

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Applications 360,
5640, 11023 and 16469 Held by
Fresno Irrigation District, Trustee

DECISION DENYING PETITION FOR RECONSIDERATION AND
ORDER AMENDING ORDER IN DECISION D 1290

I

Petition of Fresno Irrigation District, Trustee,
for Reconsideration of Decision D 1290

On November 30, 1967, the State Water Rights Board adopted Decision D 1290. This decision, insofar as it relates to Fresno Irrigation District, Trustee (herein called "Trustee District"), approved its Applications 353, 360, 5640, 11023, 11075, 15231 and 16469, approved in part Application 10979, and denied Application 10750. On December 1, 1967, the State Water Resources Control Board succeeded to the duties of the State Water Rights Board, and the latter board was abolished, pursuant to Chapter 284, Statutes of 1967. On December 29, 1967, the Trustee District filed a petition for reconsideration of Decision D 1290 "with respect to the imposition of condition 8 on Applications 360, 5640 and 11023." Condition 8 provides for the delivery of water into a highflow channel of the Kings River, about nine miles in length, in order to replenish the ground water for the benefit of overlying owners.

The petition does not question the Board's analysis of the evidence or its findings, which include the following:

1. "The evidence shows that there is an area of about nine miles of river channel that has been directly and adversely affected with respect to the recharge of ground water by the construction and operation of Pine Flat Dam and reservoir." (p. 22)

2. "... the losses [by percolation] in the Kings River Channel ... are estimated at ... 56 cubic feet per second" (p. 24)

"This testimony as to percolating and channel losses was not seriously questioned on cross-examination, nor was it controverted by other expert testimony." (p. 25)

3. "The modified entitlement method [used in Condition 8] ... affords a reasonable basis for looking at the daily recorded and calculated Piedra flows during each month of the year, and calculating on an approximate basis what specific high-flow days in the absence of Pine Flat Reservoir would have resulted in flows and percolation of water in the Kings River high-flow channel." (p. 28)

The petition for reconsideration is limited to the ground that the Board lacked jurisdiction to include Condition 8 as a permit condition. Its argument falls under two main headings:

A. Pre-1914 Appropriative Rights

The petition states that to a large extent Condition 8 of the decision relates to and affects the exercise of pre-1914 appropriative rights of the Trustee District and its trust beneficiaries. However, the Board's actions are confined to the framework of the Trustee District's own applications, and to the Board's duty to protect vested rights. (See Meridian, Ltd. v. City and County of San Francisco, 13 Cal 2d 424.)

Inclusion of Condition 8 does not hurt whatever pre-1914 rights the Trustee District or its beneficiaries own; it merely prevents them from acquiring a windfall equivalent to the amount of the high-flow channel losses which occurred naturally prior to the construction of Pine Flat Dam, but which no longer take place as a result of the construction and operation of Pine Flat Dam and Reservoir.

It is true, as is pointed out by the petition, that relief is requested for the high-flow channel area of the Kings River as well as for other areas, in the action before the Superior Court in Kings County entitled Kings County Water District v. Laguna Irrigation District, et al. A demurrer is now pending with respect to this action. To avoid any possible conflict with this or any other action, including possible proceedings before the United States Court of Claims, Condition 8 concludes as follows:

"This condition will be modified or canceled to conform to the requirements of the judgment of any court of competent jurisdiction."

We do not believe that the pendency of the Kings County action suspends the Board's duty to protect vested rights, although the Board will conform Condition 8 to the requirements of any judgment, as is expressly indicated.

B. Effect of Turner Case (Max E. Turner, et al. v. Kings River Conservation District, et al., 360 F 2d 184)

It is the position of petitioner that Condition 8 is prohibited by the Circuit Court's decision in the Turner case. We do not understand that to be the holding or effect of the Turner decision.

The Turner case was an action by owners of riparian and overlying lands against officials operating Pine Flat Dam and Reservoir, built by the United States on the Kings River pursuant to the Flood Control Act of 1944, and against the Kings River Conservation District and its members, in which an injunction was sought. The Court of Appeals held, among other things, that United States officials in the operation of Pine Flat Dam and Reservoir were authorized to interfere with riparian and overlying owners' rights, and that the owners' remedy against the United States was not an action in the U. S. District Court for an injunction but a suit in the Court of Claims for damages. Since the action related directly to the operation of the dam and reservoir, the United States was found to be an indispensable party, but the United States had authorized no such suit to be brought against it in the federal district court.

Condition 8 does not have any direct effect upon the operation of Pine Flat Dam and Reservoir by the United States. The applications being heard by the Board were those of the Trustee District, not of the United States. Condition 8 relates to a high-flow channel which is about 34 miles downstream from Pine Flat Dam, in the midst of an area where river diversions are controlled by the watermaster for the Kings River Conservation District.

There is only an indirect connection between Condition 8 and operation of Pine Flat Dam and Reservoir. By contract between the United States and the Kings River Conservation District, the project is operated to store and release water as requested by the district, but without interfering with mandatory flood storage operations. Compliance with Condition 8 would probably require the Trustee District to order the releases of certain quantities of water by the United States for delivery into the high-flow channel no later than the end of July of each year when required. This is water which the Trustee District, in the absence of Condition 8, would have ordered for release and delivery to members of the Kings River Conservation District, who are also beneficiaries of the trust. It is not water which the United States has any interest in after it leaves the reservoir. The deliveries into the high-flow channel would be expected to average somewhat more than one-tenth of one percent of the average flow of the Kings River at Piedra. This amount

of water is small in comparison with the total operation of the Kings River Conservation District, and with the additional quantities of unappropriated water which are approved for appropriation by these applications.

Insofar as the Turner case involved proceedings against the Kings River Conservation District, its members and officials, the decision left open the possibility of future state action, in court or administrative proceedings, as appropriate. In this connection the Court stated at page 199:

"We are satisfied that there was no basis for federal jurisdiction of appellants' second cause of action which did not require the presence of the United States: diversity of citizenship was lacking; and the interests of the United States were inextricably involved in all of appellants' claims arising under federal statutes."

For the foregoing reasons this petition for reconsideration will be denied.

II

Petition by California Department of Fish and Game for Order Amending Order in Decision D 1290

By a petition dated December 22, 1967, the California Department of Fish and Game (Department) requested an amendment of the order in Decision D 1290.

The Department points out that not only does it have an agreement with the Trustee District regarding releases of water to be made below Pine Flat Dam for the protection

and enhancement of fish and wildlife, but that dismissal of the Department's protest was contingent upon inclusion of the agreement by reference or otherwise as a permit condition.

The Department also points out that it had requested that any permit issued on Application 16469 expressly require the same releases of water below Courtright Reservoir as are required by order of the Federal Power Commission, issued September 3, 1958 (Fish and Game Exh. 4); and the Trustee District so stipulated on April 6, 1967 (RT 427, 428).

These permit conditions requested by the Department were omitted by clerical error and oversight, and the order in Decision D 1290 will be corrected to include them, pursuant to Water Code Section 1359.

ORDER

IT IS HEREBY ORDERED that the petition for reconsideration of Decision D 1290, filed by Fresno Irrigation District, Trustee, be, and it is, denied.

IT IS FURTHER ORDERED that the order in Decision D 1290, starting on page 44 and concluding on page 50, which approves, among other applications, Applications 5640, 11023 and 16469, be amended by adding after Condition 10 the following:

11. The permits issued pursuant to Applications 5640 and 11023 will each contain the following additional condition:

Unless otherwise agreed by permittee and California Department of Fish and Game, permittee shall store and release water under this permit only in accordance with the provisions of the agreement dated September 11, 1964, by permittee and said Department, for the preservation and enhancement of fish and wildlife.

12. The permit issued pursuant to Application 16469 will contain the following additional condition:

Permittee shall maintain, in the stream downstream from Courtright Dam, water flows for the preservation of fish and aquatic life, in the quantities and for periods hereinafter specified:

<u>June 1 through November 30</u>	<u>December 1 through May 31</u>	<u>Dry Years</u>
4 cfs	2 cfs	2 cfs

A dry year shall be defined as one in which the unimpaired seasonal runoff of Kings River at Piedra, as estimated on May 1 by the State of California, Department of Water Resources, will be 1,000,000 acre-feet or less. The point of measurement of the above flows shall be just downstream from the point where the flow through the discharge tunnel returns to the stream.

Adopted as the decision and order of the State Water Resources Control Board at a meeting duly called and held at Sacramento, California.

Dated: JAN 18 1968

/s/ George B. Maul
George B. Maul, Chairman

/s/ W. A. Alexander
W. A. Alexander, Vice Chairman

/s/ Ralph J. McGill
Ralph J. McGill, Member

Board Members Norman B. Hume and E. F. Dibble, not having participated in hearings on these applications or in Decision D 1290, disqualified themselves from participating in this decision and order.