

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Applications 23343,)
23344, and 23345 of Honcut Creek) Order: WR 78-1
Ranch, Yosuba Farms, and Sam Zall,) Source: South Honcut Creek
respectively, to appropriate from) County: Yuba
South Honcut Creek in Yuba County.)

ORDER MODIFYING DECISION 1476
UPON PETITION FOR RECONSIDERATION

BY THE BOARD:

On December 16, 1977, applicants Honcut Creek Ranch, Yosuba Farms and Sam Zall, timely filed a petition for reconsideration of Board Decision 1476, adopted November 17, 1977. Decision 1476 approved subject applications in part and ordered issuance of permits upon appropriate terms and conditions.

1. Since applicants' diversion includes a dam, and since the Board did not require inclusion of a specific provision for protection of fish, one of the terms and conditions ordered to be included in the permits was the term mandated by Section 762.5, Title 23, California Administrative Code, which provides as follows:

"Passage of Water for Fish. In compliance with Section 5937 of the Fish and Game Code, all permits for diversion of water from a stream by means of a dam which do not contain a more specific provision for the protection of fish shall require the permittee to allow sufficient water at all times to pass through a fishway,

or in the absence of a fishway, allow sufficient water to pass over, around, or through the dam to keep in good condition any fish that may be planted or exist below the dam; provided that during a period of low flow in the stream, upon approval of the Department of Fish and Game, this requirement will be satisfied if sufficient water is passed through a culvert, waste gate, or over or around the dam to keep in good condition any fish that may be planted or exist below the dam if it is impracticable or detrimental to pass the water through a fishway. In the case of a reservoir, this provision shall not require the passage or release of water at a greater rate than the unimpaired natural inflow into the reservoir."

2. Applicants, by their petition for reconsideration, have drawn our attention to the fact that they have supplemented their supply of water from South Honcut Creek with purchased imported water, some of which comes down to them through South Honcut Creek which, to that extent, is being used as a conveyance facility. Such a practice is expressly authorized by Water Code Section 7075. Applicants intend to continue purchasing imported water, to be delivered as described above.

3. Applicants correctly point out that the permit term mandated by Section 762.5 of Title 23 is intended to implement Fish and Game Code Section 5937. Applicants then content that:

"Section 5937 of the Fish and Game Code was not intended and should not be construed to require petitioners to release [sic] imported water from their dam since petitioners pay for such water and, in the absence of their purchases, South Honcut Creek would be dry during much of the purchase season." (Petition, page 3.)

4. We agree with applicants' contention. If the dam at issue here were part of a storage diversion, the mandated

permit term would have included language implementing the final sentence of Section 762.5, which provides:

"In the case of a reservoir, this provision shall not require the passage or release of water at a greater rate than the unimpaired natural inflow into the reservoir." (Emphasis added.)

This sentence, which is not part of Fish and Game Code Section 5937, was intended to interpret the scope of an applicant's duty under Section 5937 to bypass water by limiting that duty to the rate of unimpaired natural inflow, insofar as the Board's permitting authority is concerned.

5. In the instant matter, applicants' dam is not part of a storage diversion; the dam facilitates direct diversion both of South Honcut Creek water and the purchased imported water described above.

6. We conclude that the considerations which led to the Board's adoption of the final sentence of Section 762.5 concerning reservoirs are equally applicable to dams facilitating a direct diversion, that is, that the bypass duty should be limited to the natural unimpaired flows coming down to the dam. The permit term at issue here should be modified accordingly.

7. However, applicants' petition contains language suggesting a further interpretation of Fish and Game Code Section 5937 which goes beyond exclusion of purchased imported water from the scope of applicants' duty to bypass. Applicants state:

"The language of paragraph 10, however, which purports to require passage of sufficient water 'at all times' to keep in good condition fish that may exist below the dam might be interpreted to require release of imported water when the natural flow of South Honcut Creek would be insufficient to protect the fish and at the same time satisfy the reasonable requirements of those with riparian or appropriative rights." (Petition, pages 3-4; emphasis added.)

Applicants further submit that it would be unreasonable for the Board to require that:

"...where a bed of an intermittent stream is used for transport of imported water to a diversion by means of a dam, water must be released for fish protection even though all the natural flow of the stream is subject to riparian or appropriative rights." (Statement of Points and Authorities, page 2; emphasis added.)

Finally, applicants suggest modification of paragraph 10 of the Order of Decision 1476 by adding the following proviso:

"provided, that nothing in this permit shall be deemed to require permittees to release water for fish protection outside of the diversion season permitted hereby or at any time that the natural flow of South Honcut Creek is less than that required to satisfy the appropriative or riparian rights of permittees." (Petition, page 4.)

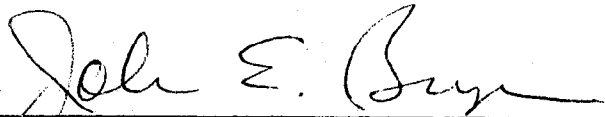
8. As we have noted above, we agree with applicants' contention that Fish and Game Code Section 5937 is not intended to include purchased imported water within the scope of the bypass duty. We do not, however, agree with applicant's interpretation of Section 5937, insofar as such interpretation is implied in applicants' petition, that one who diverts directly by means of a dam is entitled under all circumstances to full satisfaction of all beneficial uses, under claim of riparian or appropriative right, from the natural flow in the source before the duty to bypass water for fish arises.

9. Accordingly, applicants' proposed revision of paragraph 10 is not accepted. Modification of paragraph 10 shall be limited to implementing the policy implicit in the final sentence of Section 762.5.

IT IS ORDERED that paragraph 10 of the Order of Decision 1476 be modified to read:

"10. In compliance with Section 5937 of the Fish and Game Code, the permittee shall allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around, or through the dam to keep in good condition any fish that may be planted or exist below the dam; provided that during a period of low flow in the stream, upon approval of the Department of Fish and Game, this requirement will be satisfied if sufficient water is passed through a culvert, waste gate, or over or around the dam to keep in good condition any fish than may be planted or exist below the dam if it is impracticable or detrimental to pass the water through a fishway. This provision shall not require the passage or release of water at a greater rate than the flow in the stream at the diversion, less any flow attributable to use of the stream as a conduit, pursuant to Water Code Section 7075."

Dated: JAN 5 1978



John E. Bryson, Chairman



W. Don Maughan, Vice Chairman



W. W. Adams, Member

