partially or entirely unavailable for the priority level of this permit.

CERTIFICATION

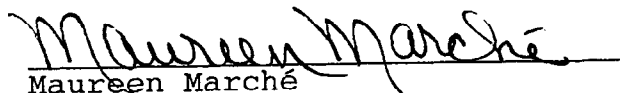
The undersigned, Administrative Assistant to the State Water Board, does hereby certify that the foregoing is a full, true, and correct copy of a decision duly and regularly adopted at a meeting of the State Water Resources Control Board held on June 3, 1992.

AYE: W. Don Maughan  
John Caffrey  
Marc Del Piero  
James M. Stubchaer

NO: None

ABSENT: Eliseo M. Samaniego

ABSTAIN: None

  
Maureen Marché  
Administrative Assistant to  
the Board