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State of California

State Water Resources Control Board

In the Matter of the Draft Cease and Desist Order)	Pre-Hearing Brief
Against California American)	Public Trust Alliance
For Its Unlawful Diversions from Carmel River)	
_____)	

I. Introduction

The State Water Resources Control Board Hearing Officer requested briefs from Prehearing Conference participants regarding the scope of the planned public hearing regarding the Draft Cease and Desist Order against Cal-Am. Thirteen years after WR 95-10 was delivered, fish classified as Threatened or Endangered under our Endangered Species Acts are being rescued and physically moved to areas in the river where actual water still exists. The Carmel River appears oversubscribed and the meaning of “compliance” with California Water Law and Federal Endangered Species legislation is losing credibility with the general public. Narrowing the scope of this hearing to quantitative provisions of statutory permits and orders without independent reference to the California Public Trust Doctrine is a disservice to statewide beneficiaries and prevents a credible analysis of this situation. It precludes appropriate inquiry into the diversion and use of public trust protected waters for purposes not related to either domestic use or agricultural irrigation. As the ecology of a watershed approaches collapse, trustees face an enhanced burden to defend trust resources. Accordingly, we offer the following in defense of protecting public resources and encouraging respectful development of our State’s waters.

II. The Board Must Consider Post 1995 Endangered Species Act Developments

A. *ESA Developments Are Within the Scope of the March 19th Notice of Public Hearing and Pre-Hearing Conference*

California Water Code section 134 requires that the notice of a cease and desist order “contain a statement of facts and information that would tend to show the proscribed action. . .” The

Board's description of the purpose of the hearing and the key issue to be addressed clearly cover the continued impacts of Cal-Am's water diversions on the Carmel River public trust resources. In stating the purpose of the hearing, the notice sets forth the Board's intent to "receive evidence relevant to determining whether to adopt, with or without revision," an attached draft Cease and Desist Order. Notice p. 2. The "Key Issue" identified by the Board was: "Should the Board adopt the draft CDO? If the draft CDO should be adopted, should any modifications be made to the measures in the draft order? What is the basis for each modification?" Notice p. 3. The bases for the measures outlined in the draft order include the Board's premise that "Cal-Am's unauthorized diversions *continue to have adverse effects on the public trust resources on the Carmel River and should be reduced.*" Notice p. 2 [emphasis added]. Continuing adverse effects include a worsening impact on public trust fishery resources. This connection is made explicit by Board Finding 2 in the Draft Cease and Desist Order provided with the Notice: "Cal-Am's unauthorized diversions continue to have adverse effects on the public trust resources and should be reduced."

West's Ann.Cal.Gov.Code § 11513 (c) states in pertinent part that "Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. . ." The post-1995 listing of Carmel River and Carmel watershed species and the increasing water scarcity affecting Cal-Am customers are directly relevant to the continuing adverse effects of Cal-Am's unauthorized diversions and to the adequacy of the Board's proposed measures.

Moreover, Endangered Species Act protections clearly fall within the scope of facts that both Cal-Am and the Board must consider as responsible entities. The Endangered Species Act ("ESA") plays a critical role in the validity of water rights and in the state water allocation and planning process. The Carmel River steelhead and the Red-Legged Frog are currently threatened and are moving toward endangered status. ESA Section 9, prohibiting any unpermitted "take" of an endangered species, applies to any water user, public or private, and imposes civil and criminal penalties for knowing violations. "Take" includes harm to a species, including substantial habitat modification. See 50 C.F.R. § 17.3 (1994) (defining the term "harm"); *Babbitt v. Sweet Home Chapter*, 515 U.S. 687 (1995).

B. The Board Cannot Craft an Effective Order If It Fails to Consider Context and Current Data

Citing *California Trout, Inc. v. Superior Court*, 218 Cal.App.3d 187, 266 Cal.Rptr. 788, 801 (1990) (ordering the water board to establish flow rates based on available data while proceeding with more elaborate studies), the Supreme Court of Hawaii directed the state water agency to use "the best information presently available" in protecting public trust values. *In re Water Use Permit Applications*, 94 Hawai'i 97, 9 P.3d 409 (Hawai'i, 2000). The Court emphasized the importance of comprehensive and pro-active planning in a region where growth and its attendant demands on groundwater outstrip the region's limited supply. The Court eloquently summed up

the role of a water agency: “The constitutional framers and the legislature designed the Commission as an instrument for judicious planning and regulation, rather than crisis management. . . . [The public trust] concept implies not only the power to protect the resources but the responsibility to do so long before any crisis develops [citing Stand. Comm. Rep. No. 77 in 1 Proceedings, at 688] [T]he water code should serve as a tool and an incentive for planning the wise use of Hawaii’s water resources, rather than as a water crisis and shortage management mechanism [citing Stand. Comm. Rep. No. 348, in 1987 House Journal, at 1262-63].”

A crisis has developed and deepened in the Carmel watershed in the 13 years since the Board issued Order 95-10, requiring expeditious action within a relatively comprehensive legal framework. Bob Baiocchi describes clearly the effects on the Carmel River public trust resources. Pre-Hearing Briefing Comments by California Salmon and Steelhead Association, March 20, 2008. The urgency of the situation is an indispensable consideration in determining the adequacy of measures outlined in the Draft Cease and Desist Order. The Board should not permit any party to narrow the scope of the hearing so as to exclude the knowledge and full consideration of this crisis. See *Postema v. PCHB*, 142 Wash.2d 68, 11 P.3d 726 Fn 6 (2000), in which a Washington court weighed in on the side of using the most current knowledge to determine water quality impairment and the impact of groundwater withdrawal on surface waters. The court concluded, “The APA is not to be read in such a way as to prevent Ecology from using new scientific knowledge, whether it is a change in theory or in quantum of data.” The court cited *American Trucking Ass’n v. Atchison, T. & S.F. Ry. Co.*, 387 U.S. 397, 416, 87 S.Ct. 1608, 18 L.Ed.2d 847 (1967) (administrative agencies are not required to, nor should they, regulate the present and future within the inflexible limits of yesterday); *Michigan v. Thomas*, 805 F.2d 176 (6th Cir.1986) (Environmental Protection Agency could apply its definition of “reasonably available control technology” to disapprove proposed state dust rules where it had approved similar rules of other states, in light of new knowledge); cf. *International Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Daniel*, 439 U.S. 551, 566 n. 20, 99 S.Ct. 790, 58 L.Ed.2d 808 (1979) (deference due administrative agencies is due in part because of willingness to accord some measure of flexibility to an agency as it encounters new and unforeseen problems over time).

Due process does not require further notice and comment where the issue of appropriate flows on the Carmel River has been before the Board for years. See, e.g., Section 5.12 of Order WR 2001-08, *In the Matter of Fishery Resources and Water Right Issues of the Lower Yuba River* (rejecting objections regarding the limited time to comment on Decision 1644). The Board suggested that the remedy for past delay is not to further extend the proceedings through reconsideration of issues and evidence that have already received an extraordinary amount of attention from the SWRCB and the parties.

III. The Public Trust Doctrine Is an Appropriate Framework for the Cal-Am Hearing

A. *The Public Trust Doctrine Complements Wildlife Protection Statutes*

Cal-Am is required by Cal. Fish & Game Code 5937 to maintain an adequate flow in the Carmel River to keep in good condition any fish that may be planted or exist below the dam that it operates." Section 5937 "is a legislative expression of the public trust doctrine." *California Trout, Inc. v. State Water Resources Control Board*, 255 Cal. Rptr. 184, 209, 212 (Cal. Ct. App. 1989)). The public trust doctrine and section 5937 overlap, addressing the fisheries at different levels of generality. The public trust doctrine has long protected fisheries used by commercial and recreational fishers, and more recent case law has expanded the doctrine to include the general public's right to preserve fisheries and their related habitat for their intrinsic environmental value as ecological units. *Marks v. Whitney*, 6 Cal. 3d 251, 259, 491 P.2d 374, 380 (1971) (establishing that the doctrine changes in tandem with changing public values and scientific understanding) and *National Audubon Soc'y v. Superior Court of Alpine Cty*, 33 Cal.3d 419, 435, 658 P.2d 709 (Cal. 1983), cert denied, 464 U.S. 977 (1983).

The ESA, Section 5937, and the public trust doctrine fill complementary roles. The federal ESA adds a mandatory duty to the public trust balancing envisioned in *National Audubon*. Flow depletion may amount to a "take" of threatened or endangered species under the ESA. In turn, since title to water and wildlife resides with the states, the public trust doctrine may be used to add clarity to the manner in which the federal ESA applies to state water law and water rights.¹

Section 5937 complements the public trust doctrine because it mandates not only the preservation of fisheries, but the preservation of the fish in "good condition." In turn, the public trust doctrine has the potential to fill any gaps in the statutory requirements of the ESA and Section 5937. Legislation may provide only partial protection, contain "loopholes" for special interests and may not fully account for changing conditions. Enforcement of legislation may be spotty or inadequate. These limitations in the legislative approach justify and require an aggressive use of the public trust doctrine.²

Indeed, it is not possible to consider the relevant wildlife statutes without considering the framework of the public trust doctrine. The noncodified public trust doctrine remains important both to confirm the state's sovereign supervision and to require consideration of public trust uses in cases filed directly in the courts. *National Audubon*, 33 Cal. 3d 419 at n. 27. See also, *Kootenai Envtl. Alliance v. Panhandle Yacht Club, Inc.*, 105 Idaho 622, 671 P.2d 1085, 1095 (Idaho 1983) (Mere compliance with legislation is not sufficient). The government cannot act outside of the boundaries of the public trust doctrine with respect to public trust resources. *San*

¹ STATE WATER POLICY ALTERNATIVES FOR INSTREAM AND DOWNSTREAM FLOW PROTECTION, Proceedings of the 2005 Georgia Water Resources Conference, April 25-27, 2005 at University of Georgia, [www.uga.edu/water/GWRC/Papers/Panel Instream paper5.pdf](http://www.uga.edu/water/GWRC/Papers/Panel%20Instream%20paper5.pdf).

² Ralph W. Johnson, Craighton Goepfle, David Jansen, & Rachael Paschal, *The Public Trust Doctrine and Coastal Zone Management in Washington State* 4-5 (Washington State Department of Ecology October 1991, Publication No. 93-54), <http://www.ecy.wa.gov/pubs/93054.pdf>.

Carlos Apache Tribe v. Superior Court ex rel. Maricopa County, 193 Ariz. 195, 972 P.2d 179, 199 (1999) ("The public trust doctrine is a constitutional limitation on legislative power . . .").

B. The Public Trust Doctrine Protects River Systems on the Verge of Collapse

It has been documented with exceptional clarity that an ecological collapse is occurring in the Carmel River. The Board can and must use its public trust powers to intervene.

In 1884, the California Supreme Court upheld an injunction prohibiting upstream hydraulic mining that was clogging and polluting the American and Sacramento Rivers and leading to the collapse of public trust navigational values and the natural use of the river for drainage of flood waters. *People v. Gold Run Ditch & Mining Co.*, 66 Cal. 138, 4 P. 1152 (1884). In *Woodruff v. North Bloomfield Gravel Mining Co.*, a federal court effectively ended hydraulic mining in the Sierras by holding that the public trust precludes activities that overwhelmed navigation and other valued flood plain uses of the Yuba, Feather and Sacramento Rivers. *Woodruff v. North Bloomfield Gravel Mining Co.*, 18 F. 753 (C.C.D. Cal. 1884).

The principle that the public trust doctrine precludes activities leading to the collapse of navigational uses has been clearly extended to ecosystem collapse. In California, consumptive uses of water may be subordinated to the restoration and maintenance of fragile and collapsing ecosystem values. *National Audubon Soc'y v. Superior Court of Alpine Cty*, 33 Cal.3d 419, 446, 658 P.2d 709 (Cal. 1983), cert denied, 464 U.S. 977 (1983).

The law has historically and consistently recognized that rivers and estuaries once destroyed or diminished may never be restored to the public. Accordingly, the law has required the highest degree of protection from the public trustee. *Morse v. Oregon Div. of State Lands*, 34 Or. App. 853, 860, 581 P.2d 520, 524 (1978), af'd, 285 Or. 197, 590 P.2d 709 (1979).

C. The Public Trust Doctrine Bridges and Integrates the Board's Water Allocation and Water Quality Roles

The public trust doctrine is an appropriate framework to integrate the Board's consideration of water quality and water rights law. Under the Porter-Cologne Water Quality Control Act, the state formulates water quality control plans that establish beneficial uses and water quality standards to protect such beneficial uses for each regional basin. The SWRCB must consider the protection of beneficial uses in determining whether water is available for appropriation. Moreover, the SWRCB may modify permits, and diversions may be curtailed if new information about adverse effects on water quality becomes available and water quality standards are revised. Water diversions that substantially degrade water quality can be considered unreasonable use under California Constitution Article X, Section 2. See, e.g., *United States v. State Water Resources Control Bd.*, 182 Cal. App. 3d 82, 132, 227 Cal. Rptr. 161 (Ct. App. 1986).

Several Porter-Cologne Act sections recognize that flow requirements for instream beneficial uses

and effects on water quality are considered as part of water right decisions. See Cal. Water Code 174, 1243, 1243.5, 1258 (cited by *U.S. v. SWRCB*, 182 Cal. App.3d 82 (1986)). In *U.S. v. SWRCB*, 182 Cal. App.3d 82 (1986), the court upheld the Board's authority to curtail water rights in order to preserve water quality via an instream flow provision. The court applied National Audubon and found that the Porter-Cologne Act requires the Board to establish water quality objectives to "ensure the reasonable protection of beneficial uses . . .," a protected category which includes "preservation and enhancement of fish, wildlife, and other aquatic resources" The court also noted that the Clean Water Act requires the Board to establish and periodically revise water quality standards in its water quality role, "taking into consideration their use and value for . . . propagation of fish and wildlife . . ." (33 U.S.C. § 1313(c)(2).) Thus, the Board properly set instream flow standards under its water quality authority to establish standards for the protection of fish and wildlife.

Also on point is the decision of Judge Robie in *State Water Resources Control Board Cases*, 136 Cal. App. 4th 674; 39 Cal. Rptr. 3d 189; 2006 Cal. App. LEXIS 171 (2006), in which the SWRCB and various water rights holders sought review of rulings of the Superior Court of Sacramento County that the Board failed to implement all of the flow objectives in a water quality control plan. Robie noted the interconnectedness of the Board's water rights and water quality decisions: "The principal enforcement mechanism available to the State Water Resources Control Board to enforce compliance with water quality control plans is its regulation of water rights."

Commentators have suggested that flow impairment qualifies as a form of "pollution." According to Reed Benson, [T]he CWA characterizes flow impairment as a form of nonpoint source pollution. Flow impairment fits within the CWA's broad definition of pollution: "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." Moreover, CWA section 304(f) specifically lists "changes in the movement, flow, or circulation of any navigable waters or ground water, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities" as a form of nonpoint source pollution.³

D. The Board Has Substantial Information to Allow It To Address Public Trust Issues

The Board has established informational priorities in conducting public trust proceedings. In Water Right Order 91-06, and in the Alameda Creek proceedings, Water Right Order 91-6, the

³ Reed D. Benson, *Pollution Without Solution: Flow Impairment Problems Under Clean Water Act Section 303*, 24 STAN. ENVTL. L.J. 199, 227, n. 158 (2005 (citing 33 U.S.C. 1362(19) (2000)). See also *PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology*, 511 U.S. 700, 714 (1994) (affirming definition of "pollution"); 65 Fed. Reg. 43,586, 43,593 (July 13, 2000) (EPA agreeing that "reduced stream flow may constitute 'pollution' under the Act"); 33 U.S.C. 1314(f)(2)(F) (2000).

Board noted that addressing the issues raised in the public trust complaint would require it to commit substantial engineering, environmental and legal resources. It stated that its limited enforcement resources are directed primarily to watercourses where instream flow requirements have previously been set, watercourses on which fishery studies have been conducted, or instances involving protection of public trust resources of statewide significance. The Board should proceed on the public trust issues at stake in the Carmel River matter in light of existing fishery studies documenting the threatened status of the Carmel River steelhead.

E. The Board Has An Affirmative Duty to Consider and Protect Public Trust

The public trust rationale for acting to protect the fish in the Carmel River is well established. “The State holds the propriety of this (bottomland) for conservation of public rights of fishery thereon, and may regulate the modes of that enjoyment so as to prevent the destruction of that fishery. In other words, it may forbid all such acts as would render the public right less valuable or destroy it altogether.” *Smith v. Maryland*, 59 U.S. 71, 75; 15 L. Ed. 269; 18 How. 71 (1855).

The power to act also amounts to an affirmative duty. The state has an affirmative duty to take the public trust ecosystem values into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible. *National Audubon Soc’y v. Superior Court of Alpine Cty*, 33 Cal.3d 419, 446, 658 P.2d 709 (Cal. 1983), cert denied, 464 U.S. 977 (1983).

The public trust imposes a duty of continuing supervision. *Id.*, at pp. 446-447. See also, *Marks v. Whitney* (1971) 6 Cal.3d 251, 259 [98 Cal.Rptr. 790, 491 P.2d 374] (The state remains a trustee with the duty to supervise trust resources). Accord, *State Water Resources Control Bd. Cases*, 136 Cal. App. 4th 674, 777 (2006).

The Board’s affirmative duty goes well beyond the role of moderator or “umpire.” *Save Ourselves, Inc. v. Louisiana Environmental Control Com’n*, 452 So.2d 1152 (La.,1984). In addressing the implications of an agency’s role as the trustee of natural resources and environmental values, the court stated that “it necessarily follows that the agency must act with diligence, fairness and faithfulness to protect this particular public interest in the resources. . . . Consequently, the commission’s role as the representative of the public interest does not permit it to act as an umpire passively calling balls and strikes for adversaries appearing before it; the rights of the public must receive active and affirmative protection at the hands of the commission.”

Respectfully submitted,



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