

STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD

WR ORDER 2002-0010-DWR

**IN THE MATTER OF STATEMENT OF WATER DIVERSION AND USE S015151
PETITION FOR TEMPORARY CHANGE
INVOLVING THE TRANSFER OF UP TO 1,015 ACRE-FEET OF WATER
TO INSTREAM USE WITHIN THE NORTH FORK TULE RIVER
UNDER PRE-1914 APPROPRIATIVE WATER RIGHT CLAIM**

ORDER DENYING TEMPORARY CHANGE IN PLACE OF USE AND PURPOSE OF USE
BY THE CHIEF OF THE DIVISION OF WATER RIGHTS:

1.0 SUBSTANCE OF PETITION

On June 25, 2001,

Ms. Dagny Grant
c/o Dan Suyeyasu
5655 College Ave. Ste. 304
Oakland, CA 94618

filed a Petition for Temporary Change under Water Code sections 1725-1732 and 1707 with the State Water Resources Control Board (SWRCB). The petitioner requests that the SWRCB approve a temporary change of the place of use under a claimed pre-1914 appropriative water right to allow use of the water for the purpose of preserving recreational and fish and wildlife resources in an approximate two-mile stretch of the North Fork Tule River adjacent to Battle Mountain Ranch (Ranch). The temporary change would be effective for a period of one year following issuance of an order.

2.0 BACKGROUND

The petitioner requests a temporary change to a pre-1914 water right claim (Statement of Water Diversion and Use file No. S015151) under Water Code sections 1707 and 1725-1732, for the purpose of dedicating approximately 1,015 acre-feet of water to instream use. The proposed place of use under the proposed change is a portion of the North Fork Tule River that fronts on the Ranch, further described as being between the historic Dillon Ditch diversion headworks located within the NE $\frac{1}{4}$ of the NW $\frac{1}{4}$ of section 19, T19S, R30E, MDB&M, and the downstream boundary of the Ranch, located within the SW $\frac{1}{4}$ of the SW $\frac{1}{4}$ of section 25, T19S, R29E, MDB&M. In the absence of the proposed transfer, the water would likely remain in the stream, as records indicate that diversion and use of water has not occurred since approximately 1995 and petitioner currently lacks the diversion infrastructure to apply the claimed right to the Ranch.

2.1 Substance of Ms. Grant's claimed water rights On June 25, 2001, Ms. Grant filed Statement of Water Diversion and Use No. S015151. The statement indicates that 100 miners inches of water (2.0 cubic feet per second [cfs]), based on the Southern California standard for miner's inches), has been diverted from the North Fork Tule River to irrigate 90 acres of pastureland and to water stock on the Ranch since 1880. In addition to the pre-1914 claim, portions of the property appear to be riparian to North Fork Tule River, and there are springs located on the property that serve the Ranch.

2.2 Purpose of the Proposed Transfer Under the proposed change, 1.5 cfs, approximately 1,015 af of water, would remain in the stream for instream use rather than be diverted. The proposed place of use is that portion of the North Fork Tule River that fronts on the Ranch, further described as being between the historic Dillon Ditch diversion headworks located within the NE $\frac{1}{4}$ of the NW $\frac{1}{4}$ of section 19, T19S, R30E, MDB&M, and the downstream boundary of the Ranch, located within the NW $\frac{1}{4}$ of the SW $\frac{1}{4}$ of section 25, T19S, R29E, MDB&M.

3.0 AVAILABILITY OF WATER FOR TRANSFER

The Tule River Watershed, including all tributaries to the Tule River system that have hydraulic continuity during any part of the year, are identified in the SWRCB records as being fully appropriated. (See Order WR 98-08). In the Declaration of Fully Appropriated Stream Systems, the SWRCB finds that water is not available for the development of any new use of water, with the exception of valid riparian rights. Ms. Grant claims a pre-1914 appropriative water right in the amount of 2.0 cfs. The claimed water right is identified in Department of Water Resources Bulletin 94 –1 (1964), Land and Water Use in Tule River Hydrographic Unit Table 3, Descriptions of Surface Water Diversions In Tule River Hydrographic Unit. In addition, the topographic and parcel maps of the Springville area indicate that the Ranch, or portions thereof, are riparian to North Fork Tule River, as the Ranch contains approximately two miles of frontage along the river.

4.0 COMMENTS RECEIVED ON THE PROPOSED TRANSFER/EXCHANGE

The SWRCB issued a public notice of the proposed temporary change on January 18, 2002. The SWRCB received comments and objections from five parties: Larry Otter, Rita A. Portwood, James Drumm, Robert Donlan, and Douglas Philips. The comments and objections raised the issue of whether a valid basis of right still exists for the claimed pre-1914 appropriative water right of the Dillon Ditch. The commentors provided some evidence indicating that little or no use of the water occurred for the period, conceptually beginning about 1972 to the present time.

Petitioners Response:

The petitioner's response discussed the construction, size, and operation of the Dennison/Dillon Ditch following the consolidation of the ditch companies after flooding occurred in 1966. However, petitioner presented no evidence or record of actual usage for the 1972-1989 period. The flume that carried water from the Dennison Ditch was in disrepair by 1989 when Ms. Grant purchased the property. In 1991-1992 a new 4-inch line was installed, and water was periodically used on the Ranch until January 1995. From 1995 through 1999, water was not diverted pending resolution of the conflict between the Grants and the Dennison Ditch Company. Dennison Ditch installed a control at the diversion facility to limit its diversions, and Ms. Grant ceased to use, and claim the right to use, the facility altogether. The control returns any diverted water above Dennison Ditch Company's allotment back to the river. From 1999 to the present, water from the North Fork Tule River has not been diverted or used on the Ranch.

Petitioner contends that an appropriator does not lose a right under the forfeiture statute, if despite a long period of nonuse, application of the water to beneficial use recommences prior to the initiation of the forfeiture proceedings. (See June 6, 2002 letter from Dan Suyeyasu at 3 (citing Sax et al., Legal Control of Water Resources [2d ed. 1991].) The casebook quoted by petitioner to support this contention cites Idaho and Wyoming law. The casebook includes a discussion explaining how western states have different approaches to statutory forfeiture. (Sax et al., at p. 277.) In some states, forfeiture is automatic, where others provide a variety of defenses, some including recommencement prior to the initiation of forfeiture proceedings. California law does not include the recommencement of use defense in its statute or case law.

5.0 CRITERIA FOR APPROVING PROPOSED CHANGE:

In considering approval of a temporary change petition, the SWRCB must make the findings specified in Water Code section 1725:

The transfer would only involve the amount of water that would have been consumptively used or stored by the permittee or licensee in the absence of the proposed temporary change;

The transfer would not injure any legal user of the water; and

The transfer would not unreasonably affect fish, wildlife, or other instream beneficial uses.

5.1 The transfer would only involve the amount of water that would have been consumptively used or stored in the absence of the proposed temporary change: To paraphrase Water Code section 1725, a party may temporarily change the point of diversion, place of use or purpose of use due to a transfer or exchange of water or water rights if the transfer would only involve the amount of water that would have been consumptively used or stored by the party in the absence of the proposed temporary change. The record of information provided by all parties indicates that diversion of water by the Ranch did not occur last season, nor has it occurred since at least 1995. The evidence indicates that water will not be used consumptively this year due to lack of a means to divert the water. Therefore, the SWRCB cannot find that the proposed transfer would involve only the amount of water that would have been consumptively used or stored in the absence of the proposed temporary change.

5.2 The transfer would not injure any legal user of the water: Although an action has not been taken by parties in the watershed to define the nature and extent of the Grant's claimed pre-1914 right, it appears that the claimed pre-1914 appropriative water right may have been lost in accordance with Water Code sections 1240 or 1241. If the claimed pre-1914 right has been forfeited, any reactivation of use could act to the detriment of legal users in light of the fact that the Tule River Watershed is fully appropriated. Since the validity of the pre-1914 right is in question, the SWRCB cannot conclude the proposed transfer would not injure any legal users of water.

Since the property or portions thereof would appear to be riparian, proper riparian diversions may begin at any time to the extent that they are reasonable and take only their correlative share of the available flow. This petition did not request a transfer of riparian water, however, petitioner is free to petition the SWRCB to transfer a riparian right for the purposes of preserving or enhancing instream flow under Water Code section 1707.

5.3 The transfer would not unreasonably affect fish, wildlife, or other instream beneficial uses: Instream beneficial uses are discussed in Section 6.0

6.0 ENVIRONMENTAL CONSIDERATIONS

In accordance with Water Code section 1729, temporary changes involving transfer of water are exempt from the requirements of the California Environmental Quality Act (CEQA) (Pub. Resources Code § 21000 et seq.). However, the SWRCB must consider potential impacts on fish, wildlife and other instream beneficial uses in accordance with Water Code section 1727(b)(2).

The water available for the transfer is currently flowing in the North Fork Tule River, and would remain in the river. Therefore there would not be any effect on any natural streamflow or hydrologic regime.

7.0 SWRCB'S DELEGATION OF AUTHORITY

On May 16, 2002, the SWRCB adopted Resolution 2002-0106 section 2.6.17, delegating to the Chief of the Division of Water Rights the authority to act on petitions for temporary changes, except where the SWRCB conducts a hearing to accept additional evidence.

8.0 CONCLUSIONS

The SWRCB has adequate information in its files to make the evaluation required by Water Code section 1725, et. seq. and therefore I find as follows:

In accordance with Water Code section 1725, the proposed transfer does not involve only water that would have been consumptively used or stored in the absence of the temporary change.

In accordance with Water Code section 1727(b)(1), the proposed transfer may cause injury to legal users of the water.

In accordance with Water Code section 1727(b)(2), the proposed transfer would not unreasonably affect fish, wildlife, or other instream beneficial uses.

ORDER

NOW, THEREFORE, IT IS ORDERED that the petition filed for a temporary change in the place of use under Statement of Water Diversion and Use No. S015151 is not approved.

ORIGINAL SIGNED BY

Harry M. Schueller
Chief Deputy Director

Dated: September 20, 2002