

**Purpose and Intent
of
Fish and Game Code Section 5937,
The Public Trust
and
In Good Condition**

by

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Prepared for

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Abstract

The California legislature in exercising its trusteeship responsibilities over the fish and other aquatic life in the state's rivers and streams has enacted several statutes to control the threats posed by dams, weirs and other obstructions to the migration of salmon and steelhead trout since 1852. The purpose was to provide an aquatic environment free of obstructions to the migration of salmon and steelhead trout and to keep in good conditions fish and other aquatic life that may exist, pass through or that may be planted in the reach downstream from a dam. The various statutes have evolved into today's Fish and Game Code Section 5937 and has been so since 1937. The key actionable item is that fish and other aquatic life must be maintained in "good condition" below a dam. It is the responsibility of the owner of a dam to at all times release the water necessary to provide and keep in "good condition" the downstream ecosystem, its fish and other aquatic life. This is a responsibility of the owner of a dam, whether or not Code Section 5937 is a specific condition of any permit or license. The "good condition" includes the health of individual fish, the health and diversity of the various populations and their ability to maintain self-sustaining populations, and the health of the entire biotic community. State and federal resource and regulatory agencies must act responsibly as trustees. Arbitrary and capricious administration of the trust is not allowed. Fish conservationists, environmentalists, and others of like interest must be ready to file a lawsuit against those who disregard or walk away from their duties and trust responsibilities.

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The State of California entered the Union on September 9, 1850 on an equal footing with the original 13 states. The original states adopted the laws of England, which adopted much of Roman civil law. During Roman Emperor Justinian's reign (529 – 534 AD), the Institute of Justinian Codes (Roman law) recognized that "By law of nature these things are common to all mankind: the air, running water, the sea, and consequently the shores of the sea". The fish life, fishing, hunting, beaching boats, collecting seaweed and shellfish, bathing, swimming are a few examples of public and private uses protected by the Public Trust Doctrine. Public uses of the banks of estuaries, rivers and lakes for like activities were included in the Institute of Justinian Codes (Althaus – 1978).

The Public Trust Doctrine provides that certain resources, uses and values belong to the people and are to be administered by the state for the benefit of the people. The Public Trust Doctrine is a background principle of property law (Lin – 2012). The core principle of the Public Trust Doctrine is that every sovereign has a property interest for the people, in its water, fish and wildlife, held as a trust for the benefit of today's generations and generations yet born (Wood – 2004). The Public Trust Doctrine, as a background principle, predates today's environmental laws and applies to every water right that impacts trust resources and may, in fact, "define or limit" the very nature of the right to put water to beneficial use (Klass & Huang - 2009)

In 1853, the California Supreme Court in Eddy v. Simpson (3 Cal. 249), 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." The American Heritage Dictionary defines ~usufruct~ as "the right to utilize and enjoy the profits and advantage of something belonging to another so long as the property is not damaged or altered in any way" (emphasis added). Put in the context of a water right -- a user of water must respect the rights and interests of others, including the people's fish property, and is not to alter the integrity of that water as a water supply (water quality) or an ecosystem. Private rights in water are usufructuary, not possessory (Trelease-1957).

California has been concerned about the threats posed by dams and other obstructions to anadromous fish in the state's rivers and streams since early statehood. In 1852, the California legislature enacted a statute outlawing any weir, dam, fence or other obstructions to salmon migration in any river or stream, as a public nuisance. (Ch. 82 Compiled Laws of Cal. 1852 at 325). In 1870 the legislature passed An Act to Provide for the Restoration and Preservation of Fish in the Waters of the State. This Act states that it is the duty of the Board of Fish Commissioners to require owners of dams, weirs and other man made structures, to construct and to keep in good repair fishways or fish ladders so that fish can ascend them and continue on their migration to their historic spawning and nursery areas. This Act was actually Section 637 of the California Penal Code (Ch. 457, 1870, Statutes of California at 663-664). In 1882, in Taylor v Hughes (62 Cal. 38 -1882), the Court found Taylor guilty for failing to keep the fishway in good repair on his dam on Papermill Creek, in Marin County.

The legislature on May 24, 1915, amended Penal Code Section 637. This amendment required that the owners of dams shall allow sufficient water at all times to pass through the fishway for the purposes of keeping fish below the dam "in good condition" (emphasis added). Section 637 also provided that during minimum water flows, the dam owner could pass water through a culvert, waste gate, over or around the dam in order to keep "in good condition" any fish that may exist or planted below the dam (Ch. 492, 1915 Statute. of Cal. at 820).

On April 11, 1933, the Governor signed the Act Establishing the Fish and Game Code. Obstructions and Fish Screens are contained in Article 2. Section 637 of the Penal Code was incorporated into Section 525 of the Fish and Game Code. However several earlier Sections provide additional meaning to Section 525. Section 520.5 requires that plans for any dam in any stream be submitted to the Fish and Game for review to see if fishways are necessary. Section 521 requires the Commission to examine all dams on all rivers of the state naturally frequented by salmon, trout, shad, and other fish. Section 522 requires owners of dams that obstruct fish migration to build a fishway. Section 523 requires that the owner of a fishway must keep the facility in good repair and free of blockage. Section 524 states that it is unlawful to willfully destroy, injure or obstruct any fishway. Section 525 requires that the owner of any dam shall allow sufficient water at all times to pass through the fishway to keep in "good condition" any fish that may be planted or exist below the dam. This Section also provided that during the minimum flow, the dam owner could pass water through a culvert, waste gate, over or around the dam to keep in "good condition" any fish that may be planted or exist below the dam, when in the judgment of the Commission, it is impractical or detrimental to the owner to pass the water through the fishway. Section 626 states that that if the construction of a fishway is impractical, the Commission may order the construction of a hatchery and related facilities instead of a fishway at the expense of the dam owner (Ch. 73, 1933 Stat. of Cal. 394, 442-443).

On June 19, 1937, the legislature passed An Act to Amend Section 525 of the Fish and Game Code relating to water flow through a dam. Section 525 then read "The owners of any dams shall allow sufficient water at all times to pass through the 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. -- (Ch. 456 Stat. of Cal. 1937 at 1400). Also see Baiocchi – 1980.

Today Fish and Game Code Section 5937 (Passage of water for fish below a dam) incorporates Penal code Section 637, and Section 525 as amend in 1937, reads, “The owner of any dam shall allow sufficient water at all times to pass through the 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. The fishway (fish ladder) is to assist the migration of adult salmon and steelhead to their historic spawning grounds and nursery areas. The flow regimen released is to maintain in “good condition” populations of fish and other components of the aquatic ecosystem that may reside, are in transit or may be planted below the dam.

The operative words are “**that dam owners must at all times release sufficient water to keep in good condition any fish that may be planted or exist below the dam**”. This is not a new insight. The California State Attorney General, Fred Howser, in Opinion No. 59-68 dated May 10, 1949, recognized that courts have ruled that fish, wildlife and their habitats and recreational uses were beneficial uses of water. The people learned from People v. Truckee Lumber Co. (115 Cal. 397, 48 Pac. Rpt. 374, April 3, 1897) that the fish within our waters is unique property called wild game, the general right and ownership is with the people of the state, and the power to protect and preserve such property is a recognized prerogative of the sovereign. This Public Trust aspect was not specifically mentioned in the opinion by Attorney General Howser.

Mr. Henry Holsinger, the Principal Attorney for the Division of Water Resources (now Department of Water Resources - DWR), also recognized the importance of Code Section 525 during the issue over the San Joaquin River -Friant water rights in 1951. The Division of Water Resources designed Friant Dam and Reservoir as a State project and did not incorporate fish flow releases into the operation of Friant Dam. Holsinger and Attorney General Edmund G. Brown needed to contrive justification for taking all the San Joaquin River flows. The result was the AG Brown Opinion 50-89 July 23, 1951. The contrived justification was “the United States is not required by state law to allow sufficient water to pass Friant Dam to preserve fish life below the dam”. The reasoning was that all the San Joaquin River water was needed for purposes other than fish and wildlife conservation. However, Friant Dam and Reservoir was constructed under Federal law as a part of the Central Valley Project (CVP) and is operated by the United States - Bureau of Reclamation.

Department of the Interior and Bureau of Reclamation administrators ignored Section 8 of the Reclamation Act of 1902 which states in part;

“-- nothing in this Act shall be construed as affecting or intended to affect or in any way interfere with the laws of any state or territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act shall proceed in conformity with such laws --”.

The State Board in 1959 issued D-935, approving the near total diversion of the San Joaquin River at Friant by the Bureau of Reclamation. This action was in spite of the fact that the State's responsibility for protecting fish and other public trust resources was clearly spelled out over 60 years earlier in People v. Truckee Lumber Co. (115 Cal. 397, 48 Pac. Rpt. 374, April 3, 1897). Did the State Board knowingly ignored the meaning of Truckee when it dried up the San Joaquin River downstream of Friant Dam? The lawsuit People v. Truckee Lumber Company, its findings and uniqueness of fish and wildlife resources were not mentioned or referenced in the Audubon – Mono Lake case.

The State Board's Friant Decision D-935 was grabbed by interests desiring to or building dams on tributary streams because they wanted to release as little water as possible to maintain fish and other aquatic life or Delta water quality. These new dams included New Melones, New Don Pedro, New Bullards Bar, New Exchequer, New Hogan, as well as Camanche, Folsom and Oroville Dams. These are large capacity, low elevation dam and reservoirs mostly replaced existing facilities. Some of these facilities were constructed with partial funding with Federal tax dollars via the Corps of Engineers for flood control purposes, but also had water supply and power benefits. Some are operated under licenses from the Federal Energy Regulatory Commission. In most cases the flow regimens released downstream for the protection and propagation of Chinook salmon, steelhead trout, other fish and aquatic life have been grossly inadequate in quantity, quality and timing and contribute little to Delta water quality.

A interesting historical event. Attorney General, Evelle J. Younger, in Opinion No. SO 73-44, dated November 21, 1974, overturned Attorney General Brown 1951 opinion. The Younger opinion concludes with "-- the State Water Resources Control Board is required to regulate the activity of water appropriation so that major consideration is given to preservation of California's fishery resources". Reference is also made to People v. Truckee, -- and that ownership of fish and wildlife was in the State as trustee.

Today's evidence is that the once abundant spring-runs of Chinook salmon to the San Joaquin system are **extinct**, while the fall-run Chinook is **extinct** in the upper San Joaquin River and has been so since the mid 1940's. All other natural spawning races of Chinook salmon (winter-, spring-, fall- and late fall-runs called Evolutionarily Significant Units) and all natural spawning steelhead runs in Central Valley are severely impacted by reservoir construction and operation. Under the Federal Endangered Species Act, the winter-run Chinook was listed as threatened in 1989 and endangered in 1994. In March 1998, the spring-run Chinook was listed as endangered. The natural spawning steelhead runs of the Central Valley are listed as threatened, effective May 1998. In addition the Delta smelt was listed as threatened in 1993. The efforts to restore the spring and fall runs of Chinook salmon are underway as part of the Federal / State San Joaquin River Restoration Program initiated in 2006. The reintroduction of adult Chinook salmon to the San Joaquin River occurred during 2012.

The Reawakening of the Public Trust Doctrine

The principles of the public trust doctrine were established, reaffirmed or clarified in National Audubon Society v. Superior Court Alpine County, (Audubon) 33 Cal. 3d 419, 189 Cal. Rpt. 346 (1983). One of the most important findings of Audubon is that “The public trust is more than affirmation of the state’s power to use public property for public purposes. It is an affirmation of the 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 the abandonment of that right is **consistent** with the purposes of the trust” (189 Cal. Rpt. 346 at 360, emphasis added). This view of the public trust responsibility is tremendously important because of its focus on both the authority and duty of the State to protect water, fish, wildlife and related resources.

Audubon resolved any doubt that private parties have standing to sue to enforce the public trust. This effort not only introduced private enforcement of Fish and Game code section 5937, but also led to the development of much of the code section 5937 law under California Trout v. State Water Resources Control Board (Cal Trout 1 - 1989) and California Trout v. Superior Court (Cal Trout 2 - 1990) (Bork, et al - 2012).

The Audubon Court recognized that stream flow, the stream channel, its invertebrates and algae, riparian vegetation and associated fauna all interact as an integrated ecosystem. The Audubon Court effectively tied the protection of public trust interests to the perpetuation of natural resources (Mono Lake, its inflows, natural resources and ecological aspects) for their innate values, not to private off-site uses of water (Koehler - 1995). The State Board's oversight is a perpetual responsibility and especially over water rights previously issued. Under Audubon water required to protect the public trust can be withdrawn from appropriation without conflicting with the taking issue. Based on the Audubon decision and Cal Trout 1 and 2, the State may only transfer those water rights that are not necessary for the fulfillment of its public trust responsibilities. During the 1977 drought, Mr. Ron Robie, Director of DWR, (now Appellate Court Judge) in an article “The Public Interest in Water Rights Administration” asserted that the State lacks the power to transfer water in amounts that are necessary to protect the Public Trust (Robie -1977).

The operative words of Fish and Game Code Section 5937 are “The owner of any dam shall at all times release sufficient water to keep in “good condition” any fish that may be planted or exist below the dam” are supported by the principles of the public trust doctrine. The guiding principles of in “good condition” are discussed in California Trout 1 and 2 cases. The Fish and Game Code Section 45 definition of “Fish” means wild fish, mollusks, crustaceans, invertebrates, or amphibians, including any part, spawn, or ova thereof.

The criteria for fish in “good condition” has been established in case law. It includes 1) the health of individuals, fish are healthy, free of disease, parasites, etc., and have reasonable growth rates with adequate habitat; 2) diversity and abundance of aquatic populations, diversity of age class, sufficient habitat to support all life stages and support self-sustaining populations; 3) the community, its overall health including co-evolved species and the health of the aquatic ecosystem at several trophic levels. (Bear Creek- SWRCB Order 95-4 at 18 to 22) 1995, Putah Creek v. Solano Irrigation

District, Sacramento Superior Court No. CV515766, April 8, 1996), Cal Trout 1 and 2, and State Board Order WR 95-17, Lagunitas Creek, October 1995. Also see Moyle, et al. 1998.

The Cal Trout 1 Court stated the provisions of Code Section 5937 straight forwardly limit the amount of water that may appropriated by diversion from a dam by requiring that sufficient water first be released to sustain fish below the dam (at 599). The water necessary for fish and other aquatic life is to be reserved **first** before any use permit, license or appropriation of water is made for instream or out-of-stream purposes. Today's understanding would be sufficient water encompassing all the ecological, biological and physical parameters that make water a productive ecosystem supporting salmonid fishes and to maintain them at a high and sustainable populations levels to support today's and future generations in communities within the Central Valley and along the California and Oregon coast.

The Bureau of Reclamation is the holder of the water rights for the operation of the Folsom / Nimbus facilities on the American River. The State Attorney General filed an Amicus Curiae in Reynolds v. City of Calistoga stated, "the City's obligation to protect the public trust is to not cause harm by its own actions" as the City of Calistoga diverts water from the Napa River (Cal. A.G.- 2013). On the American River for example the Bureau's obligation to protect the public trust is not to cause harm to the public trust by its own actions of operating Folsom / Nimbus Dams and Reservoirs. Another example would be Merced Irrigation District's operation of New Exchequer Dam and Reservoir on the Merced River.

The State Board's Permit Term 69 - Passage of Water for Fish – can be added to permits when requested to do so by the Department of Fish and Wildlife. However, it is the responsibility of the owner of a dam to comply with Code Section 5937, whether or not it is specifically stated in the water right permit or license issued by the State Board (personal com. Chris Murray, July 24, 1998). This has been the case since 1975.

Flow regimens to keep fish in "good condition" have not been established for all tributaries to the Delta. The State Board is in the process of developing such flow regimens to protect public trust resources, uses and values including beneficial uses.

In United States v. State Water Resources Control Board, (227 Cal. Rpt. 161 -1986, also called Racanelli) the Court determined that the operation of reservoirs, duration and timing of diversions to storage, direct diversions, and hydro-electric generation releases alter the amount, timing and temperature of stream flows as they pass downstream to the Delta. The Court reasoned that the State Board should take a "global perspective" and consider all competing upstream diverters and polluters and past, present and future beneficial uses of water in its water quality and water planning activities (pg179-180). The Court reasoned that since all reservoir projects and all diverters of water are a part of the problem, it is only reasonable that all have a responsibility to contribute their "fair ecological share" of the unimpaired stream flow to support the ecological conditions necessary to protect, conserve and restore

downstream resources and values protected by the public trust. This “fair ecological share” of stream flow would pass from the headwaters, commingle with others waters passing downstream through the tributaries to the Sacramento and San Joaquin Rivers to the Delta, contributing to the protection of beneficial uses, water quality and other public trust interests of the Delta pool and to Delta outflow.

Interestingly, the Court in California v. United States, (438 U.S. 645 -1978), stated that the “cooperative federalism” of Section 8 of the Reclamation Act of 1902, requires that the United States comply with state water law unless there is a specific congressional directive to do otherwise. Therefore without a directive to do otherwise, it would follow that the Bureau is required to follow state water laws such as Fish and Game Code Section 5937 as well as the Public Trust Doctrine. The decision in United States v. California, (694 F. 2d 1171, 1176-77 9th Cir. Ct. of Appeals -1982), in Natural Resources Defense Council (NRDC) v. Houston, (9th Cir. Ct. of Appeals, filed June 24, 1998) (Friant Dam) clarified that on a facial review, Fish and Game Code Section 5937 would apply to dams operated by the Bureau of Reclamation.

Some interests believe the operation of Folsom / Nimbus Dams and Reservoirs is inconsistent with the Reclamation Act of 1902 and subsequent reauthorizations of the CVP including the CVPIA of 1992. The CVPIA directed the Bureau to protect fish and wildlife. This may require that project operations be modified (re-operated) to comply with applicable State and Federal water quality standards, and to obey State law. Courts have recognized that Fish and Game Code Section 5937 is California law (Cal Trout 1 and 2, Natural Resources Defense Council (NRDC) v. Patterson II, 333 F. Supp 2d 906 (E.D. Cal - 2004). In Patterson II, NRDC and DOI counsels agreed to the meaning of code section 5937. Patterson II (DOI) laid the path for applying Code Section 5937 to all Bureau of Reclamation Dams (Bork, et al. -2012). State law includes the Public Trust Doctrine, Clean Water Act - Section 401 certification, and water right laws. The timing and quality of discharges / releases from Folsom / Nimbus Reservoirs have not received Clean Water Act, Section 401 Certification by the State Board.

The Federal Water Pollution Control Act, as amended (33 U.S.C. 466 et seq.) has the goal of providing water quality that provides for the protection and propagation of fish shellfish and wildlife and provides recreation in and on the Nation’s waters. Section 401 requires that applicants for a Federal license or permit to construct or operate facilities involving any discharge to waters regulated by this Act, shall provide state certification that any discharge (i.e. activity) will comply with applicable provisions of Section 301, 302, 303, 306, and 307 of this Act and will be consistent with state law. The State should not certify the discharge of a FERC licensed project, until the owner of the dam, as required by Fish and Game Code Section 5937, agrees to provide the flow regimen necessary to protect and improve water quality to keep in “good condition” fish and other aquatic life throughout the length of the waterway affected by the operation of the project. This proposed action was clarified in PUD NO.1 v. Washington Department of Ecology, (114 S. Ct. 1900 -1994). The Supreme Court ruled that stream flow requirements are permissible conditions for Section 401 certification. As the language of Section 401(d) expressly states, any condition placed in a Section 401

certification, "-- shall become a condition on any federal license or permit--." Meeting the in "good condition" for fish of Fish and Game Code Section 5937 is a worthy condition.

The discharge of water at a temperature that can impact cold water habitats increases the susceptibility of Chinook salmon and steelhead trout to disease / infection, increase prespawning mortality, decrease the viability of eggs in female and sperm in male Chinook salmon and results in environment conditions conducive to increased predation. Elevated water temperature impacts summering over young and juvenile steelhead and increases the incidences of disease. In good condition would include water temperature to support a strong immune system to ward off disease and infections and holding and maturing adult Chinook salmon. Risk of disease is enhanced when water temperature are above 62 Degrees F and become very stressful accompanied by mortality at temperature above 63.5 degrees F (Titus - 2007). To protect and restore steelhead trout and Chinook salmon populations, stream flow, timing and duration of those flows and associated temperature criteria must emphasize high survival rates of several life stages (e.g, egg incubation, juvenile, smolt, migrating and holding adults). Where multiple life stages are present, temperature criteria should protect the most sensitive species and the most sensitive life stages. Regarding the outbreak of bacterial infection "rosy anus", Dr. William Cox of CDFW stated "this bacterial infection could resolve on its own if temperature would drop to a level so that the fish's immune system would prevail" (Titus per. Com Nov-2013, also see Titus - 2007). On the American River, high prespawning mortality suffered by adult fall-run Chinook salmon holding as they wait for water temperature to initiate spawning is a frequent concern mentioned in CDFW annual Chinook Salmon Spawning Escapement Survey reports.

The people of California learned in 1897 from People v. Truckee Lumber Co. that the fish within our waters is unique property called wild game, the general right and ownership is with the people of the state, and the power to protect and preserve such property is a recognized prerogative of the sovereign. The people also learned that it is a well established principle that every person shall use and enjoy his own property, however absolute and unqualified his title, so his use shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the public. Truckee Lumber Co. was letting / dumping sawdust, slabs, shaving and other substances in to the Truckee River. The effect was to pollute the Truckee River, kill fish and other aquatic life and destroy a fishery. This pollution destroyed beneficial uses of the Truckee River as a water supply, as habitat for the fish trust - trout and a fishery. All of which was alleged to be in violation of the rights of the people, and a public nuisance. Truckee Lumber Company's pollution acts were deemed to violate the rights of the people and a public nuisance under statute and common law. The State's police powers were used to enjoin Truckee Lumber's actions.

The Bureau of Reclamation operates the Folsom / Nimbus facilities of the CVP. Folsom Reservoir accumulates heat from solar radiation and high temperatures during the long summer. Stratification of Folsom Reservoir occurs during most years. In the fall, natural seasonal cooling of this heat sink is delayed by several weeks. The present

facilities for managing the total reservoir storage including the solar heated water, are inadequate to protect downstream beneficial uses and Chinook salmon and steelhead resources. The shutter facilities to the hydroelectric intakes are inadequate to manage the temperature of the water discharged from Folsom Reservoir. This discharge of heated water pollutes the cold water habitat of the Lower American River, has impacted and will continue to adversely impact beneficial uses, ecological values and habitats used by various life stages of steelhead trout and Chinook salmon, the people's fish trust. The extent of prespawning mortality (10 to 62 percent of the run has been lost, the incidence of disease / infections (rosy anus), can, in part, be attributed to elevated water temperature over 3 to 8 weeks from mid August, September, October and in a few years into mid to late November. Also see S.D. Warren Company, v. Maine Board of Environmental Protection, et al (547 U.S. 370 - 2006)

The discharge of this solar heated water from Folsom / Nimbus Dams and Reservoirs to the American River impacts water quality (cold freshwater habitats, i.e. holding, spawning and rearing) and steelhead trout and Chinook salmon resources "the people's property"; degrades beneficial uses; violates the California Constitution, Article X, Section 2; and the purpose and intent of the public trust under which these salmonid resources are held.

The Central Valley Project Improvement Act -1992 (PL 102-575, Title 34, Sec. 3406, (a) (1)(2)(3)) specifically provides that mitigation, protection, restoration and enhancement of fish and wildlife and their habitats, are project purposes having equal priority with such purposes as irrigation, power, and municipal water supply.

The Federal Power Act, as amended by the Electrical Consumers Protection Act (ECPA), Section 10(j) (1) provides that adequate and equitable means and measures to mitigate damages, protect, and enhance fish and wildlife shall be included in each FERC license issued. Section 27 of the Federal Power Act, as amended, states --

"That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

On the strength of the language of Section 8 of the Reclamation Act of 1902, that Fish and Game Code Section 5937 applies to dams operated by the Bureau of Reclamation (United States v. California , 694 F. 2d 1171, 1176-77 9th Cir. Ct. of Appeals -1982, in Natural Resources Defense Council v. Houston, 9th Cir. Ct. of Appeals, filed June 24, 1998). Following the same concept, with no language saying otherwise in the Federal Power Act, and with the Supreme Court ruling of PUD NO.1 that stream flow requirements, including water quality, are permissible conditions for Section 401 certification, it should follow that the meaning of Fish and Game Code Section 5937 would apply to owners of dams operated under FERC, whether or not the requirements of Section 5937 are specifically stated in the permit or license. Temperature criteria protective of various life stages of salmonid fishes is especially important if the runs of Chinook salmon and steelhead trout are to be increased on

rivers and streams of the Central Valley dominated by FERC licensed projects such as on the Feather, Yuba, Mokelumne, Tuolumne and Merced Rivers.

In the Central Valley the meaning of Fish and Game Code Section 5937 is that all dam owners would **first** determine the flow regimen necessary to maintain in “good condition” all fish and other aquatic life throughout the respective channel downstream as inflow to the Delta. And under Racanelli all water right holders would contribute their “fair ecological share” of flows needed to meet the water quality objectives of the Bay / Delta Water Quality Control Plan. If the criteria for fish in “good condition” are being met at the individual, population and community levels, one could believe that water quality objectives are being met and beneficial uses are being protected. Verification will be needed.

The State Board and FERC have encouraged parties needing permits or licenses to meet with resource agencies for the purposes of reaching a negotiated settlement. Some interests use such negotiations to nullify their obligations and mute the principles of the public trust doctrine. Several negotiated settlements have been submitted to the State Board, and to FERC as representing agreements among water developers, resource agencies and selected interests. Some settlements were conducted behind closed doors and away from public input or overview. Settlements not developed through a public hearing of all the facts in front of a judge or other like body, but agreed to behind closed doors or massaged down the throats of resource agency managers as a special favor for special friends, are suspect by the environmental community.

Any negotiated settlement trumpeted as acceptable to resource agencies by the permit applicant, are clearly suspect. Such settlements must be reviewed to ascertain consistency with the intent of the various statutes, sworn testimony before the State Board, with recommendations prepared in agency reports. Also are recommendations capable of maintaining fish and other aquatic life in “good condition”? Are findings consistent with the principles of Audubon, Cal Trout 1 and 2, the public trust doctrine, and will they contribute the stream’s “fair ecological share” for meeting water quality objectives of the Bay / Delta?

Will the “coequal goals” of Water Code Section 85054 which states “Coequal goals” means the two goals of providing a more reliable water supply for California and protecting, restoring and enhancing the Delta ecosystem. The coequal goals shall be achieved in a manner that protects and enhances the unique cultural, recreational, natural resources and agricultural values of the Delta as a evolving place”. Until these goals are attained there will be no meaningful restoration and protection of fisheries, wildlife, recreation and aesthetic values of Central Valley rivers and streams.

To protect, conserve and restore the quality of the state’s waters and to provide the good conditions necessary for the natural spawning of Chinook salmon, steelhead, trout and especially those species candidate or those listed under the Endangered Species Act, are trust responsibilities. State and Federal resource and regulatory agencies must act as responsible trustees. Arbitrary and capricious administration of the trust should not be allowed or tolerated. Environmentalists, fish conservationists

and others of like interest must be ready to file a lawsuit against those who disregard or walk away from their duties and trust responsibilities.

End

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