State of California

Before the State Water Resources Control Board

In the Matter of Hearing to Consider Monterey Peninsula Water Management District's Petitions to Change Permits 7130B and 20808

Testimony of Felix Smith

Carmel River
Public Trust Doctrine
And
In Good Condition

The Public Trust Doctrine in European, English and American law has its roots back to Roman times. The Institutes of Justinian in the sixth century A.D. stated: "by the law of nature these things are common to mankind-the air, running water (i.e. rivers and streams), the sea and consequently the shores of the sea", i.e. these are properties that belong to all the people (Althaus 1979). Public ownership of fish and wildlife also has its roots in this ancient Roman law. Fish and wildlife (including fish and other aquatic life, birds, mammals and other classes of wild animals) in their natural environment / habitat can be regarded as property belonging to the people that are supposed to receive public trust protection.

Carmel River rises near the wooded / chaparral crest of the Santa Lucia Range and flows generally west to Carmel Bay and the Pacific Ocean a distance of about 35 miles. (State Lands Commission - 1993).

Carmel River is a wetland. It has supported or now supports numerous beneficial uses such as cold freshwater fish habitat, fish migration, fish spawning and rearing habitat, wildlife habitat (riparian vegetation), irrigation and livestock water supplies, domestic water supply, groundwater recharge, water contact recreation, recreational navigation (seasonal rafting and canoeing) and non-water contact recreation. Its bed and shore lands with their varied vegetation are critical to many of the beneficial uses and values. Carmel River is an integral ecosystem from its headwater to its confluence with the Pacific Ocean.

The State of California holds several interests of the Carmel River in trust for the people. The State holds an interest called "public trust easement" along navigable waterways below the ordinary high water line. Steelhead migrate / navigate the river to their spawning grounds. In general, the title of a private owner of the fee underlying the state's easements is subservient to the easement, although the fee owner may use the land in

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any manner "not inconsistent with public trust needs" (SLC-1993). A member of the public has the right to utilize the Carmel River for boating, rafting, fishing and similar water dependent uses when access to the waterway is available or legally obtained. This right exists even where the bed is privately owned. Any member of the public, or the State acting on behalf of the public, may enjoin any interference with that right (SLC 1993).

The flow of Carmel River and the quality of that flow are under the jurisdiction of the State Water Resources Control Board and the Regional Water Quality Control Board. The fish and other aquatic life, wildlife (mammals, birds, reptiles, etc) are under the jurisdiction of the California Department of Fish and Game. The Carmel River steelhead is listed as endangered under the Federal ESA and is under the jurisdiction of NOAA's National Marine Fisheries Services (NMFS).

The California Supreme Court in Eddy v. Simpson (3 Cal 249 - 1853) stated "It is laid down by our law writers that the right of property in water is usufructuary, and consists not so much of the fluid itself as the advantage of its use." In the context of a water right--a user of water must respect the rights and interests of others and is not to alter the integrity of that water as a water supply or an ecosystem for aquatic life. In this case the listed steelhead are of concern.

In People v. Truckee Lumber Co. (116 Cal 397, 48 Pac 374 -1897) the California Supreme Court advised that the fish within our waters constitute the most important constituent of property, the general ownership and right to its use is in the people of the state. The Court also advised that the dominion of the state, for the purposes of protecting its sovereign rights in the fish within its waters and their preservation for the common enjoyment of its citizens is not confined. It extends to all waters supporting fish or that they utilize for spawning or other purposes, and through which they have freedom of passage to and from the public fishing grounds of the state. There are a variety of public trust interests in addition to fish and a fishery in a stream (Cal Trout Inc. v. SWRCB 207 Cal. App. 3d 585 –1989).

The Public Trust imposes a trustee obligation on the State on behalf of all the people, for publicly owned properties and interests. What this trusteeship entails can best be understood by reviewing a charitable trustee's obligations. Such a trustee has two basic obligations. The first is to safeguard trust assets from decline. The second is to increase trust assets. The trustee must develop as well as conserve assets under his protection. Conservation and development of the steelhead resource requires initiative, shrewd investment, and prudent management. A trustee must actively seek out conservation and protection opportunities, evaluate them wisely, and act upon them as is appropriate.

The California Supreme Court in Marks v. Whitney (6 Cal. 3d 251, 491 P. 2d 374, 98 Cal. Rptr. 790 - I97I) helped redefine the scope of the State's interest in navigable waters and tidelands. The Court recognized and clarified that uses encompassed within the tidelands trust, in addition to the traditional purposes of navigation, fishery and commerce, also included the preservation of those areas in their natural state as open space and as environments which provide food and habitat for birds and marine life and which favorably affect the scenery and the climate of the area. The California Court recognized that tidelands, with their plant and animal life, the water over them and in the sand, gravel or mud substrate, all interact and are valuable ecosystems in themselves that have public trust uses and values.

Ecologist studying freshwater systems recognize that sand, gravel, rock or mud substrate of a stream with its plant and animal life, the water over them and the water that passes through the substrate, all interact and are valuable ecosystems in themselves that have public trust uses and values.

In the Mono Lake Decision (National Audubon Society v. Superior Court Alpine County (33 Cal 3d 4I9, I89 Cal Rpt. 346 -I983), the California Supreme Court ruled that long established water rights are subject to limitations protecting the public trust in navigable waters. The Court's decision was an expression for the State to treat common heritage resources, wherever they are found, under its public trust authority. The Court recognized that instream flow; the streambed, riparian vegetation and associated components of the aquatic ecosystems interact and have similar uses and values as the tidelands discussed in Marks v. Whitney.

An important point made by the California Court in the Mono Lake Decision, was that "the public trust is more than the affirmation of State powers to use public property for public purposes; it is an affirmation of duty of the State to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when abandonment of that right is consistent with the purposes of the trust". If there is a surrendering of the trust protection, or other uses made of the water there must be an effort to minimize harm to trust resources, uses and values. See State Board Order and Decision 1631.

Mitigation or compensation features are a vitally important aspect of permitted uses or developments. Such features are necessary so the activity can be carried out consistent with public trust protection with minimum unavoidable harm and that harmful effects are offset to the greatest degree reasonably possible. These mitigation features must be evaluated periodically to ascertain that they are in fact doing what they are supposed to be doing.

The provisions of California Department of Fish and Game Code, Section 5937 requires that "the owner of any dam shall allow sufficient water at all times to pass through a fish way, 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". For fish mitigation and conservation purposes flow releases have been incorporated into the operations of Los Padres and San Clemente Dams and Reservoirs. These mitigation features must be evaluated to ascertain that they are in fact doing what they are supposed to be doing. Anecdotal evidence indicates that additions flows are need through most of the year in order to meet the good condition of Code Section 5937.

Fish and Game Code Section 5937 limits the amount of water that may be appropriated by requiring that first sufficient water be released to protect the riverine ecosystem and associated environmental conditions thereby assuring that fish, other aquatic life and trust uses below a dam or diversion are maintained in good condition. The provision of Fish and Game Code Section 5937 is equal to a riparian water right for stream resources use and values protected by the public trust (Cal. Trout 1989). The Court recognized that instream flow; the streambed, riparian vegetation and associated components of the aquatic ecosystems interact and have similar uses and values as the tidelands discussed in Marks v. Whitney –1971).

The "in good condition" criteria are not defined in Section 5937. Both the health and renewability of the entire aquatic ecosystem and its component parts are involved. From a public trust prospective, it must include the physical (stream bed and shore lands), biological (flora and fauna), and the chemical parameters (water quality) that are necessary to support self-maintaining or renewing fish populations, aquatic life and ecological values and other beneficial uses. This habitat quality criteria "in good condition" and fish health criteria "in good condition" means more than poor or fair, marginal or minimum conditions but less than better or best, maximum or optimum.

With a conservation program built on Public Trust principles public resources (in this case the ESA listed steelhead) and associated interests would be treated as property entitled to be maintained and protected for the benefit of present and future generations.

According to Professor Wilkinson, a public trust scholar, the public trust, as it applies to the appropriation and use of water is based on some modest beliefs. These are (1) a belief that the public benefits from private development, but that the public interest is greater than the sum of the private interests; (2) a belief that property rights in water, like rights on land, are not absolute but must be regulated and controlled for the good of the people; (3) a belief that waste and unreasonable use of public

resources are wrong and are not excused by flows returning to our rivers that contain salts, silt, organic matter, chemicals or thermal accumulation that impact water quality; (4) a belief that our lakes, rivers and streams and their meandering waterways are more than commodities, that they have a sacred trust; (5) that the fish and other aquatic resources of our rivers and streams are part of this sacred trust and (6) a belief that the words "public trust" and "held in trust" should be taken seriously for the health and well being of all the people and future generations (Wilkinson 1989).

The key to carrying out the State's public trust duties are its powers to regulate as well as its powers to protect the State's fundamental rights in trust properties, ecological values and public use of those properties. "The powers of the State as trustee are not expressed. They are commensurate with the duties of the trust. The State as trustee has the implied power to do everything necessary to the execution and proper administration of the trust". See People v. California Fish Company, 166 Cal. 576, 138 Pacific 79, 87, 88 (1913), City of Long Beach v. Mansell 91 Cal 23., 476 P. 2d 423 at 437 (1970).

I have read the NOAA Fisheries submittal regarding the conservation and protection of the Carmel River steelhead resource. There are other aspects of the public trust that are not being considered in the NOAA analysis.

I believe that the State Board should:

1. Clarify that the Carmel River is fully appropriated during the period June 1 thru November 1, and that there be no diversions of water from the Carmel River during this low water period. However if water is desired by a surface diverter or ground water pumper (pumping the under flow), it is to be released from upstream reservoirs, is limited to the amount released and is compatible with fish resource needs. In drier than normal runoff years the naturally low flow period may have to be expanded to May 1 through November 31 or to December 15 with the same conditions for diverting water applying. This could be done annually on an adaptive management basis (early rains, etc.).

2. Require a monitoring program to ascertain the effectiveness of each NOAA - Fisheries flow stipulation. If desired conditions are not being met, recommend changes to the flows, timing, and duration, to help assure greater effectiveness of the stipulations for the good of the Carmel River steelhead population. The monitoring program should be funded by the project sponsor with the monitoring study parameters and actual monitoring work conducted under the authority of the State Board. All reports are to be delivered to the

State Board and then made available to the public for review and comment.

3. The cost of monitoring studies are to be in addition to the funds deposited by California American Water into the Carmel River Conservation Fund for I have read the NOAA Fisheries submittal regarding the conservation and protection of the Carmel River steelhead resource. There are other aspects of the public trust that are not being considered in the NOAA analysis.

4. NOAA Fisheries makes a statement that results show that there is substantial water (10,0000 acre-feet) available for diversion from the Carmel River during normal years and a lot more during wet years. A detailed explanation of the assumptions used by NOAA Fisheries is needed to justify this amount and its conclusion. What NOAA Fisheries apparently is saying is -- given its flow recommendations for protecting all steelhead life history stages and the associated ecosystem needs, all other water / flows can be diverted from the Carmel River. I believe it is time to be precautionary in light of uncertainties given that no monitoring studies have been conducted to ascertain the effectiveness of NOAA Fisheries recommendations or unforeseen impacts from California American Water operations.

In my professional opinion a flow regimen formulated for a stream to protect and help assure the sustainability of the Carmel River fish resources, is the same with or without a storage or diversion project. It is only after the public trust protection requirements are meet can someone determine what water is left for other instream and out of stream needs. At this time such out of stream demands may be met and hopefully on a public need and priority bases.

Prepared by Felix E. Smith for the Carmel River Citizens Group Task Force

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