

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

DIVISION OF WATER RIGHTS

In the Matter of Application 31491

G. SCOTT FAHEY

ORDER CANCELING PROTEST AND DISMISSING PROTESTS

SOURCE: Two Unnamed Springs tributary to Unnamed Streams thence Hull Creek

COUNTY: Tuolumne

WHEREAS:

1. G. Scott Fahey (Applicant) filed water right Application 31491 with the State Water Resources Control Board (State Water Board), Division of Water Rights (Division) on January 28, 2004 to divert water from two unnamed springs tributary to unnamed streams thence Hull Creek.
2. The Division publicly noticed Application 31491 on October 1, 2004. The protest filed by the City and County of San Francisco (San Francisco) was previously resolved through permit conditions related to prior water rights. The protests filed by Stanislaus National Forest, Modesto Irrigation District and Turlock Irrigation District (Districts), and Central Sierra Environmental Resource Center (Central Sierra) are addressed in this order.
3. The protest filed by Stanislaus National Forest was addressed through the Mitigated Negative Declaration (MND) and a permit condition requiring the Applicant to obtain all necessary federal permits. In an April 21, 2011 letter, Stanislaus National Forest stated that it does not oppose conditional issuance of a water right. Accordingly, the protest is dismissed.
4. The Districts' protest was based on potential injury to prior rights. The Districts' protest was addressed through inclusion of permit conditions originally developed for the San Francisco protest. The permit language specifically addresses the measures that are required to be taken to prevent interference with the Districts' water right(s). The Districts' letter of March 18, 2011 states that inclusion of the permit conditions developed for the San Francisco protest is sufficient to resolve the protest. Inasmuch as the permit conditions are included in Permit 21289 on Application 31491, the protest is dismissed.
5. The Central Sierra protest was based on: (a) violation of management direction for the Clavey River watershed (Clavey Critical Aquatic Refuge); (b) potential to diminish quality of riparian habitat; (c) potential to increase water temperature in a manner that reduces habitat suitability for amphibians and other species; and (d) cumulative impacts of this project and Applicant's diversion of other springs under Permit 20847 (Application 30104).

6. The Division circulated a MND (SCH # 2011022066) for this project. Central Sierra commented on the MND. On May 17, 2011, the Division provided protestants and those who commented on the MND with a draft response to comments and a draft permit. The Division advised these persons that the Division intended to evaluate the information in the environmental document and water availability analysis (WAA) to determine whether it can resolve the protests. (Wat. Code § 1335.)
7. On May 30, 2011, Central Sierra responded to the Division's May 17, 2011 draft documents. Central Sierra indicated that its protest could be resolved if: (a) the bypass flow is set at 10 gallons per minute (gpm) for each spring, rather than the proposed 5 gpm, and (b) the Division assumes that a 40 gpm diversion will result in a 240 percent increase in water tanker truck traffic and an increase to 100 trucks weekly, and an equal increase in greenhouse gas emissions, or the permit allows no increase over current tanker truck operations. Issue (a) is addressed below. Issue (b) is addressed in the MND.
8. Central Sierra's May 30, 2011 letter includes comments that fall into three categories. The first category is further responses to the MND. The Division's response to comment letter on the MND is being issued on the same date as this Order.

A second category relates to conditions in the draft permit. To resolve its protest, Central Sierra suggests that the bypass flow be 10 gpm for each spring, instead of the 5 gpm identified in the MND and draft permit. Central Sierra states that a higher bypass flow should better protect resources. The proposed permit requires monitoring of the areal extent of riparian habitat along set transects, and requires reduced diversion (i.e., increased bypass flows) should monitoring show a measureable diminution in riparian habitat.

A third category includes new issues. Central Sierra asserts that the Division should not have accepted onsite water measurement data for the project because the measurement was conducted by the Applicant. The Applicant is a registered engineer in the state of Idaho. As a registered engineer, the Applicant is subject to sanction by the Idaho Board of Registration for Professional Engineers and Professional Land Surveyors if he acts in a manner not allowed under his license. The Applicant made onsite measurements over an extended time period to provide accurate onsite data and correlations to other sources of information. The data was used by Dr. Grunwald, an independent consultant, to prepare a WAA for the project. Dr. Grunwald's analysis supports a finding that water is available for appropriation.

Central Sierra objects to use of the Cherry Lake Dam gage and discontinuous Clavey River stream gage data to evaluate watershed flows, and asserts that the available data does not accurately portray onsite conditions. The analysis in question relies on a method that is used to estimate streamflow in areas where stream gage data is not available at or near the vicinity of the project. This method is generally recognized as a reasonable approximation based on the available information.

Another new issue is potential injury to downstream water rights. The Applicant agreed to provide replacement water to San Francisco and the Districts from a non-hydrologically connected source whenever there is potential interference with prior rights. The comment letter questions the Districts' water right(s) and whether the replacement water should be deemed as having been obtained from a separate source. Inasmuch as San Francisco's and the Districts' prior rights protests have been addressed with inclusion of permit conditions, no further action will be taken on this issue.

9. The MND and responses to comments on the MND identify mitigation measures to: (a) reduce any impacts to riparian habitat to a less than significant level, (b) describes the consultations and biological surveys conducted to collect the data needed to address Riparian Conservation Objectives of the Clavey Critical Aquatic Refuge, and (c) address the potential for temperature increase downstream of the springs. The protest also asserts cumulative riparian habitat impacts of diversion under Application 31491 and Permit 20847. The MND mitigation measures require monitoring and corrective action to ensure no net loss of riparian habitat downstream of the Application 31491 springs. Accordingly, there will be no cumulative impact.
10. There is no substantial evidence in light of the whole record to support the protest allegations. Therefore, the protest is canceled. (Wat. Code § 1335.)

NOW, THEREFORE, IT IS ORDERED THAT THE CENTRAL SIERRA PROTEST FILED ON APPLICATION 31491 IS CANCELED.

STATE WATER RESOURCES CONTROL BOARD



FOR *Barbara Evoy, Deputy Director
Division of Water Rights*

Dated: **AUG 01 2011**

