

STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

In the Matter of Permits 15026, )  
15027, and 15030 on )  
Applications 5632, 15204, and )  
15574 of )  
YUBA COUNTY WATER AGENCY, )  
Petitioner, )  
CALIFORNIA SPORTFISHING )  
PROTECTION ALLIANCE, )  
UNITED ANGLERS OF CALIFORNIA, )  
U. S. FISH AND WILDLIFE SERVICE, )  
BAY INSTITUTE OF SAN FRANCISCO, )  
and the CALIFORNIA DEPARTMENT )  
OF FISH AND GAME, )  
Interested Parties. )

ORDER: WR 89-23  
SOURCES: North Yuba, Yuba,  
Middle Yuba, and  
Oregon Creek  
COUNTIES: Yuba, Nevada,  
Butte, and Sutter

ORDER DISMISSING PETITION FOR RECONSIDERATION  
OF ORDER WR 89-17  
AND DIRECTING THAT SPECIFIED INFORMATION  
BE PROVIDED TO THE  
CALIFORNIA SPORTFISHING PROTECTION ALLIANCE

BY THE BOARD:

1.0 INTRODUCTION

The Board having issued Order WR 89-17 on July 20, 1989; Order WR 89-17 having approved a temporary transfer of water from Yuba County Water Agency to the Department of Water Resources; a petition for reconsideration of Order WR 89-17 having been filed on August 21, 1989 by the California Sportfishing Protection Alliance; the issues raised by the petition having been duly considered; the Board finds as follows:

2.0

**GROUNDS FOR RECONSIDERATION**

Section 768 of Title 23 of the California Code of Regulations provides that reconsideration of a Board decision or order may be requested for any of the following causes:

- a. A procedural irregularity which has prevented the petitioner from receiving a fair hearing;
- b. The decision is not supported by substantial evidence;
- c. There is relevant evidence available which, in the exercise of reasonable diligence, could not have been produced at the hearing; or
- d. An error in law.

3.0

**SUMMARY OF PETITION**

The California Sportfishing Protection Alliance (CSPA) filed a petition for reconsideration dated August 17, 1989 which was received by the Board on August 21, 1989. The petition seeks reconsideration on the grounds that the Board made an error in law, did not properly evaluate the effects of the transfer on fish

and wildlife resources and did not make an adequate finding regarding the effects of the transfer on fish and wildlife. In support of the general allegations regarding the Board's alleged errors in law, the petition for reconsideration sets forth seven specific alleged errors concerning the adoption of Board Order WR 89-17. The alleged errors of Order WR 89-17 as well as the specific relief which CSPA requests are summarized below.

3.1 Alleged Deficiencies in the Adoption of Board Order WR 89-17

The specific reasons for which CSPA alleges that the Board's adoption of Order WR 89-17 was deficient are as follows:

1. The Board did not make a finding regarding effects of the water transfer on water quality and wildlife in the area of the Tulare Lake Basin Water Storage District.
2. The Board did not make a finding regarding effects of the water transfer on the water quality and wildlife in the area of the Empire Westside Irrigation District.
3. The Board did not require specified flows in the Yuba River in the spring of 1990 which would

provide adequate outmigration for young salmon and attraction flows for American shad migration into the Yuba River system.

4. The Board's evaluation was based in part upon testimony from the California Department of Fish and Game (DFG) that the transfer could result in a further exchange of water with the U. S. Bureau of Reclamation (USBR) to provide cold water for fall run Chinook salmon in the Sacramento River. CSPA alleges, however, that a July 26, 1989 letter from Donald Paff of the USBR to Bob Baiocchi of CSPA

"... clearly shows that the Bureau will not provide adequate cold water for fall run Chinook salmon, thereby showing that the Board's finding regarding a possible water exchange with the Bureau was erroneous."

5. The Board improperly relied upon hearsay evidence from DFG which was not subject to cross examination as the basis for finding that the transfer would not adversely affect winter run Chinook salmon.
6. The Board should have adopted a policy and rules to implement the statutory provisions of governing temporary transfers of water (Water Code Section 1725 et seq.) prior to approving the transfer.

7. This transfer is not a temporary transfer. Rather, CSPA contends that this is the third transfer from YCWA in three years and it should be evaluated pursuant to the statutes governing long-term transfers. CSPA also alleges that evaluating the transfer pursuant to the procedure governing temporary transfers set forth in Water Code Section 1725 et seq. was contrary to the policy set forth in Board Order WR 88-12 which stated that fish and wildlife studies should be conducted before the Board would consider transfers similar to a 1988 water transfer between YCWA and DWR.

3.2

Relief Requested by Petitioner

Based on the alleged deficiencies summarized above, CSPA requests that the Board modify Order WR 89-17 or provide other specified relief as described below:

1. The Board should require YCWA, the Department of Water Resources (DWR) and DFG to monitor the effects on water quality and wildlife resources which may result from use of water as part of the transfer.
2. The Board should require YCWA to maintain a flow of 2000 cfs in the Yuba River during April and May of

1990 and should require that water temperatures be adequate to maintain and protect the anadromous fish during this period.

3. The Board should begin preparation of a policy and rules to implement the provisions of Water Code Section 1725 et seq.
4. The Board should require daily trawling surveys in the Delta to determine if young winter run Chinook salmon are in the Delta during September through December.
5. CSPA should be provided with copies of all reports and information required to be submitted to the Chief of the Division of Water Rights under Order WR 89-17.
6. Condition No. 4 of Order WR 89-17 should be modified to require that the USBR provide a maximum water temperature of 56°F in the Sacramento River for both winter run and fall run Chinook salmon.
7. The Board should not allow YCWA to file another petition for temporary transfer under Water Code

Section 1725 because it would constitute a long-term transfer.

8. The Board should strictly enforce all terms and conditions of Order WR 89-17. In the event of any threatened violations of the conditions of the order, the Board should institute an enforcement action pursuant to Water Code Section 1831 et seq.

#### 4.0

#### **YCWA'S STATEMENT IN OPPOSITION TO PETITION FOR RECONSIDERATION**

YCWA submitted a letter dated September 27, 1989 asking that the petition for reconsideration be denied. YCWA argues that CSPA has offered no new evidence and has not submitted a statement of points and authorities in support of legal issues raised in the petition for reconsideration. YCWA also contends that all of the contentions raised by CSPA were raised previously. In addition, YCWA questions whether CSPA has standing to petition for reconsideration since it participated in the hearing only as an interested party which did not present evidence.

Responding first to the question of standing, the Board notes that Section 768 of Title 23 of the California Code of Regulations authorizes "any person interested in any application, permit, or license affected by a

board decision or order" to petition for reconsideration for any of the causes listed in Section 2.0 of this order. In this instance CSPA has participated at every stage of the Board's consideration of the water transfer at issue and we find that the organization has standing to seek reconsideration of Order WR 89-17. The fact that CSPA bases its request upon legal grounds and evidence presented by other parties does not preclude it from requesting reconsideration. With respect to the requirement to offer a statement of points and authorities in support of the petition (Title 23, Cal. Code Regs., Section 769(c)), we find that the six-page petition and statement of reasons provides an adequate statement of CSPA's legal arguments and the statutes cited in support of those arguments. Finally, we agree with YCWA that many of CSPA's contentions were raised previously. Nevertheless, our regulations allow an interested party to ask the Board to reconsider arguments which the Board has previously rejected if the interested party believes that the Board made an error in law or that the order is not supported by substantial evidence. (Title 23, Cal. Code Regs., Section 768.)

5.0 ANALYSIS OF ISSUES RAISED BY PETITION FOR RECONSIDERATION

Before responding to the specific forms of relief which CSPA requests in Section 5.2, we first will address the alleged deficiencies in Order WR 89-17 raised by the petition.

5.1 Response to Alleged Deficiencies Raised by CSPA

As noted in Section 3.1 above, CSPA alleges that Order WR 89-17 was deficient for not including findings regarding the effects of the water transfer on water quality and wildlife resources in the Tulare Lake Basin Water Storage District and the Empire Westside Irrigation District areas. Despite whatever problems which may exist in those areas, we find there was insufficient evidence presented from which the Board could conclude that the water transfer at issue would adversely affect water quality or wildlife in those areas in any way. Rather, the evidence presented showed that the transferred water would be used to reduce use of poorer quality ground water which would otherwise be used to irrigate previously planted crops. Thus, with respect to the Tulare Lake Basin Water Storage District and the Empire West Side Irrigation District, this transfer would not be expected to have an unreasonable effect on water quality.

With respect to the alleged deficiency of Order WR 89-17 in not requiring higher spring flows in the Yuba River for the benefit of young salmon and American shad, we respond initially that there is no requirement that Board approval of a temporary water transfer be conditioned upon maximizing benefits to the fishery. Rather the statutory requirement is that the transfer not have an unreasonable effect upon fish, wildlife, and other instream uses. (Water Code Sections 1725, 1727.) Order WR 89-17 requires that YCWA maintain a minimum flow in the Yuba River of 700 cfs at the U. S. Geological Survey gage near Marysville from October 1, 1989 through January 31, 1989 and a mean daily temperature not to exceed 56°F for November 1, 1989 through March 31, 1990. Flows in the Yuba River near Marysville are to be not less than 600 cfs during February and not less than 400 cfs during March of 1990. (Order WR 89-17, pp. 40-41.) These requirements were supported by DFG and no evidentiary showing has been made to establish that the stated requirements are inadequate. The subject of appropriate long-term flows in the Yuba River will be addressed in a separate Board proceeding in connection with CSPA's complaint against YCWA's operations on the Yuba River.

CSPA's fourth contention concerns the subject of the possibility of DFG arranging for a further exchange of water in connection with the YCWA/DWR transfer which would allow the USBR to maintain lower water temperatures in the Sacramento River for the benefit of fall and winter run Chinook salmon. (Order WR 89-17, pp. 7, 39.) CSPA has submitted a July 26, 1989 letter from the Bureau to demonstrate that the water exchange described will not occur. In response to CSPA's contention, the Board first notes that we do not read the July 26, 1989 Bureau letter as precluding the type of cooperative arrangement described in Order WR 89-17. More importantly, however, it is essential to recognize that Order WR 89-17 was not based on the assumed "fact" that a further water exchange for the benefit of the salmon would occur. Rather, our order simply noted that testimony from DFG indicated that a further transfer with the Bureau may occur, and that such a transfer would be expected to benefit the salmon. Unfortunately, some uncertainty associated with predicting the effects of a particular water transfer or approval of any water supply project is often unavoidable.

The fifth alleged deficiency cited in CSPA's petition concerns the Board's reliance upon "hearsay" evidence from DFG which was not subject to cross-examination.

The evidence referred to is a brief interdepartmental memorandum from DFG which analyzed the limited data available to predict the period which young winter run Chinook salmon are most likely to be migrating out through the Delta.

As a general matter, the Board acknowledges the benefits of providing an opportunity for cross-examination regarding the methodology or conclusions of a disputed technical analysis, particularly when that technical analysis relates to a key issue under consideration. In the case of petitions for temporary transfers of water under Water Code Section 1725 et seq., however, the Water Code authorizes an expedited procedure in which a hearing is not required prior to Board approval of a proposed transfer. If the Board determines that it can make the statutory findings required for approval, it can authorize a proposed transfer without any hearing, even if the transfer is opposed by other parties. In such a case, virtually all of the information on which the Board relies could be deemed "hearsay", yet Board approval is authorized nonetheless. Therefore, we conclude that, in this type of a proceeding, the Board is not precluded from considering information which becomes available after a hearing, even if such information has

not been subject to cross examination. In this instance the DFG memorandum in question was submitted after the hearing, but CSPA and other interested parties had an opportunity to comment on the memorandum prior to the adoption of Order WR 89-17.

CSPA's sixth objection to the Board's approval of the YCWA/DWR transfer concerns the fact that the Board has not adopted a "policy and rules to implement Section 1725 et seq. of the Water Code" prior to approval of the transfer. Pursuant to California Administrative Procedures Act, the type of policy and rules which CSPA refers to must be adopted as Board regulations in accordance with the requirements of Government Code Section 11340 et seq. The Board's existing regulations governing temporary transfers of water are set forth in Sections 800 through 803 of Title 23 of the California Code of Regulations. These regulations have not been revised to reflect the amendments to Water Code Section 1725 et seq. enacted in 1988. The Board has begun the process of amending the regulations. In the interim, however, the Board remains subject to the requirement of implementing the current statutory provisions governing temporary transfers of water. Enactment of amended regulations will aid in the implementation of the statutory requirements, but amended regulations are not essential to approval of temporary water transfers.

The final alleged deficiency raised by CSPA is that the Board processed the YCWA petition as a temporary transfer despite the fact that similar transfers have occurred previously thereby establishing that this "is clearly a permanent long-term transfer" subject to different legal requirements. (Petition for Reconsideration, pp. 4-5.) From a legal standpoint, the Board's response is that YCWA requested and received authorization for the transfer of 200,000 acre-feet of water to DWR for use in specified areas. Although similar transfers have been approved previously, in each case there have been significant differences regarding place of use, purpose of use, etc. In addition, neither Board Order WR 89-17, nor any of the previous temporary transfer orders purport to authorize a transfer of water which will be effective for more than one year. Thus, we do not conclude that the 1989 YCWA/DWR transfer should have been treated as a long-term transfer under Water Code Section 1735 et seq.

From a practical standpoint, however, we share CSPA's concern that the transfer of water from YCWA to other parties has been occurring on a regular basis, without the long-term effects of continuing transfers ever having been thoroughly evaluated. As noted above, the subject of long-term flows in the Yuba River will be

addressed in the Board's proceeding on the CSPA complaint. With respect to the effects of temporary transfers on the Sacramento River and Delta, the Board directs the parties' attention to Board Order WR 89-20, adopted at the September 21, 1989 Board meeting. As stated in that order, the Board will require a thorough environmental analysis prior to any future temporary transfers of water involving an increase in water exports through the Delta.<sup>1</sup>

5.2 Evaluation of Relief Requested by CSPA

In view of the alleged deficiencies in Order WR 89-17 or the procedure leading to its adoption, CSPA requests several forms of relief. First, it requests that YCWA, DWR, and DFG be required to monitor the effects on water quality and wildlife of using the transfer water in the Tulare Lake Basin Water Storage District and the Empire West Side Irrigation District. As discussed in Section 5.1, however, the evidence indicates that the transfer water is of better quality than the ground water which it is replacing. Therefore, requiring monitoring of effects on water quality and wildlife as a condition of approving this transfer would be an unreasonable requirement.

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<sup>1</sup> The Board will require a similar environmental review prior to approval of any temporary changes in place of use which will result in increased Delta exports. (Board Order WR 89-20, p. 9.)

CSPA's request that the Board require flows of 2000 cfs in the Yuba River during April and May is not supported by the evidence before the Board at this time. More information regarding desirable levels of instream flow in the Yuba River should be available in the near future with the completion of DFG's instream flow study of the Yuba River as required by Public Resources Code Sections 10001 through 10004. This study and other relevant evidence will be considered in the Board's evaluation of CSPA's complaint against YCWA operations on the Yuba River.

CSPA's third request is that the "Board should commence the preparation of a policy and rules to implement Section 1725 et seq. of the Water Code." As explained above, the Board has begun the process of amending the regulations governing temporary transfers of water. CSPA will be provided an opportunity to comment upon the Board's proposed amended regulations when those regulations are circulated for public comment prior to adoption.

CSPA's fourth request is that the Board require daily trawling surveys in the Delta to determine if young winter run Chinook salmon are in the Delta during

September through December. Due to the small size of outmigrating juvenile salmon and the probability that many would be in shallow water, a trawling survey would be of limited effectiveness in determining the presence of young winter run Chinook salmon in the Delta. As discussed below in Section 6.0, however, the most recent information from DFG indicates that young winter run Chinook salmon may reach the Delta prior to the peak period of outmigration of January through April as identified in DFG's earlier report. Therefore, the Board agrees with CSPA that a high priority should be given to monitoring for the presence of juvenile salmon in the Delta. (See Condition 12 of Order WR 89-17.) This subject is discussed further in Section 6.0 below.

CSPA's fifth request is that it be provided "timely copies of all reports and submittals which are required to be submitted" by YCWA, DWR and DFG. Order WR 89-17 specifically requires that all parties who so request shall be provided with DWR's and YCWA's operations and water temperature information as described in Conditions 7, 9 and 10 of the order. In addition, Conditions 11, 12, and 13 of Order WR 89-17 require submission of other specified reports, studies and proposals related to determining the hydrological and environmental effects of this transfer and similar

water transfers. The order does not direct that the information specified in Conditions 11, 12 and 13 be provided to CSPA or other interested parties, but it would be available to them under the Public Records Act. (Government Code Section 6250 et seq.) In view of CSPA's long-standing interest in the potential environmental effects of YCWA water transfers, and in view of the pending complaint by CSPA against YCWA's operations on the Yuba River, the Board concludes it is reasonable to direct YCWA, DWR and DFG to provide CSPA copies of all reports or other information required by Order WR 89-17 at the time the information is filed with the Board.

The sixth form of relief requested by CSPA is that the Board require that the Bureau of Reclamation provide water temperatures of not more than 56°F for successful salmon spawning in the Sacramento River if YCWA water is used to meet Delta outflow requirements as part of any water exchange involving the Bureau. The possibility of YCWA water being utilized in an exchange with the Bureau to lower Sacramento River water temperatures was acknowledged in Order WR 89-17. The evidence of the potential effect of such an exchange, however, was totally insufficient for the Board to conclude as part of this proceeding that the Bureau should be directed to maintain water temperatures in

the Sacramento River at any particular temperature. In addition to the evidentiary limitations, the Bureau was not a party to the proceedings before the Board on this transfer.

The seventh type of relief requested by CSPA is that the Board not allow YCWA to file another petition for temporary transfer under Water Code Section 1725 because "it would constitute a long-term transfer". As discussed in Section 5.1 above, the Board recognized in Board Order 89-20, that it is imperative to have thorough environmental analysis prior to approving further transfers which would increase exports of water from the Delta. The Board also will institute proceedings in response to CSPA's complaint regarding YCWA's Yuba River operations. That does not mean, however, that any transfer which YCWA might propose in the future would qualify for treatment as a long-term transfer under Water Code Section 1735 et seq., or even that all future YCWA transfers will involve the export of water from the Delta. Each proposed transfer must be examined on its own merits in accordance with applicable law.

CSPA's final request for relief asks that the Board strictly enforce the terms and conditions of Order

WR 89-17 and that the Board institute cease and desist proceedings pursuant to Water Code Section 1831 et seq. should any threat of violation occur. In response, we affirm that the Board always intends the terms and conditions of Board orders to be observed closely. Board staff will monitor for compliance to the maximum extent feasible with existing resources.

**6.0 OTHER MATTERS**

Due to the limited amount of information regarding potential fishery impacts of the proposed temporary transfer and the limited amount of time available to evaluate the transfer, the Board was forced to rely heavily upon the expert opinion of staff from the Department of Fish and Game. DFG spokesperson Dick Daniel emphasized the following points at the Board hearing: (1) DFG staff does not expect the transfer to have unreasonable impacts upon fish and wildlife; and (2) through cooperation and coordinated operations among YCWA, DWR, and the USBR, the temporary transfer could provide a means of helping the Sacramento River salmon fishery resulting in a beneficial net effect on fishery resources. YCWA and DWR both stressed the desirability of having DFG serve as the coordinating agency to ensure that the transfer not adversely impact fish. Condition 12 of Order WR 89-17 stresses the central role of DFG particularly with respect to protection of the winter run Chinook salmon.

Condition 6 of Order WR 89-17 reads as follows:

"For the protection of fish, wildlife, and other instream beneficial uses in the Yuba, Feather, and Sacramento Rivers and the Sacramento-San Joaquin Delta, YCWA and DWR shall consult with DFG and adjust flows and pumping such that the proposed flow changes and operation attributable to this transfer will not unreasonably affect fish, wildlife, or other instream beneficial uses, with particular emphasis on the endangered winter run Chinook salmon.

Similarly, Condition 8 provides:

"No export of water attributable to the transfer approved in this order shall be made until the petitioner and DWR have consulted with DFG and have implemented appropriate mitigation measures or alternatives substantially in accordance with the procedures set forth in Sections 2090 through 2097 of the California Fish and Game Code."

The provisions of Fish and Game Code Sections 2090 through 2097 referred to in Condition 8 set forth a procedure for consultation with DFG to ensure that actions undertaken by state agencies do not jeopardize the continued existence of any endangered or threatened species.

Board Order WR 89-17 concluded that:

"[T]he consultation and mitigation procedures specified in Sections 2090 through 2097 should apply notwithstanding the fact that temporary transfers of water are exempt from the requirements of CEQA." (Order WR 89-17, p. 31.)

In addition to the requirements of Conditions 6 and 8, Condition 12 of Order WR 89-17 requires DWR and DFG to develop a monitoring program to evaluate any fishery impacts of the additional pumping at the Banks pumping plant associated with the temporary transfer. The combined effect of Conditions 6, 8 and 12 of Order WR 89-17 is to place DFG in the central role of coordinating and monitoring DWR and YCWA operations attributable to the transfer with the objective of preventing adverse effects on fish. Conditions 14 and 15 of Order WR 89-17 establish that the Board maintains continuing authority over the transfer and that it may impose additional requirements as necessary for the protection of vested rights, fish, wildlife, instream beneficial uses and the public interest.

The Board's continuing authority and the central role provided to DFG are particularly relevant in this instance in view of a memorandum dated September 18, 1989 from DFG Director Pete Bontadelli to DWR Director David Kennedy. The memorandum states that DFG has captured four winter run Chinook salmon fry at the Glenn-Colusa Irrigation District intake screen near Hamilton City and that more are expected through the remainder of September. DFG concludes that some juvenile winter run could be present in the Delta

during the transfer period (October 16-November 30). Therefore, DFG believes that continuous monitoring at the fish salvage facility is essential to determine if winter run juvenile Chinook salmon are present during the increased pumping period. DFG states, if juvenile winter run salmon do appear, that either DWR will have to curtail the pumping of additional water or take other unidentified measures to avoid the impacts of entrainment.

The DFG memorandum goes on to say that DFG has "some very real and grave concerns over the potential impacts to winter run Chinook" salmon of DWR's projected increased pumping from the Delta over past years. The DFG letter concludes with a request to meet with DWR staff to seek a long-term solution.

Since the DFG memorandum does not identify any particular remedial measures and since DFG has not called upon the Board for further action, we will not take any such action at this time. We want to affirm, however, that under the circumstances surrounding this particular transfer, YCWA and DWR agreed that DFG should have a key role in coordinating operations to avoid unreasonable fishery impacts, particularly impacts to the endangered winter run Chinook salmon.

We would also direct the parties' attention to Condition 6 of Order WR 89-17 which provides that:

"DWR shall consult with DFG and adjust pumping such that the proposed flow changes and operations attributable to this transfer will not unreasonably affect fish, wildlife or other instream beneficial uses, with particular emphasis on the endangered winter run Chinook salmon."

**7.0 CONCLUSION**

Based on the findings above, we conclude that Order WR 89-17 should not be reconsidered or modified. As discussed in Section 5.2 of this Order, however, we conclude that CSPA should be provided with copies of all information and reports regarding the YCWA/DWR temporary transfer which are required to be submitted to the Chief of the Division of Water Rights. The other points raised in the petition for reconsideration and the above findings do not require a further order from the Board at this time.

**ORDER**

**IT IS HEREBY ORDERED THAT:**

1. DWR, YCWA, and DFG shall provide CSPA with copies of all reports, data, and other written submittals which Board Order WR 89-17 requires to be provided to the Chief of the Division

of Water Rights. Said information shall be mailed to CSPA, P. O. Box 357, Quincy, CA 95971 at the time the information is submitted to the Division of Water Rights.

2. The petition for reconsideration filed by CSPA on August 21, 1989 is hereby dismissed.

#### 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 October 19, 1989.

AYE:           W. Don Maughan  
                  Darlene E. Ruiz  
                  Edwin H. Finster  
                  Eliseo M. Samaniego  
                  Danny Walsh

NO:             None

ABSENT:        None

ABSTAIN:       None

  
Maureen Marché  
Administrative Assistant  
to the Board

