



**Comments of Orange Cove Irrigation District
on**

**Proposed Adoption of Curtailment of Diversions due to Insufficient Flow for
Specific Fisheries Emergency Regulations (“the Proposed Regulations”)**

I. Summary

Orange Cove Irrigation District (“OCID” or “the District”) recognizes the emergency conditions related to California’s on-going drought. Moreover, OCID shares the objectives of the State Water Resources Control Board (“SWRCB” or “the Board”), the National Marine Fisheries Service (“NMFS”) and the California Department of Fish and Wildlife (“CDFW”) to assure minimum flow in Mill Creek for migration of endangered salmonids during abnormally dry conditions expected through the fall spawning season. As a result, OCID proposes to dedicate all of the water arising under its pre-1914 water rights on Mill Creek during the remainder of 2014 to (i) non-consumptive instream beneficial use to support fish and habitat in lower Mill Creek pursuant to Water Code §1243 and (ii) a subsequent consumptive beneficial use on wildlife easements managed by the United States Fish and Wildlife Service (“USFWS”) by changing the point of diversion to an existing, screened diversion downstream of the confluence of Mill Creek with the Sacramento River.

Notwithstanding the District’s consistent intent to voluntarily dedicate water arising under its Mill Creek water right to support fish, wildlife and habitat during the drought, OCID strongly objects to the Proposed Regulations because they are ill-conceived, poorly drafted, inadequately supported and beyond the Board’s legal authority.

II. Identification of OCID

Orange Cove Irrigation District is a California Water District formed in 1937 for the purpose of importing surface water for use within its boundaries. The District has contracts with the Friant Unit of the federal Central Valley Project (“CVP”) for delivery of approximately 39,200 acre-feet of water per year from the San Joaquin River. Comprised of approximately 28,000 acres, OCID is located in Fresno and Tulare counties, approximately 30 miles southeast of Fresno.

However, these comments are filed by the District in respect of its pre-1914 water rights on Mill Creek and are confined to the effect of the Proposed Regulations on Mill Creek. The District’s water rights on Mill Creek would be significantly, negatively, unnecessarily and illegally impacted if the Board were to adopt the Proposed Regulations as recommended by its staff. We urge the Board to properly exercise its authority to curtail uses found to be unreasonable under drought circumstances rather than resort to the expedient but extra-legal Proposed Regulations.

III. Intent to Cooperate to Protect Fish

In 2000, the District purchased pre-1914, fully-adjudicated, water rights on Mill Creek that have been put to consistent beneficial use, primarily for agricultural irrigation, for more than a century. These water rights have been confirmed in a decree of the Superior Court of Tehama County, Decree #3811 entered on August 16, 1920 (“the Decree”). The rights currently owned by OCID entitle the District to divert and put to beneficial use 5.57% of the variable natural flow in Mill Creek up to 203 cubic feet per second (“cfs”).¹

The motivation for the District’s purchase of the Mill Creek water rights was to dedicate the water arising under those rights to support environmental restoration, including the Anadromous Fish Restoration Program (“AFRP”).² Pursuant to that objective, the District proposed to forbear diversion of the water arising under its Mill Creek water right so as to augment the instream flow for the benefit of endangered salmonids.³ Notwithstanding the District’s intent, USBR ultimately decided not to proceed with the forbearance project; therefore, the District has determined to put the water to alternative beneficial uses as authorized under the Decree and Water Code §1706.

From 2005 through April of 2013, the water arising under OCID’s water rights on Mill Creek was licensed to Los Molinos Mutual Water Company (“Los Molinos MWC”) which put the water to beneficial use within its service territory in Tehama County. In light of the dry conditions prevailing in the spring of 2013, however, the District revoked the license according to its terms and directed Los Molinos MWC—in its capacity as watermaster under the Decree—to suspend diversion of the water arising under OCID’s proportional right so that the water would remain in Mill Creek. OCID’s intent was that the un-diverted water would serve a non-consumptive beneficial use under Water Code §1243. The watermaster declined to carry out the District’s direction to suspend diversion pending further direction from the Court. The District and the watermaster have, therefore, sought judicial interpretation of the Decree, and the matter is set for hearing this coming Thursday, May 22.⁴

In a May 9, 2014 letter, NMFS and CDFW asked the District to meet with the agencies to explore a voluntary program to maintain minimum flows in Mill Creek to benefit endangered salmonids. As indicated by the District’s written response to that request (dated May 12, the day before the publication of the Proposed Regulations), OCID intends to work with the fish

¹ When the natural flow in Mill Creek is at or above 203 cfs, OCID’s water rights produce approximately 11 cfs. Based on analysis of data produced by the stream flow gage maintained by the United States Geological Survey on Mill Creek in the vicinity of the current point of diversion, the average yield for the District’s Mill Creek water right was 6,723 acre-feet/year during the 80-year period from 1929 through 2009. The minimum annual yield was recorded in 1977 at 4,419 acre-feet; the maximum annual yield was recorded in 1983 at 8,526 acre-feet.

² Pursuant to provisions of the Central Valley Project Improvement Act, OCID pays restoration charges to the CVP project operator in support of, among other environmental remediation, the AFRP.

³ See the draft Environmental Assessment entitled “Temporary Forbearance of a Water Right Entitlement Held by the Orange Cove Irrigation District on Mill Creek, Tehama County, California” prepared by the United States Bureau of Reclamation (“USBR”) and USFWS in September, 2002.

⁴ See *Orange Cove Irrigation District v. Los Molinos Mutual Water Company*, Case No. 3811, now pending before the Superior Court in Tehama County.

agencies to evaluate how the District's Mill Creek water rights might be used to protect the Mill Creek salmonids.

Thus, through its course of action with respect to its Mill Creek water rights, the District has consistently evidenced its support for the recovery of the endangered salmonids in Mill Creek. In fact, the District anticipates that, through voluntary cooperation with the fish agencies, it may propose a "local cooperative solution" to help "preserve drought emergency minimum flows," as contemplated in §878.2 of the Proposed Regulations.

IV. Objections to Proposed Emergency Regulation

Notwithstanding OCID's proactive and consistent support for the objective of protecting the Mill Creek fishery and notwithstanding OCID's demonstrated willingness to dedicate all of the water arising under its Mill Creek water right to augmenting stream flow during the remainder of 2014, the District strongly objects to the Proposed Orders for the following reasons:

A. The Proposed Regulations Are Not Supported by the Required Balancing of Competing Beneficial Uses

The District concurs with the Board's finding that there is a drought emergency and recognizes the Board's statutory authority to adopt emergency regulations under Water Code §1058.5. However, while OCID clearly shares the Board's objective to protect "public trust needs for minimum flows for migration" of endangered salmonids in Mill Creek, the Proposed Regulations do not even attempt to balance competing uses as required by California law. While purporting to apply the reasonable use doctrine embedded in article X, section 2 of the California Constitution, the Proposed Regulations ignore the Board's responsibility to investigate and make findings related to competing uses in the affected Mill Creek watershed. Therefore, the Board has not balanced such uses as required in order to make a factual determination of waste or unreasonable use.

"What is a reasonable use or method of use of water is a question of fact to be determined according to the circumstances in each particular case." *Joslin v. Marin Mun. Water Dist.* (1967) 67 Cal. 2d 132, 139 [60 Cal. Rptr.377, 429 P.2d 889]. Cited with approval in *State Water Resources Control Board Cases, (Robie)* (2006) 136 Cal. App. 4th 674 at 762, [39 Cal. Rptr. 3d 189 at 259].

As the Board itself recites in the "Finding of Emergency" accompanying the Proposed Regulations,

What constitutes an unreasonable use, method of use, or method of diversion depends on the facts and circumstances of each case. (*People ex rel. State Water Resources Control Board v. Forni* (1976) 54 Cal. App. 3d 743,750.)...In this particular case, application of the reasonable use and public trust doctrines

requires particularized consideration of the benefits of diverting water for current uses from [Mill Creek] and the potential for harm to the protected species from such diversions under the current drought conditions.

Further, in providing emergency regulatory authority, the legislature did not excuse the Board from following existing law. In fact, in describing the “Enhanced State Water Resources Control Board Drought Response Authority,” in SB 104,⁵ the Assembly Floor Analysis notes:

Any curtailment regulations would follow *established California water right laws* concerning priority....The bill includes prudent changes to the Water Code designed to enhance SWRCB's ability to respond to drought. A key aspect of drought response is ensuring the *existing water rights laws* are followed....The legislation *builds on existing authority* of the SWRCB to adopt emergency drought regulations to promote conservation and prevent waste and unreasonable use of water during times of drought.⁶

Notwithstanding these clear recognitions that exercising its authority to regulate waste or unreasonable use—even during a drought—depends on facts and circumstances as well as on “ensuring that existing water rights laws are followed”, the Proposed Regulations nonetheless avoid any inquiry into competing uses of water on Mill Creek which would support the Board’s balancing of such uses. Without making the factual inquiry and without balancing competing uses, adoption of the Proposed Regulations would constitute an abuse of the Board’s discretion because the Proposed Regulations fail to comply with the legally required balancing of competing uses.

The Board clearly has the authority and the responsibility to evaluate competing uses on Mill Creek under the circumstances of the current drought emergency. Upon factual inquiry, the Board could balance the competing uses and, if the facts warrant, make a determination to curtail certain uses and protect others. In fact, the District believes that the Board might reasonably determine, based on weighing of the facts, that specific uses of water on Mill Creek are unreasonable during the current drought in light of the need to protect minimum flows to promote salmonid migration (the precise effect of the Proposed Regulations). However, in order to reach a defensible conclusion, the Board must weigh the facts, as the law requires. Without observing the legal process for balancing competing uses, adoption of the Proposed Regulations would constitute an abuse of the Board’s discretion.

⁵ SB 104 was approved by the Governor on March 1, 2014.

⁶ SB 104 Assembly Floor Analysis, February 26, 2014, retrieved at http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB104&search_keywords=. Emphasis added.

B. The Proposed Regulations Would Create an Illegal Reprioritization of Water Uses

Instead of conducting the required balancing of competing uses to support a finding of waste or unreasonable use under the prevailing circumstances on Mill Creek, the Proposed Regulations purport to authorize curtailment of water rights, including pre-1914 water rights that are beyond the Board's ordinary jurisdiction, by creating an illegal and novel hierarchy of water rights.

Without balancing competing uses, the Proposed Regulations expediently and unnecessarily issue an unauthorized "trump card" to public trust uses proposed by NMFS. In doing so, the Proposed Regulations would exceed the Board's authority and violate statutes as well as settled legal precedent. Moreover, while placing that "trump card" in the hands of the Deputy Director, the Proposed Regulations do not provide necessary direction on when, how and against what water rights the card may be played, except that, "curtailment orders shall be issued in order of priority." While OCID strongly supports the objective of maintaining minimum flows in Mill Creek to assist in fish migration, it strongly objects to the Proposed Regulations' illegal reordering of water rights priorities by categorically advancing one particular use over all others.

In fact, the Proposed Regulations unnecessarily create an artificial hierarchy among water rights, irrelevantly placing health and safety diversions (of which there are none on Mill Creek) at the top of the list.⁷ The Proposed Regulations place public trust needs for minimum flows to support salmonid migration in second position (actually the highest priority, in light of the fact that the illusory demand for health and safety constitutes a null set on Mill Creek). Finally, the Proposed Regulations place all other uses in *de facto* third priority according to their order of priority. Creation and enforcement of such absolute priorities among uses is clearly in violation of statutory and common law; therefore, adoption of the Proposed Regulations impacting established water rights on Mill Creek would constitute an abuse of the Board's adjudicatory authority and a violation of elemental principles of fairness and due process.

Such arbitrary re-prioritization of established water rights is particularly unfortunate because the objective of the Proposed Regulations—assuring minimum flows in Mill Creek necessary to support salmonid migration—could be served by a proper balancing of uses and a factually supported determination that certain, specific competing uses are unreasonable under current circumstances.

⁷ Because there are no significant domestic uses on Mill Creek, there is no foreseeable harm that will be caused by awarding categorical priority to health and safety. Nonetheless, OCID notes in passing that the Proposed Regulations misapprehend and therefore misapply Water Code §106.3.

C. The Proposed Regulations Improperly Interfere with Water Rights Priorities Established through Adjudication

The Board has authority under Water Code §100 and §275 to enforce constitutional prohibitions on waste and unreasonable use, regardless of the source or provenance of a water right. However, the Proposed Regulations ignore the specific adjudicatory framework for allocating shortages on Mill Creek that are embedded in the Decree. Even under the current emergency circumstances, it is unnecessary, unwise and illegal to interfere with a valid adjudication of water rights that are beyond the Board’s ordinary jurisdiction, as the Proposed Regulations would do.

As our supreme court made clear in the *Mojave* case,⁸ it is both improvident and illegal to ignore settled water rights in order to achieve even a laudable objective in the administration of water right priorities. That is no less the case on Mill Creek where the Decree confirmed a durable regime for allocating shortage among pre-1914 water rights holders. In fact, under that regime, OCID as well as The Nature Conservancy have acquired water rights specifically to allocate water arising under such rights to augment flows to support the critical Mill Creek fishery. By relegating all uses of water under rights confirmed in the Decree (as well as other water rights on Mill Creek) to the same “third priority” (behind the non-existent health and safety priority and the “trump card” priority of minimum flows for health and safety), the Board undermines the adjudicatory process and unnecessarily destabilizes settled water rights.

Although curtailment orders under the Proposed Regulations “shall be issued in order of priority” under proposed §877 (b), all uses under the Decree have the same priority. Therefore, the Proposed Regulations “throw a blanket” over all uses under the Decree and make no distinction among those uses, some of which may be unreasonable while others are reasonable, even under drought circumstances. If the Board must exercise its authority to curtail unreasonable uses, it must proceed with fact-based distinctions among competing uses to balance their relative merits. Instead, the Proposed Regulations set aside priorities in order to elevate one use (instream flow) above all others while relying only on priority to curtail other uses without respect to the reasonableness of such uses. In doing so, the Proposed Regulations not only interfere with the Decree but fail to properly exercise the Board’s responsibility to make fact-based determination of what, under the drought circumstances, constitutes unreasonable use of water.

D. The Proposed Regulations Fail to Make Provision for Downstream Re- diversion and Use and, Therefore, Threaten to Deprive Water Rights Holders of Property Rights without Due Process

The Proposed Regulations require curtailment of water use on Mill Creek to support, as necessary, minimum instream flows to support salmonid migration. Even if such curtailments

⁸ *City of Barstow v. Mojave Water Agency*, (2000) 23 Cal.4th 1224.

were properly authorized through a fact-based determination of the merits of competing uses, the Proposed Regulations fail to protect other compatible uses of the water.

It is well settled that the right to put water to beneficial use is a property right, subject to appropriate regulation.⁹ OCID, as well as others with valid rights to the beneficial use of water in Mill Creek could, under appropriate exercise of the Board's authority to curtail unreasonable use, be required to leave such water in Mill Creek to support anadromous fish passage. However, the Proposed Regulations not only require such water to be used for the non-consumptive use in aid of fish migration in Mill Creek, but they also fail to protect the residual property right to put such water to compatible use.

As noted above, OCID intends to dedicate water arising under its Mill Creek water right to meet two compatible uses during the remainder of 2014. First, OCID proposes to change the water right to accomplish the non-consumptive use of promoting fish passage and maintaining riverine habitat, a beneficial use specifically recognized by Water Code §1243. Such use is inherently non-consumptive (except for potentially measurable evaporative and/or transit losses) and is accomplished simply by forbearance of the right to divert the water from Mill Creek and leaving it in the stream.

However, once the instream benefit is accomplished, the water is not lost to the system nor should it be escheated to downstream appropriators. Such an outcome (essentially a forfeiture of the water right) would deprive OCID of a portion of its pre-1914 property right, namely the right to change the point of diversion, purpose of use and place of use.¹⁰ Depriving OCID of the right to change the point of diversion, place of use and purpose of use—in a manner that accomplishes the Proposed Regulations' emergency requirement to protect the instream benefit of aiding Mill Creek fish passage during the drought—would amount to an unconstitutional taking of OCID's property right.

To avoid the unconstitutional taking of OCID's residual property right, the Proposed Regulations must be amended, at least, to acknowledge and protect the District's right to put the water to beneficial consumptive use, after it has served the non-consumptive instream use of aiding Mill Creek migration of endangered salmonids.

⁹ See *United States v State Water Resources Control Bd.* (Racanelli) (1986) 182 Cal.App. 82, 101 [227 Cal. Rptr. 161].

¹⁰ The right to change such attributes of the District's water rights is explicitly recognized in the Decree itself as follows:

Each of said parties [the water right holders] is and will be at all times entitled to use or dispose of the share allotted to such party of the water of said river in any manner, at any place, or for any purpose which such party may desire, or in accordance with whatever agreement or arrangement such party may make with any other person or corporation.

Decree, Section VII.

The right to change the point of diversion, place of use and purpose of use of a pre-1914 right is also protected by Water Code §1706, subject to the requirement that such changes must not injure another legal water right.

E. The Proposed Regulations Subvert Less Intrusive Alternatives for Accomplishing the Same Environmental Objectives

California Government Code §11346.1(b)(2) requires a written statement “demonstrating, by substantial evidence, the need for the proposed regulation to effectuate the statute being implemented, interpreted, or made specific and to address only the demonstrated emergency.” Furthermore, “A finding of emergency based only upon expediency, convenience, best interest, general public need, or speculation, shall not be adequate to demonstrate the existence of an emergency.”

Although OCID acknowledges the existence of the emergency requiring protection of minimum flows in Mill Creek during the current drought, the Proposed Regulations may not be implemented in a way that uses the emergency merely as a pretext to limit OCID’s Mill Creek water right more severely than is required to accomplish the emergency purpose. Put another way, the Board may not apply its emergency authority to accomplish other policy objectives.

As noted above, the Proposed Regulations fail to demonstrate the balancing of uses required to legitimize the finding that certain uses are unreasonable under specific emergency circumstances and fail to protect other inherent aspects of pre-1914 water rights, namely the right to make conforming changes in the point of diversion, place of use and purpose of use, so long as such changes do not cause injury to another legal use of water. If applied to OCID, without discrimination based on the specific facts, the Proposed Regulations will deprive the District of attributes of its property right that are beyond the scope of the Board’s legitimate objective.

F. The Proposed Regulations Are Poorly Drafted, Incomplete, Confusing and Impossible to Enforce

The Proposed Regulations include obvious errors and omissions associated with having been developed in too-great-haste. The Board will best serve the interest of the State by substantially revising the Proposed Regulations before considering their adoption.

The District appreciates the opportunity to comment on the Proposed Regulations and anticipates thoughtful consideration by the Board.