

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Temporary)	ORDER:	WR 95-8
Permit 20791)		
(Application 30439))	SOURCE:	Mattole River
)		
Karen Ruth, Permittee)	COUNTY:	Humboldt
_____)		

FINDINGS AND ORDER VALIDATING THE
ISSUANCE OF TEMPORARY PERMIT

Karen Ruth, hereinafter referred to as Ruth, having filed Application 30439 for a temporary permit to divert and use water pursuant to Chapter 6.5 (commencing with Section 1425), Part 2, Division 2 of the Water Code; the State Water Resources Control Board (SWRCB) having consulted with the California Department of Fish and Game (DFG); the Executive Director, Walter G. Pettit, having reviewed available information and authorized issuance of a temporary permit to divert and use water subject to review and validation by the SWRCB as provided by Water Code Section 1425(d); a temporary permit having been issued on May 25, 1995; the SWRCB finds as follows:

Issuance of Temporary Permits

1.0 Water Code Section 1425(d) provides for delegation of the authority to issue temporary permits. The SWRCB has delegated the authority to authorize issuance of temporary

permits to Walter G. Pettit pursuant to Resolution 91-21. When this delegation of authority is exercised, Water Code Section 1425(d) further requires that the SWRCB review and validate any temporary permit so issued within 30 days of issuance. On May 25, 1995, Executive Director Walter G. Pettit authorized issuance of the temporary permit and on the same date, the Chief of the Division of Water Rights (Division) issued Temporary Permit 20791. The matter is before the SWRCB for review and validation.

Substance of the Application and Project

- 2.0 Temporary Permit 20791 is for the direct diversion of 900 gallons per day by pumping from the upper reaches of the Mattole River in Humboldt County. The water will be diverted to two 2,500 gallon regulatory tanks thence to the place of use. An average of one hundred gallons per day will be used for domestic purposes and an average of 800 gallons per day will be used for the drip irrigation of approximately one acre of existing fruit trees planted within the NE 1/4 of NW 1/4 of projected Section 5, T5S, R2E, HB&M. The authorized season of diversion is from May 26 to October 31, 1995.
- 3.0 In January of this year, Ruth filed an application to appropriate water by permit (Application 30424) for the

irrigation of a proposed 9 acre orchard and vineyard. Application 30424 is primarily for diversion to offstream storage in a proposed 20 acre-foot pit reservoir. The application for a temporary permit was filed for irrigation of trees already planted pending action by the SWRCB on Application 30424.

Urgent Need of Permittee to Divert and Use Water

4.0 In 1992, Ruth purchased the subject property with the intent of building a residence and planting a portion of the property with fruit trees and vines. The property consists of two contiguous parcels of two and 20 acres respectively, the smaller of which fronts on the Mattole River. In reliance on advice that due to river frontage the entire property was riparian to the Mattole River, Ruth began planting the orchard on the 20 acre parcel. Approximately four hundred of the planned 1,300 fruit trees have been planted to date and irrigated from the Mattole River under claim of riparian right.

5.0 In late 1994, in response to a complaint, the Division determined that the 20 acre parcel was not riparian to the Mattole River and Ruth shortly thereafter filed Application 30424. Pending further action on Application 30424, Ruth is without a source of irrigation water for previously planted

fruit trees as she cannot legally divert water from the Mattole River until such diversion is authorized by the SWRCB. In consideration of the above circumstances, the SWRCB finds that Ruth has an urgent need to divert and use water under the temporary permit.

Notice of the Application for Temporary Permit

6.0 Public notice of the application for a temporary permit was issued on April 27, 1995. Copies of the notice were posted and also mailed, in accordance with Water Code Section 1428, to all known interested parties and diverters downstream from the point of diversion. The closing date to file comments or objections was 5:00 p.m. May 12, 1995.

Instantaneous Diversion Rate

7.0 Ruth's existing 5 horsepower pump has an instantaneous diversion rate of approximately 85 gallons per minute (gpm) under delivery system conditions. Due to concerns over the possible impact of this rate on summer flow, the Division requested installation of a smaller pump with a maximum diversion rate of 20 gpm. Ruth agreed, but asked for a 2 month delay contending that the submersible pump was under 6 plus feet of water as of mid-May 1995 making access difficult. The temporary permit was conditioned as follows:

When the depth of water in the Mattole River at the pump intake reaches two feet, or by July 15, 1995, whichever occurs first, the maximum instantaneous rate of diversion shall be reduced to 20 gallons per minute, not to exceed a seven day average of 900 gallons per day, for the remainder of the authorized diversion period.

Objections

- 8.0 Written objections to issuance of the temporary permit were received from Mr. and Mrs. Donald M. Mixson (Mixson), Mr. and Mrs. Kurt Roedl (Roedl), and Mr. Scott Partridge (Partridge) within the objection filing period stated in the notice. Following closure of the objection period, additional objections were received from Stephanie Christenberry (Christenberry), and the Mattole Watershed Salmon Support Group (MWSSG). Following is a summary of the main allegations of each objection and conditions under which the objection could be dismissed.
- 9.0 Mixson owns property directly across the Mattole River from Ruth's smaller parcel and diverts from the river for maintenance of a green belt. Mixson provided a video tape which documents the existence of newly planted trees, flow in an unnamed stream on Ruth's property, and flow in the Mattole River on May 10, 1995. Mixson alleges that granting

this temporary permit will open the door to granting a permit on Application 30424; that there are many parties with riparian rights below Ruth's diversion who have been diverting from the river for years for domestic uses, and Ruth's diversion is not for domestic but rather commercial purposes; and that there are two year-round creeks on Ruth's 20 acre parcel which could be utilized without impacting the Mattole River at all.

10.0 The Roedl property is between the Mattole River and Ruth's planned orchard on the 20 acre parcel. Roedl alleges that the irrigation of 9 acres with large amounts of unsafe water from the Mattole River presents a potential health hazard to their water supply (well) system. Roedl states that the objection could be dismissed if Ruth would provide Roedl with a new water supply from a source above the area to be irrigated.

11.0 The Partridge objection alleges that the seasonal flows in this reach of the Mattole River drop below 0.5 cubic foot per second (cfs). Thus, any appropriation by permit will negatively impact the public trust; and due to riparian use, water is seasonally unavailable for appropriation. Partridge also alleges that water returning to the stream system after diversion may be of poor quality; that the pump intake is not screened in accordance with generally

accepted fish protection practices; that Ruth has a legal obligation to first exercise any riparian rights to water available on the parcel before appropriating from the Mattole River; that figures on acreage and irrigation method are not factual; and that Ruth's method of development has destabilized an existing roadbed, caused soil erosion, and visually impacted the aesthetic value of the area.

Partridge's dismissal conditions are as follows:

1. Use year-round streams on the 20 acre parcel for irrigation;
2. Develop a storage project;
3. No use of pesticides, herbicides or non-organic fertilizers on the orchard; and
4. Plant vegetation to reduce negative visual effect of 8-foot-high orchard fencing.

12.0 The late objection of Christenberry is essentially the same as the objection of Partridge.

13.0 The late objection of MWSSG primarily concerns the impact of an 80 plus gpm diversion rate on the river, fishery resources, recreation and riparian habitat during the months of June through October. It is MWSSG's contention that decisions concerning water withdrawals from the Mattole River during the summer and early fall of 1995 be made on

the basis of measurements of historical minimum flow levels for the river reach in question. Using upstream flow measurements by the U.S. Geological Survey on August 11 and 17, 1977, MWSSG projects a minimum flow at Ruth's point of diversion of 78.5 gpm. The objection also includes allegations similar to the other objections. MWSSG's dismissal conditions are as follows:

1. Abandonment of the Mattole River diversion, or;
2. Pumping rate not to exceed 20 gpm or 10 percent of measured river discharge whichever is less;
3. Installation of a calibrated, non-resettable meter in the diversion line and installation of a flow restrictor;
4. Installation and maintenance of a pump intake screening system;
5. Erosion abatement and revegetation of land disturbed during the water system installation;
6. Discussion and analysis of water pollution risks which may result from use of fertilizers, pesticides and herbicides; and
7. Mutual acceptance of a responsible neutral party to monitor and enforce the aforementioned conditions.

Decision to Issue Temporary Permit

14.0 Ruth responded to the objections of Mixson, Roedl and Partridge but none of the objections were resolved between the parties. The decision to issue the temporary permit over the unresolved objections was based on:

1. Consultation with the DFG indicating no objection to the temporary permit this year;
2. Anticipated higher than normal flow conditions in the Mattole River through October considering that 1995 has been a very wet water year throughout the state; and
3. A determination that by limiting the instantaneous diversion rate to a maximum of 20 gpm during periods of lower river flow there would be no adverse impact on the environment and the project would qualify for an exemption under Section 15304 of the California Environmental Quality Act (CEQA) guidelines.

Analysis of Objections

15.0 Addressed below are the allegations set forth in the objections to the extent that the objections raised concerns directly related to diversion and use of water under the temporary permit and to the extent that they are within the jurisdiction of the SWRCB.

16.0 The drainage area upstream of the point of diversion is approximately 32 square miles according to MWSSG. The MWSSG projection of a minimum flow of 78.5 gpm at this point in the Mattole River in 1995 is based on two upstream flow measurements in August 1977. August 1977 was near the end of the two year 1976-77 drought. The United States Geological Survey Resources Data indicates that runoff in this area of the state in water year 1977 was between 3 and 8 percent of the 1941-70 median. To project a similar runoff for water year 1995 is not realistic.

17.0 Several of the objectors allege that there are numerous downstream riparian diversions and that these diversions result in seasonal unavailability of water at the point of diversion. All parties who divert surface or subterranean streamflow under claim of riparian right are required by law to file a Statement of Water Diversion and Use¹ (Statement) with the SWRCB. No such Statements are on file from the point of diversion downstream to beyond the juncture with Honeydew Creek, a distance of approximately 27 river miles. Consequently, the SWRCB is not aware of any riparian diverters in this reach. In addition, there are only three appropriative diversions in this reach totalling 0.077 cfs or 35 gpm.

¹ Division 2, Part 5.1 of the California Water Code.
Water Code Section 5100 et seq.

18.0 Several of the objectors contend that Ruth should be required to divert from streams on the 20 acre parcel rather than from the Mattole River and Partridge claims that Ruth has a legal obligation to first exercise any riparian right to water on this parcel. The SWRCB finds that the latter claim has no legal basis and since these streams are tributary to the Mattole River, there would be no difference in river flow if diversion were made from the streams instead of the river.

19.0 It is unclear what is intended by Mixon's contention that Ruth's diversion is not for domestic but rather commercial purposes. Ruth's use of water is for domestic and irrigation purposes and both are recognized as beneficial uses of water pursuant to Title 23, California Code of Regulations, Sections 660 and 661. It is also unclear why Mattole River water is unsafe as alleged by Roedl and there is no evidence that Ruth is discharging pollutants into Roedl's well.

Special Permit Conditions

20.0 To mitigate valid concerns raised by the Division and the objections, the following special conditions were included in the temporary permit:

- When the depth of water in the Mattole River at the diversion pump intake reaches two feet, or by July 15, 1995, whichever occurs first, the maximum instantaneous rate of diversion shall be reduced to 20 gallons per minute, not to exceed a seven day average of 900 gallons per day, for the remainder of the authorized diversion period.
- Prior to making any diversions under this temporary permit, permittee shall install and maintain a meter, satisfactory to the State Water Resources Control Board, which is capable of measuring the instantaneous rate of diversion in gallons per minute and the cumulative quantity of water diverted in gallons. The meter shall be conveniently located so as to be accessible for reading by the State Water Resources Control Board or its designated representative.
- Permittee shall report to the State Water Resources Control Board by the 20th of each month the maximum rate of diversion and the total quantity of water diverted during the previous month.
- The diversion pump intake shall be screened with a device that meets the requirements of the California Department of Fish and Game.

- Issuance of this temporary permit shall not be construed as indicating State Water Resources Control Board approval of water right permits requested under other pending applications.

Effect of the Diversion on Other Lawful Users of Water

- 21.0 Mixson diverts from the Mattole River under an apparent claim of riparian right just downstream from Ruth's point of diversion. Mixson has not filed a Statement and did not object to issuance of the temporary permit on the basis of injury to his diversion. The SWRCB has no evidence to show that Ruth's diversion adversely impacts Mixson.
- 22.0 In addition to Mixson, the only other known downstream diversion in the vicinity of Ruth's point of diversion is that of Robert and Valery McKee (McKee) under licensed Application 22574 for 3,900 gallons per day. This diversion is approximately 1/3 mile downstream. On April 25, 1995, McKee advised the Division that he had no objection to issuance of the temporary permit. The next known diversions are approximately 11 and 12 river miles downstream. It is unlikely that Ruth's diversion will have any impact on these diversions due to the small quantity of water which will be diverted and the distance to other downstream diverters.

23.0 Based upon the facts described above, the SWRCB finds that water may be diverted and used under Temporary Permit 20791 without injury to any lawful user of water.

Effects of the Proposed Diversion on Fish, Wildlife and Other Instream Uses.

24.0 No oral or written objection by the DFG has been received stating that the diversion may impair instream beneficial uses. The DFG has verbally stated that it has no objection to the diversion this year. Accordingly, the SWRCB finds that water may be diverted and used without unreasonable effect upon fish, wildlife or other instream beneficial uses.

Findings Concerning the California Environmental Quality Act

25.0 The subject project involves minor alternations in the condition of land, water and/or vegetation which do not result in significant loss of mature natural vegetation (e.g., unique habitat, mature scenic trees, riparian vegetation or marshland). This project will not cause significant adverse impacts on any sensitive environment and will not result in significant cumulative impacts. The Department of Fish and Game was contacted on April 24, 1995 and following a site visit they advised the Division on

May 4 that they had no objection because diversion under the temporary permit will not adversely affect instream beneficial uses this year. Therefore, under California Code of Regulations Title 14, Section 15304 the SWRCB finds that this project is exempt from CEQA. No formal Notice of Exemption will be issued in accordance with an April 28, 1987 directive from the Chief of the Division of Water Rights.

No Effect on SWRCB's Future Action

26.0 Action by the SWRCB on Application 30424 is still pending. No finding herein shall be construed as predetermining any issues relevant to that application.

Public Interest

27.0 Diversion and use of water by Ruth under Temporary Permit 20791 is in the public interest and in accordance with the constitutional policy that the water resources of the state be put to beneficial use to the fullest extent of which they are capable.

ORDER

NOW, THEREFORE, IT IS ORDERED that the issuance of Temporary Permit 20791 is validated subject to the conditions specified in the temporary permit.

CERTIFICATION

The undersigned, Administrative Assistant to the SWRCB, 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 June 22, 1995.

AYE: John Caffrey
 Mary Jane Forster
 James M. Stubchaer
 John W. Brown

NO: None

ABSENT: Marc Del Piero

ABSTAIN: None


Maureen Marché
Administrative Assistant to the State Board