

12-18-69

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Application 18785 and
18786 of Sonoma County Flood Control and
Water Conservation District and Mendocino
County Russian River Flood Control and
Water Conservation Improvement District
to Appropriate from South Fork Eel River
in Lake and Mendocino Counties, and
Request for Release from Priority of
Applications 17039 through 17044 in
Favor of Applications 18785 and 18786

ORDER AMENDING DECISION 1345

The Department of Fish and Game appeared at the hearing of Applications 18785 and 18786 and requested the board to reserve jurisdiction over any permits issued on the applications to impose terms and conditions for the protection of the fishery resources of the Eel River. The department stated that until certain studies have been completed, it will not be able to recommend specific permit terms for that purpose.

In Decision 1345, which approved Application 18785 and disapproved Application 18786, the department's request was denied on the ground that permit terms for protection of the fishery would be ineffectual because of the prior rights of Pacific Gas and Electric Company

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to divert all of the Eel River water sought by these applications without any obligation to protect fish. However, reconsideration was ordered in response to a petition by the department which pointed out that the Federal Power Commission will decide shortly whether the federal power license of the Pacific Gas and Electric Company should be recaptured or relicensed. The department contends that the commission might well impose conditions requiring releases of water for protection of fish, in which case the board would have an opportunity to exercise its jurisdiction with respect to the permit to be issued in this proceeding.

The board is convinced that the department's position in this respect is correct and that jurisdiction should be reserved so that if the opportunity should occur, and if further study should demonstrate that mandatory releases of water for protection of fish in the Eel River would be in the public interest, the board would be able to impose appropriate permit terms. In considering the need for water to protect fish in the Eel River, the board would also consider the need for water in the Russian River for both fish and recreation, and what effect releases of water to the Eel River would have on the supply for those purposes.

In opposition to the department's petition, applicants cite the Natural Soda Products Company case* as authority for the principle that users within the Russian River watershed are entitled to a continuation of the historic diversion of water from the Eel River and, therefore, the board should not require any of that water to be left in the

* Natural Soda Products Company v. City of Los Angeles, 23 Cal.2d 193

Eel River. The department does not agree that the Natural Soda Products case is applicable to the Eel-Russian situation. This is a judicial question which the board has no authority to determine. If a court were to decide that the Russian River users have a right to receive Eel River water, a permit from the board would be unnecessary. The applications were filed and a permit will be issued on the assumption that the diversion might otherwise be discontinued and that the water is unappropriated, except to the extent the prior rights of Pacific Gas and Electric Company continue to be exercised. The fact that the project has been in operation for a number of years is not material. The board's authority to condition the permit in the public interest is the same as it would be if the water had not been previously diverted.

IT IS ORDERED that Decision 1345 be, and it is hereby, amended as follows:

(1) Revise Paragraph 9, commencing on page 5, to read:

9. Protestant Department of Fish and Game has requested the board to reserve jurisdiction over any permit issued pursuant to Application 18785 or Application 18786, for the purpose of imposing terms and conditions for the protection of the fishery resource involved, after a study is made by the Department. The board finds that such a reservation of jurisdiction would be in the public interest and therefore the request of the department will be granted.

(2) Add Paragraph 9, on page 10, to read:

9. The State Water Resources Control Board reserves jurisdiction over this permit for the purpose of imposing terms and conditions for the protection of fish in the Eel River. Jurisdiction will be exercised only after notice to interested persons and a hearing.

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

Dated: December 18, 1969

KERRY W. MULLIGAN
Kerry W. Mulligan, Chairman

W. A. ALEXANDER
W. A. Alexander, Vice Chairman

NORMAN B. HUME
Norman B. Hume, Member

E. F. DIBBLE
E. F. Dibble, Member

RONALD B. ROBIE
Ronald B. Robie, Member

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ORDER RESCINDING DECISION 1345

On September 18, 1969, the board adopted Decision 1345 approving in part Application 18785 of Sonoma County Flood Control and Water Conservation District and Mendocino County Russian River Flood Control and Water Conservation Improvement District (hereinafter referred to as "district"), denying Application 18786, and releasing the priority of Applications 17039 through 17044 in favor of Application 18785.

The California Department of Fish and Game (hereinafter referred to as the "department"), a protestant to Applications 18785 and 18786, filed a petition for reconsideration of Decision 1345 with the board on October 17, 1969. The petition was based on the board's denial of a request by the department to reserve jurisdiction pursuant to Water Code Section 1394 over any permit issued on Application 18785 for the purpose of imposing terms and

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conditions for the protection of the fishery resource involved, following a study to be made by the department.

In denying the request for reservation of jurisdiction, the board pointed out that as any future fish protection terms which might result from future studies could not be made binding on diversion of water for power purposes by the Pacific Gas & Electric Company under its water right License 1424 and other vested rights. they would be ineffectual. The department

It is true that if the power license is recaptured by the United States and the power facilities abandoned, the district would be able to control the diversion of water from the Eel to the Russian River under any permit issued under Decision 1345 on Applications 18785 and 18786 without regard to fish life in the Eel River. Accordingly, on November 6, 1969, the board ordered that Decision 1345 be reconsidered.

Applications 18785 and 18786 cover water presently stored in Lake Pillsbury on South Fork Eel River and diverted directly from the river at Capehorn Dam by the Pacific Gas and Electric Company through the company's Potter Valley Power Plant into the Russian River. The direct diversion has been in operation since the year 1907 and the storage of water since 1922. Except for a relatively small amount of water which the company delivers to the Potter Valley Irrigation District, the water, after its release from the power plant, is impounded by the applicants' Coyote Valley Dam and is then rediverted into the applicants' systems, exported outside the Russian River Basin to areas served by the Sonoma District, used by many diverters along

the Russian River or for upstream flows in the river as provided for in Decision D 1030 for recreation and maintenance of fish life. The applicants do not intend to make any change in this historic diversion of water from the Eel River into the Russian River Basin, but are seeking permits from the board as a means of perpetuating this diversion, should the company discontinue the project.

The board is persuaded by the department's contention that proceedings by the Federal Power Commission may alter the company's project sufficiently to warrant further consideration of the matter of fish requirements. Should the department's study demonstrate that mandatory releases of water for fish protection in the Eel River would be in the public interest, the board should be able to impose appropriate permit terms.

In opposition to the department's petition, applicants cite the Natural Soda Products Company case* as authority for the principle that users within the Russian River watershed are entitled to a continuation of the historic diversion of water from the Eel River, and therefore, the board should not require any of that water to be left in the Eel River. The department does not agree that the Natural Soda Products case is applicable to the Eel-Russian situation. The board concurs with the department's view. The applications were filed and are considered by the board on the assumption that the diversion might otherwise be discontinued and that the water is unappropriated except to the extent that prior rights of Pacific Gas and Electric Company continue to be exercised. The fact that the project has been in operation for a number of years is not material. The board's

*Natural Soda Products Company v. City of Los Angeles, 23 Cal. 2d 193

authority to condition permits in the public interest is the same as it would be if the water had not been previously diverted.

The company's power license (FPC Project No. 77) will expire April 15, 1972. Upon the expiration of the license, the United States will have the right to take over the entire project subject to certain financial requirements. The company has submitted a report to the FPC to show that the public interest would best be served by the issuance of a new license to the company and that a federal takeover would not be in the public interest. The U. S. Bureau of Reclamation has recommended to the FPC that consideration be delayed for five years pending further study by the Bureau of the proposed English Ridge Reservoir, which, if constructed, would inundate a portion of the company's project. In any event, a final decision as to whether the company will be able to continue with its hydroelectric project is several years away. Should the project be relicensed, the need for permits under Applications 18785 and 18786 would appear to be unnecessary. On the other hand, should the project be abandoned by the company, the board should be able to determine, in the public interest, what water, if any, should be provided in the Eel River for the maintenance of fish.

In view of the several issues involved, including a lack of need for permits by the district for some time in the future, it is the decision of this board that Decision 1345 should be rescinded in its entirety and that the applications should revert to their former status, to be reconsidered at a later date. In the meantime, the department will be expected to proceed with its study with reasonable dispatch, as it is the board's intention that hearings be held and the fish release issue resolved, insofar as these

applications are concerned, before the matter of relicensing is considered by the Federal Power Commission, in order that the commission, in its deliberations, may have the benefit of the board's viewpoint as to what is the public interest regarding the beneficial uses of water.

The department's study, in considering the need for mandatory releases of water for protection of fish in the Eel River, should also show how the attendant reduction of transbasin flow into the Russian River Basin will affect the beneficial uses made through the diversions from the Russian River and through the instream flows provided for in board Decision D 1030 for recreation and maintenance of fish life.

IT IS ORDERED that Decision 1345 be, and it is, hereby rescinded.

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

Dated: January 8, 1970

KERRY W. MULLIGAN
Kerry W. Mulligan, Chairman

W. A. ALEXANDER
W. A. Alexander, Vice Chairman

NORMAN B. HUME
Norman B. Hume, Member

E. F. DIBBLE
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