

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition for)
Assignment of Application 14858 and)
Applications 27319; 27320, and 27321)
of the)
U. S. BUREAU OF RECLAMATION,)
Petitioner and Applicant,)
OAKDALE IRRIGATION DISTRICT,)
SOUTH SAN JOAQUIN IRRIGATION DISTRICT,)
and LAWRENCE FAMILY TRUST,)
Protestants.)

ORDER: WR 88- 6

SOURCE: Stanislaus River

COUNTIES: Tuolumne, Calaveras,
Stanislaus and
San Joaquin

88-6

ORDER DENYING PETITION FOR RECONSIDERATION
AND AMENDING DECISION 1616

BY THE BOARD:

1.0 INTRODUCTION

The Board having issued Decision 1616 on January 21, 1988; a petition for reconsideration having been filed on February 17, 1988, by the California Sportfishing Protection Alliance and California Trout, Inc.; and the petition having been duly considered; the Board finds as follows:

2.0 GROUNDS FOR RECONSIDERATION

Section 768 of Title 23 of the California Code of Regulations provides that reconsideration of a Board decision or order may be requested for any of the following cases:

- a. A procedural irregularity which has prevented the petitioner from receiving a fair hearing;
- b. The decision is not supported by substantial evidence;
- c. There is relevant evidence available which, in the exercise of reasonable diligence, could not have been produced at the hearing;
or
- d. An error in law.

3.0 SUMMARY OF PETITION

The petition for reconsideration alleges that "Decision 1616 was incomplete, violative of state law and the Board's public trust responsibilities, and would not best conserve the public interest". (Petition, p. 7.) The factual allegations presented in support of this position are that there are steelhead trout and resident trout populations in the Stanislaus River below Goodwin Dam, that there is new evidence regarding these fishery resources which was unavailable at the time of the hearing, and that the Board failed to consider appropriate protections for the steelhead and resident trout populations in issuing Decision 1616. The petition contends that steelhead and trout are a public trust resource which the Board has a duty to consider when acting upon applications to appropriate water, that Fish and Game Code Section 5937 requires the owner of a dam to... let sufficient water pass to keep in good condition any fish below the dam, and that the Board has a statutory obligation under Water Code Section 275 to prevent waste, 'unreasonable use, and unreasonable

method of use of water. The petition also alleges that the supplemental environmental document is inadequate because it did not address the potential impacts on steelhead and resident trout.

The relief requested in the petition is as follows:

1. The Board should prepare an additional environmental document which evaluates the impact of the New Melones direct diversion on steelhead and resident trout.
2. The Board should order interim flow releases from Goodwin Dam to protect the steelhead and resident trout populations and habitat.
3. The Board should "order" the U. S. Bureau of Reclamation ("Bureau" or "permittee") and the Department of Fish and Game (DFG) to revise their agreement and study plan to include the steelhead trout and resident trout fisheries of the Stanislaus River as species to be studied.
4. Decision 1616 should be rescinded until a new environmental document has been completed unless it can be shown that an interim flow agreement will protect the steelhead and resident trout populations and habitat below Goodwin Dam.

4.0 ANALYSIS OF ISSUES RAISED BY PETITION

4.1 Procedural Requirements for Requesting Reconsideration

Section 768 of Title 23 of the California Code of Regulations provides that any person interested in any application, permit or license

affected by a Board decision or order may petition for reconsideration upon any of the four causes specified in Section 3.0 above. Petitions for reconsideration which are based in whole or in part upon newly available relevant evidence must include an "affidavit or declaration under penalty of perjury stating that additional evidence is available that was not presented to the board and the reason it was not presented." (Title 23 Calif. Code of Regs. Section 769(b).)

In this case, the petition is based primarily upon the availability of additional evidence not presented at the hearing, yet no affidavit or declaration was submitted explaining why the evidence was not presented at the hearing.* Based on Exhibit B to the petition, it appears that Jim Crenshaw, who serves as president of petitioner California Sportfishing Protection Alliance, was aware of the existence of steelhead in the affected reach of the Stanislaus River well in advance of the Board hearing on the water right applications involved. Similarly, the January 20, 1988 letter to the Board from John Murphy, Region IV, Governor of California Trout Inc., states that the resident trout population below Goodwin Dam predated the New Melones Reservoir. Mr. Murphy's letter also cites a 1966 Department of Fish and Game report as evidence of a historic steelhead run in the Stanislaus River.

* In addition to alleging that the Board should consider additional evidence regarding steelhead and resident trout, the petition alleges that Decision 1616 is contrary to applicable law, an allegation which in some instances would provide an independent basis for requesting reconsideration. In this instance, however, the alleged legal deficiencies of Decision 1616 all relate entirely to the additional evidence which petitioner proposes to submit. Therefore, the requirement that petitioner submit an affidavit or declaration under penalty of perjury regarding the additional evidence clearly applies.

Rather than appearing at the hearing to present evidence regarding the steelhead and trout populations and appropriate fishery protection measures, however, the petitioners chose to withhold comment from the Board until just prior to the adoption of the Board decision, well after the hearing record had closed. The Board recognizes that parties often rely upon the Department of Fish and Game to provide evidence on fishery needs. In cases such as this, however, where petitioners' own submittals document a dissatisfaction with the Department of Fish and Game course of action well before the water right hearing, it was incumbent upon the petitioners to present any available evidence which they wished the Board to consider at the time of the hearing.

Based upon the fact that, in the exercise of reasonable diligence, much of the evidence which petitioners cite in their petition could have been produced at the hearing, the Board concludes that the petition for reconsideration is deficient and that the specific relief requested in the petition should be denied. As discussed in Section 4.2 below, however, the Board believes that the Fish and Game Commission's recent recognition of the existence of a significant steelhead and resident trout population downstream of Goodwin Dam provides a sufficient basis for Board consideration of the instream flow requirements of these species of fish.

4.2 Consideration of the Instream Flow Requirements of Steelhead and Resident Trout

Based on the evidence presented at the hearing regarding the chinook salmon fishery and the need for further studies to define the instream

flow requirements for water quality objectives and fishery purposes, Decision 1616 directed that the Bureau of Reclamation conduct instream flow and fishery studies and provide interim instream flows as required in the June 1987 agreement between the Bureau and the Department of Fish and Game. Decision 1616 also reserved jurisdiction over the authorized water right permits "for the purpose of revising instream flow requirements for water quality objectives and fishery studies...". (Decision 1616, p. 33, Condition 15; p. 36, Condition 10.)

The focus of the studies specified in the June 1987 agreement is on chinook salmon. No evidence was presented at the hearing regarding the instream flow requirements of steelhead and resident trout nor were any studies requested to define what those instream flow requirements should be. Nevertheless, the scope of the Board's reserved jurisdiction is sufficiently broad to establish appropriate protective measures for all types of fishery resources, including steelhead and resident trout. In addition, the California Supreme Court's ruling in National Audubon Society v. Superior Court (1983) 33 Cal.3d 419, 189 Cal.Rptr. 346 establishes that the Board has "an affirmative duty to take the public trust into account in the planning and allocation of water resources and to protect public trust uses whenever feasible." (33 Cal.3d at 446.) Even after the Board has approved an appropriation of water, the public trust imposes a duty of continuing supervision over the taking and use of water. In carrying

out this duty, the Board has the authority to reconsider past allocation decisions. (33 Cal.3d at 447.)

In this instance, the Board reviewed the evidence in the record regarding fishery uses of the Stanislaus River and, based on the recommendation of the Department of Fish and Game, required the Bureau of Reclamation to conduct the previously described studies of chinook salmon instream flow requirements. Lacking evidence of other significant fishery resources, the Board made no specific provisions for protection of steelhead trout or resident trout. Attached as Exhibit A to the petition for reconsideration, however, is a document entitled "State of California, Fish and Game Commission, Statement of Purpose for Regulatory Action". This document was prepared pursuant to the requirements applicable to the enactment of administrative regulations. The document reports that the Department of Fish and Game has determined that the reach of the Stanislaus River between Goodwin Dam and Riverbank "supports good numbers of rainbow trout, as well as an anadromous run of steelhead rainbow trout". The document recommends that specified regulations be amended "as a means of maintaining the existing trophy aspects of the fishery while at the same time allowing for increased use."

This Fish and Game Commission document is dated November 16, 1987, nearly five months after the date of the Board hearing on the affected water right applications. Pursuant to Section 761(d) of Title 23 of the California Code of Regulations, the Board takes official notice of this document to establish that the California Fish and Game

Commission has recognized the presence of a significant steelhead and resident trout fishery in the reach of the Stanislaus River affected by the New Melones Project. There is insufficient evidence in the record or offered by the petitioner to determine if the use of water diverted pursuant to the New Melones water right permits should be regulated to provide specific protection for these fishery resources. The fact that the Fish and Game Commission has instituted rulemaking proceedings to protect steelhead and resident trout in the designated area, however, is sufficient evidence to warrant closer investigation of the effects of the direct diversion of water pursuant to Bureau of Reclamation permits on the steelhead and resident trout populations of the Stanislaus River downstream of Goodwin Dam.

Therefore, the Board concludes that a condition should be added to the permits issued on Applications 14858 and 27319 to require the Bureau of Reclamation to conduct a study or studies on the steelhead and resident trout fishery in the Stanislaus River downstream of Goodwin Dam. The study should address the instream flow requirements of the fishery and the effects of the New Melones Project operations on the fishery. The study should be conducted in consultation with the California Department of Fish and Game and the results should be submitted to the Board at the time of or prior to the submission of the results of the previously planned chinook salmon study.

The question of the propriety of changes or additions to the terms and conditions of the water right permits to protect steelhead and resident trout can be considered under the Board's existing reservation

of jurisdiction following submission of the fishery study results. If the petitioners or any other interested parties believe that the information provided by the permittee's fishery study or studies may be inadequate for the Board to make an informed determination regarding instream flow requirements, such party or parties may present evidence provided by their own independent studies on a timely basis.

4.3 Compliance With the California Environmental Quality Act

The water right applications acted upon in Decision 1616 allow for the direct diversion of water which is one in a series of stages in the development of the New Melones Project. The California Environmental Quality Act (CEQA) was enacted in 1970 and, therefore, did not apply to the early stages of the New Melones Project initiated by water right applications filed in 1960. In accordance with federal law, however, an Environmental Impact Statement (EIS) was completed for the New Melones Project in 1972. This 1972 EIS was incorporated by reference in the Draft Supplement to Previous Environmental Documents dated April 1987 which was prepared to assess the effects of the water right applications presently at issue. The draft supplement, in turn, was incorporated by reference in the final supplement dated December 1987.

The intent of the 1987 draft supplement and final supplement was to address impacts to water quality and anadromous fish which were left unresolved in previous approvals of earlier stages of the New Melones Project. A review of the 1972 EIS shows that the anadromous fish

considered to be impacted by the New Melones Project were chinook salmon. Reestablishment of a steelhead fishery was identified in the 1972 study as a benefit which may accrue from development of the project, not as a potential adverse impact to an existing resource. Similarly the 1972 EIS discussed how the development of the New Melones Project would result in a net increase in the resident trout fishery in the Stanislaus River.

The possibility that the beneficial impacts of the New Melones Project on steelhead and resident trout may be limited by the direct diversion of water authorized in Decision 1616 does not mean that steelhead and trout are adversely affected by the project. The original EIS discussed the net long-term effects of the development of the New Melones project on steelhead and resident trout and it concluded that the net effect was positive. There has been no evidence submitted which alters that conclusion or which would lead to the conclusion that the requirements of CEQA have not been met.

The Board also notes that the time to file an action challenging the adequacy of the supplemental environmental impact report expired 30 days after the filing of the Notice of Determination. (Public Resources Code Section 21167.) In this instance, Decision 1616 was issued on January 21, 1988 and the Notice of Determination was filed on February 1, 1988. The last day to file any legal action to challenge the Board's compliance with CEQA was March 2, 1988. Proof of service upon the public agency of a notice of commencement of any such legal action is required to be filed concurrently with the

pleading initiating the action. (Public Resources Code Section 21167.5.) Having received no notice of the commencement of an action challenging the adequacy of the supplemental environmental impact report, the Board assumes that no such action was filed within the time allowed, and that the issue of the adequacy of the environmental impact report is moot.

5.0 CONCLUSION

Based on the preceding information, the Board concludes that the petition for reconsideration should be denied and that the permits issued on Applications 14858 and 27319 should include a condition requiring the permittee to conduct fishery studies as set forth in the following order.

ORDER

IT IS HEREBY ORDERED THAT:

1. Decision 1616 is amended to provide that the following additional condition shall be added to any water right permits issued on Applications 14858 and 27319:

"Permittee shall conduct, in **consultation** with the California Department of Fish and Game, a study of the steelhead and resident trout fishery in the Stanislaus River downstream of Goodwin Dam. The study shall address the **instream** flow requirements of the steelhead trout and the resident trout populations in the Stanislaus River and it shall assess the

effects of the New Melones Project operations on the fishery. The results of the study shall be submitted to the Board at the time of or prior to the submission of the results of the studies required by the June 1987 'Agreement Between California Department of Fish and Game and the United States Department of the Interior, Bureau of Reclamation Regarding Instream Flow and Fishery Studies in the Stanislaus River Below New Meloes Reservoir' on file with the State Water Resources Control Board."

2. The petition for reconsideration filed by the California Sportfishing Protection Alliance and California Trout, Inc., is dismissed.

CERTIFICATION


The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on April 6, 1988.

AYE: FJ. Don Maughan
Edwin H. Finster
Eliseo M. Samaniego
Danny Walsh

NO: None

ABSENT: Darlene E. Ruiz

ABSTAIN: None


Maureen Marche
Administrative Assistant to the Board