

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

DIVISION OF WATER RIGHTS

DIVISION DECISION 2010-0001

In the Matter of Application 31115 of

Daniel and Celeste Encell

SOURCE: Salinas River

COUNTY: San Luis Obispo

DECISION DENYING APPLICATION

BY THE DEPUTY DIRECTOR FOR WATER RIGHTS:

1.0 INTRODUCTION

This decision of the State Water Resources Control Board (State Water Board), Division of Water Rights (Division) denies Application 31115, which seeks an appropriative right to store 47 acre-feet per annum (afa) in an existing reservoir for recreational purposes. The proposed diversion season is January 1 through May 14 of each year.

Daniel and Celeste Encell (Applicants) filed Application 31115 on May 18, 2000. The project consists of an existing dam, known as Pierce Dam, forming Crescent Lake. The lake is located on the Salinas River approximately seven miles downstream of Santa Margarita Lake. Pierce Dam is over sixty years old, approximately 15 feet high, and constructed of mortared rock on a granite dam base. The lake is approximately 150 feet wide and 2,000 feet long. The Applicant estimates that the present capacity of the lake is 10 acre-feet due to siltation which has reduced the depth of water behind the dam to about 18 inches, except for an area along the outside bend of the river that has an estimated depth of three feet. There is a silt island behind the dam, which further limits storage. There is no plunge pool below the dam. There are two gate valves in the dam, but only one of the gate valves is in working condition.

The project site is located approximately three miles east of the community of Santa Margarita in San Luis Obispo County. The Salinas River, which is tributary to the Pacific Ocean, flows through the project site. The project site is located on a 640-acre undeveloped parcel surrounded by hillsides with low to steep slopes and consisting primarily of chaparral, oak woodland, and grassland habitat with riparian habitat along the watercourse.

2.0 FIELD INVESTIGATION ISSUES

A field investigation took place on October 1, 2008, pursuant to a September 8, 2008 notice of field investigation. The unresolved protest issues are:

- Impact on public trust resources including steelhead trout (*Oncorhynchus mykiss*) of the South/Central California Coast Evolutionarily Significant Unit and California red-legged frog (*Rana aurora draytonii*), which are both listed as “threatened” under the Endangered Species Act (ESA).
- The dam has no outlet pipe to release water during low flows to keep any fish existing below the dam in good condition as required by Section 5937 of the Fish and Game Code.
- The dam is a barrier to fish passage. Suitable spawning and rearing habitat for steelhead exists within the river channel upstream from the existing dam.
- Cumulative diversions from on-stream reservoirs may reduce fish habitat values in the Salinas River system.

3.0 PARTIES

The parties to the field investigation were the applicants, protestants and Division staff. The Division dismissed the protests filed by the City of San Luis Obispo and the City of Paso Robles on October 23, 2001 and August 2, 2002, respectively. Protest dismissal was conditioned on inclusion of terms in any permit issued pursuant to Application 31115 recognizing the prior rights of the cities and non-interference with the existing bypass flow condition. (See

October 23, 2001 Division letter to City of San Luis Obispo and August 2, 2002 Division letter to City of Paso Robles.) The remaining protestants are the California Sportfishing Protection Alliance (CSPA), Canyon and Stream Alliance (CASA), National Marine Fisheries Service (NMFS), and Department of Fish and Game (DFG).

The following parties participated in the field investigation: Katherine Mrowka and Lauren Dailey (Division of Water Rights), Dan Encell (Applicant), Brian Erlandsen (DFG), and Phil Ashley (CASA).

NMFS and CSPA did not attend the field investigation.

4.0 AVAILABILITY OF UNAPPROPRIATED WATER

When considering whether to approve an application to appropriate water, the State Water Board must determine whether unappropriated water is available to supply the project described in an application. (Wat. Code, § 1375, subd. (d).) The Salinas River is fully appropriated from May 15 through December 31. (See WR-Order 98-08, Declaration of Fully Appropriated Streams.) The Applicant has not documented the availability of unappropriated water to serve Application 31115. (Wat. Code, §§ 1260 subd. (k); 1375 subd. (d).)

5.0 CALIFORNIA ENVIRONMENTAL QUALITY ACT

In general, CEQA applies to discretionary projects that public agencies approve or propose to carry out. (Pub. Resources Code § 21080 subd.(a).) The Applicant's project is a discretionary project as defined in CEQA. (Pub. Resources Code § 21065.) Therefore, the Applicant must comply with CEQA before the Division can approve Application 31115.

On August 27, 2004, the County of San Luis Obispo issued a final Mitigated Negative Declaration (MND) and Notice of Determination (NOD) (SCH# 2004081164) for removal of 5,000 cubic yards of sand and gravel from behind the Applicant's dam. The project would result in the disturbance of approximately 45,000 square feet on a 640-acre parcel. The MND concluded that because the material would be removed from directly behind a dam, the potential for impacts to river hydrology were less than significant. However, the potential for erosion and sedimentation of the stockpiled material was considered significant because the

material would be unconsolidated and located in a flood hazard area. Mitigation measures were adopted to address this concern.¹

5.1 Status of Reservoir Dredging Project

The Applicant has not yet dredged the reservoir. Prior to reservoir dredging, the Applicant should consult with DFG and the Central Coast Regional Water Quality Control Board (Central Coast Water Board) to ensure that the dredging project does not adversely affect a fishery or result in unregulated sediment discharge to a waterway. The Applicant must obtain any necessary permits, including (1) a Streambed Alteration Agreement from DFG, (2) Clean Water Act section 401 Certification from the Central Coast Water Board, and (3) a Clean Water Act section 404 Permit from the United States Army Corps of Engineers.

6.0 EFFECT ON PUBLIC TRUST RESOURCES

6.1 Department of Fish and Game Protest

Fish Passage

During the field investigation, DFG indicated that the dam is a barrier to passage of steelhead. DFG offered the Applicant the following alternatives to resolve its protest regarding fish passage. The Applicant could: 1) install a fish ladder; 2) install a head-gate; or 3) remove the dam.

- 1) Fish ladder: DFG has not evaluated the technical feasibility of installing a fish ladder. DFG is concerned that if spawning occurs above the dam, it would be difficult for juveniles to out-migrate through Crescent Lake as the lake is uniformly shallow, slow moving, and contains predators.
- 2) Head-gate: A head-gate is a rectangular cut in the dam with flashboards used to control water flow. DFG suggested that a head-gate could be installed and opened prior to the start of steelhead migration to drain the lake and allow fish passage

¹ The CEQA document only addressed silt removal/dredging and did not discuss other impacts that might result from operation of the reservoir.

during the migration season. The flashboards would be installed in early June after the migration season, allowing the lake to fill for recreational purposes. This method of operation conflicts with the January 1-May 15 diversion season identified in Application 31115 and also conflicts with WR Order 89-08 that declares the Salinas River fully appropriated from May 15 to December 31. Consequently, this option will not be considered.

- 3) Dam removal: The dam removal option addresses the fish passage issue. Removal of the dam would require a phased approach, including removal of the silt behind the dam prior to demolition.

California Red-legged Frog

DFG indicated that California Red-legged Frogs (CRLF) require seasonal ponds that dry up after the larval stage to prevent the presence of bullfrogs which are a predator of CRLF. DFG indicated that Crescent Lake is poor habitat for CRLF because it is an on-stream reservoir with perennial flow. The Applicant confirmed that bullfrogs are present in the reservoir.

6.2 CASA Protest

Fish Passage:

During the field investigation, CASA indicated that the dam is a barrier to fish passage. To address fish passage issues, increased predation on an endangered species, and to restore Salinas River continuity, CASA recommends dam removal and installation of four stepped pools. CASA noted that there is an existing dam located about four miles upstream of the Applicant's dam, but the upper dam is not a fish barrier unless flows drop below 0.5 cubic feet per second. Therefore, removal of the dam will improve access to upstream steelhead habitat with minor limitation from the upstream dam.

6.3 Applicant's Comments

The Applicant did not object to altering the dam to allow fish passage, but indicated that he lacked funding to modify the dam.

7.0 COMMENTS FILED AFTER FIELD INVESTIGATION

Parties were afforded 30 days after the Field Investigation to submit comments, with a 30-day period for response to comments.

7.1 DFG Comments

DFG's December 12, 2008 letter stated that the project may result in direct and cumulative adverse impacts to public trust resources both above and below Pierce Dam because: 1) the dam impedes fish passage to potential spawning habitat upstream; and 2) the dam restricts sediment transport downstream. In order to maintain fish habitat and a healthy riparian zone, DFG staff believes it is necessary to restore the Salinas River's continuity. DFG reiterated two of the prior options: installation of a head-gate or installation of a fish ladder. DFG modified the head-gate proposal to require that the head-gate or a partial head-gate be left open throughout the steelhead migration season (September 15-April 1). This would allow for collection to storage from April 1 to May 14 each year. Sediment transport studies would be necessary, along with management plans to address sediment loading downstream and the chemical constituents of the sediment.

The second option is installation of a fish ladder. However, out-migrating juveniles would pass through the shallow, slow-moving lake where they would be exposed to predators, increased water temperatures, and low oxygen levels. During the investigation, DFG indicated that it prefers dam removal.

7.2 Applicant Comments

The Applicant advised DFG on December 24, 2008 that an 18- to 24-inch pipe exists with a gate valve that can be opened to drain the lake. The Applicant proposed using the existing pipe to drain the lake and also provide a conduit for fish passage during the migration season.

7.3 CASA Comments

On January 28, 2009, CASA responded by letter, stating that installation of a head-gate or fish ladder will not adequately restore Salinas River continuity. Out-migrating juvenile steelhead would continue to be exposed to heavy predation as they pass through Crescent Lake. Also, the suggestion to install a partial head-gate with fish ladder would only restore a portion of the 2,000 feet-long lake to alternating riverine pools and riffles, which are essential to steelhead survival and recovery. If a head-gate is installed, CASA maintains that the diversion season should not start until May 1 because April is a substantial rain and stream flow month on the California Central Coast and DFG and NMFS have previously designated April stream flows as important to steelhead. CASA prefers dam removal to the other options.

8.0 DISCUSSION:

8.1. Public Trust Concerns

The primary public trust concern associated with Application 31115 is the protection of steelhead in this critical habitat area. The mainstem of the Salinas River is considered a Class 1 stream and serves as a migratory corridor when sufficient runoff provides a connection to the Pacific Ocean (Order WR 2000-13, p. 27). Adult steelhead enter the Salinas River and its tributaries primarily during the months of January through May. (See Order WR 2000-13, p. 27.) Suitable steelhead spawning and rearing habitat has been identified along the mainstem of the Salinas River between the Salinas Dam and Highway 58, but certain factors significantly reduce the probability of steelhead successfully spawning (Order WR 2000-13, pp. 28-30.). Nevertheless, CSPA testified that juvenile and adult steelhead have been found in the river about three miles below the Salinas Dam, which is upstream of the Application 31115 dam. (See Order WR 2000-13, p. 29.)

The Salinas River has been designated under the ESA as critical habitat for steelhead trout (*Oncorhynchus mykiss*). On February 16, 2000, NMFS designated the watershed below the Salinas Dam that has anadromous access as critical habitat² for steelhead under the federal ESA. (65 Fed. Reg. 7764 (Feb. 16, 2000).)

² Critical habitat is defined as the specific areas within the geographic area occupied by the species on which are found those physical or biological features that are essential to the conservation of the species and that may require special management considerations or protection. (16 U.S.C. § 1532(5)(A)(i).)

The June 21, 2007 NMFS Final Biological Opinion (BO) for the Salinas Valley Water Project states that the Upper Salinas River has a low abundance of steelhead, with a negative population growth trend. (BO, p. 25.) The population in the Salinas River does not currently meet the definition of viable. (BO, p. 25.) Several of the potentially viable sub-populations, including the Upper Salinas, are among the lowest ranking sub-populations under current conditions. (BO, p. 28.) The top stressors for this fish population are: 1) summer base flow, 2) flow-related passage, 3) water temperature, and (4) barriers. (BO, p. 29.) The top threats to the population are groundwater and surface diversions and dams. (BO, p. 31.) Groundwater pumping, surface and underflow water diversions, and dams associated with agricultural and urban developments all potentially contribute to reductions in surface flows which can limit upstream migration of adult steelhead and downstream migration of smolts, depending on the time of year. Steelhead use of upper Salinas River tributaries is dependent upon the presence of a migration corridor in the mainstem Salinas River. (BO, p. 44.)

The Upper Salinas River steelhead population is listed as one of the populations at highest risk of extirpation. (BO, p. 36.) NMFS reached this conclusion based on the extinction risk profiles and on their degree of isolation. Steelhead sub-populations of the Salinas River basin play a significant role in the survival of the Distinct Population Segment (DPS). (BO, p. 36.) Without the Salinas River basin population, only smaller coastal populations and the Pajaro River basin populations would remain. (BO, p. 37.) Based on watershed size, location, ecological context, and overall status of the South-Central California Coast (SCCC) steelhead, a viable population in the Salinas River has the potential to lessen fragmentation in the distribution of SCCC steelhead, contribute to the genetic diversity of the species, and ameliorate the overall extinction risk of the DPS. (BO, p. 38.) NMFS concluded that this DPS continues to decline toward extinction. (BO, p. 39.)

Factors that may affect steelhead migration and spawning include warm summer water temperatures, the presence of man-made dams with heights up to 15 feet that form significant passage barriers for fish, as well as the presence of predators (bass and bullfrogs) in the lakes created by the dams (Order WR 2000-13, p. 28).³ When considering fish passage, height is one factor to consider when assessing whether a structure may be a barrier to steelhead. If

³ The Applicant has confirmed that bullfrogs are present in the reservoir.

other factors such as suitable plunge pools and flows exist, steelhead are capable of surmounting barriers 14 to 15 feet high (Order WR 2000-13, p. 30). During the field investigation, Division staff observed that there is no plunge pool downstream of the Applicant's dam.

CASA and DFG representatives stated that Pierce Dam is a physical impediment to fish passage. The Applicant did not provide any information to the contrary.

8.2 Public Trust Impacts are Unresolved

The existing facility is operated in a manner that is injurious to public trust resources due to adverse impacts to fish passage, spawning, and rearing. The Applicant asserts that this could be remedied by operating the existing outlet valve to reduce storage in the reservoir and potentially allow for fish passage. Although the Applicant indicated that the valve works, no information was provided as to when the valve was last used. Moreover, access to the valve is contingent on instream flows being low enough to enter the streambed below the dam and operate the gate valve. The Applicant did not provide any information documenting whether this is feasible or safe to do during fish passage season.

The Applicant has not previously operated the facility by opening the valve in the winter. The dam is full of sediment, and opening the valve may result in sluicing of sediment into the stream channel. Moreover, it is unknown whether fish can enter the reservoir through the valve because the Applicant did not establish whether the Salinas River downstream of the valve has sufficient depth to inundate the area near the valve and allow fish access to this area. It is also unknown whether the exit velocity of water through the valve is too great for fish passage and whether sediment upstream of the valve precludes fish passage.

Operation of the existing facility continues to expose out-migrating juveniles to inadequate conditions in Crescent Lake due to shallow, slow moving water where predation may occur. Although the protestants provided options for modifying the dam via installation of a fish ladder or a head-gate, a CEQA evaluation has not been done for those options.

The public trust concerns regarding operation of the reservoir project are unresolved, and the Applicant has not documented the availability of unappropriated water. The Applicant has not

provided any supportive documentation that the existing facility does not impact steelhead and public trust resources. The NMFS Biological Opinion documents that the steelhead population is declining toward extinction, and NMFS states that the presence of dams is one of the factors in the population decline. The Applicant did not propose any alternatives supported by evidence that would prevent or limit the impacts on steelhead and would restore river continuity.

Due to typically year-round low flow conditions in the Salinas River in the 14-mile long Salinas River Canyon resulting from low flow releases from Salinas Dam, even well designed fish ladders/structures may not work adequately for steelhead migration and recovery. (CASA, June 8, 2001 letter.)

8.3 Beneficial Purpose

The final issue for evaluation is whether the reservoir serves a useful, beneficial purpose. The reservoir is located on private property, with no public access. The Applicant suggests that the existing facility could be used for recreational purposes, but did not identify an existing recreational use. The Applicant provided a 2001 property sales advertisement featuring the lake. In the undated sales photograph, the lake does not show evidence of the silt island, tules, and other features that are now present and may reduce recreational use. The Applicant stated that in 11 years, the reservoir depth had changed from 4 feet to 18 inches. Although San Luis Obispo County prepared an MND for removal of 5,000 cubic yards of sand and gravel behind the dam in 2004, the Applicant had not removed the silt prior to the October 1, 2008 field investigation, and the Applicant has not indicated that he intends to pursue a silt removal project. At present, the reservoir is too shallow for swimming, and boating would be marginal, since the reservoir is so shallow. Also, there is no information to document that the fishing experience is better in the reservoir than in the natural stream course. Therefore, at most, the evidence shows that the reservoir has only a marginal beneficial purpose.

ORDER

IT IS HEREBY ORDERED THAT Application 31115 is denied.

IT IS FURTHER ORDERED THAT Applicant shall submit a plan, with time schedule, for dam removal and river restoration to the Deputy Director for Water Rights within 120 days of issuance of this order for Division review, modification and approval. Prior to dam removal, Applicant should consult with the Department of Fish and Game and the Central Coast Water Board to ensure that removal of project facilities does not adversely affect a fishery or result in unregulated sediment discharge to a waterway. The Applicant should also consult with the Department of Water Resources, Division of Safety of Dams if a jurisdictional size dam will be removed or breached (dam height 25 feet or more, or reservoir volume 50 acre-feet or more). These agencies may require a permit or other approval prior to any construction activity.

Failure to timely submit the plan and comply with the provisions of the plan may result in administrative civil liability pursuant to Water Code section 1052 without further notice. In addition, pursuant to Water Code section 1831, the State Water Board may issue a cease and desist order in response to an unauthorized diversion or threatened unauthorized diversion.

STATE WATER RESOURCES CONTROL BOARD

ORIGINAL SIGNED BY:

Barbara Evoy
Deputy Director for Water Rights

Dated: OCT 28 2010