

State of California

Before the State Water Resources Control Board

Board Order WR 2009-0033

**In the Matter of Specified License and Permits of the
State Water Project and the Central Valley Project**

**Board Order Approving a Change in the Place of Use of License and
Permits of the California Department of Water Resources and United States
Bureau of Reclamation in Response to Drought Conditions**

**Petition of Reconsideration by the California Salmon and Steelhead
Association**

**The California Salmon and Steelhead Association (hereinafter known as
“CSSA”) file a petition of reconsideration against Board Order WR 2009-
0033 as follows:**

**The Board Abused its Public Trust Authority When it Approved Board
Order WR 2009-0033**

Board Order WR 2009-0033 violates the Public Trust Doctrine as follows:

Public Trust Doctrine – Mono Lake Decision

**Before state courts and agencies approve water diversions they should
consider effect of such diversions upon interests protected by public trust,
and attempt, so far as feasible, to avoid or minimize ant harm to these
interests. We reference National Audubon Society v. Superior Court of
Alpine Decision.**

**Board Order WR 2009-0033 violates the Mono Lake Decision with reckless
disregard to the millions of striped bass species; threatened steelhead
trout species; and endangered Chinook salmon species that are harmed
and lost at the State Pumps from the continued operations of the State
Pumps by the California Department of Water Resources. Board Order WR
2009-0033 provides no relief to the people who own the public trust fishery
resources lost at the State Pumps nor any relief for the millions of fish
species lost at the State Pumps.**

**The public trust is more than affirmation of state’s power to use public
property for public purposes; it is an affirmation of the duty of the State to
protect 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 purposes of trust. We reference National Audubon Society v. Superior Court of Alpine Decision.

The loss of millions of striped bass species; steelhead trout species; and Chinook salmon species continues to occur at the State Pumps for about 30 plus years without the State Water Board taking responsible regulatory and legal actions in mitigating and reducing the fish losses at the State Pumps in all water rights decisions approved by the State Water Board that diverts the people's water using the State Pumps. Clearly the State Water Board has neglected their duty and responsibilities in carrying out their public trust duty and protecting public trust uses in Board Order WR 2009-0033.

The State Water Board, in undertaking planning and allocation of water resources is required by statute to take public trust interest into account. We reference California Water Codes 1243 and 1257.

Clearly the State Water Board has neglected their duty in carrying out their public trust duty under Sections 1243 and 1257 of the California Water Code and failed to protect public trust fishery resources of California that are damaged and harmed at the State Pumps. In fact the California Department of Fish and Game is absent from these proceeding in carrying out their duties and responsibilities to protect the people's fishery resources affected by the operations of the State Water Project and the Central Valley Project in Board Order WR 2009-0033.

The State as sovereign retains continuous supervisory control over navigable waters and lands beneath those waters and that principle, fundamental to concept of public trust, applies to rights in flowing waters as well as rights in tidelands and lakeshore. It prevents any party from acquiring vested right to appropriate water in manner harmful to interests protected by the public trust. We reference National Audubon Society v. Superior Court of Alpine Decision.

Clearly the loss of millions of striped bass, steelhead trout, and Chinook salmon species at the State Pumps and the change petition including the ongoing operations of the State Pumps is harmful to the people's fishery resources protected by the public trust, but lost and harmed at the State Pumps.

State has affirmative duty to take public trust into account in planning and allocation of water resources, and to protect public trust uses whenever feasible. We reference National Audubon Society v. Superior Court of Alpine Decision.

Board Order WR 2009-0033 did not take into account the protection of the people's anadromous fisheries lost at the State Pumps, a violation of the Public Trust Doctrine.

In exercising its sovereign power to allocate water resources in public interest, the state is not confined by past allocation decision which may be incorrect in light of current knowledge or inconsistent with current needs. We reference National Audubon Society v. Superior Court of Alpine Decision.

In Board Order WR 2009-0033, the State Water Board turns it's regulatory enforcement backside on the losses to the public trust fisheries lost at the State Pumps and approves new conditions based on former allocations that provide no protection measures for millions of fish species lost and harmed at the State Pumps.

Person claiming that use of water is harmful to interests protected by the public trust may seek Water Board determinations of allocations of water in stream system, a determination which may include reconsideration of previously granted in that system. We reference National Audubon Society v. Superior Court of Alpine Decision.

This Petition for Reconsideration is consistent with the Mono Lake Decision as shown above because Board Order WR 2009-0033 and the existing water right permits held by the California Department of Water Resources are harmful to the public trust asset lost at the State Pumps.

Conclusion\

The Board abused its discretion when approving Board Order WR 2009-0033 which violates the Public Trust Doctrine and the Mono Lake Decision.

The Board Abused Article X, Section 2 of the California State Constitution in Approving Board Order WR 2009-0033 by Allowing for the Unreasonable Method of Diversion at the State Pumps

"Section 2. It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which that are capable, and that the waste or unreasonable use or unreasonable method of diversion be prevented, and that the conservation of such water is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare." We reference California Constitution; Article X, section 2.

Clearly the diversions of the people's water at the State Pumps under the existing water right permits are the unreasonable method of diversion that violates the California Constitution because of the millions of fish lost at the State Pumps.

Further, the water allocated to the Central Valley Project and the State Water Project by the State Water Board is the cumulative unreasonable use and cumulative unreasonable method of use of the people's water because said allocations harm the public trust because of the lack of water to protect California public trust fisheries resources of the Sacramento River Watershed; Trinity River Watershed; American River Watershed; and the Bay Delta Estuary.

Conclusion

The Board abused its discretion when approving Board Order WR 2009-0033 violates Article X, Section 2 of the California State Constitution.

The Board Continues to Abuse California Fish and Game Code 5937 by failing to Enforcement State Law in Water Right Decisions and Board Order WR 2009-0033 to Protect the State Fisheries Under WR License and Permits held by CDWR and USBR at All Point of Diversion

California Fish and Game Code requires sufficient water at all times is released from dams to keep fish below the dams and downstream in good condition. We reference Natural Resources Defense Council v. Houston. (Friant Dam Decision – California Fish and Game Code 5937).

The Board and its staff on a regular basis in making decision on water right licenses and permits routinely violates California Fish and Game Code 5937 with reckless disregard for California fisheries that are owned by the people of California.

The point of storage and diversion for the State Water Project is Oroville Dam. The point of rediversion and use is the State Pumps. Because the rediversion of water at the State Pumps from Oroville Reservoir is having adverse effects to millions of fish species, the CDWR has violated California Fish and Game Code 5939 by failing to provide sufficient amounts of water into the Bay Delta Estuary and also preventing fish species from being harmed and lost at the State Pumps at the point of rediversion.

The same is true of the operations of the Central Valley Project by the US Bureau of Reclamation where water is stored at Shasta Dam; Trinity Dam; and the American River and rediverted at the Federal Pumps in the Bay

Delta Estuary. Consequently the USBR is in violation of California Fish and Game Code 5937.

It is a well-known fact that the Bay Delta Estuary has been adversely harmed by water diversions collectively by the State Water Project and the Central Valley Project.

Conclusion

The specified water right license and permits held by the Department of Water Resources and the US Bureau of Reclamation violates California Fish and Game Code 5937.

The Board Abused Their Discretion in Approving the Board Order WR 2009-0033 in Carrying Out the Governor's Emergency Drought Conditions

The Governor of California, the State Water Resources Control Board, including Board Order WR 2009-0033 do not have the authority and discretion to overrule and overturn the Public Trust Doctrine in Approving Board Order WR 2009-0033.

The Governor of California, the State Water Resources Control Board, including Board Order WR 2009-0033 do not have the authority and discretion to overrule and overturn the California Constitution in Approving Board Order WR 2009-0033

The Governor of California, the State Water Resources Control Board, including Board Order WR 2009-0033 do not have the authority and discretion to overrule and overturn the California Fish and Game Code 5937 in Approving Board Order WR 2009-0033.

Conclusion

The Governor of California and the State Water Resources Control Board do not have the discretion nor the authority to overrule and overturn the Public Trust Doctrine; Article X, Section 2 of the California Constitution; and California Fish and Code 5937 in matters pertaining to the people's public trust assets and resources affected by the Governor Drought Conditions.

The Board Failed to Provide any Evidence of the Storage at Reservoirs at the State Water Project and the Central Valley Project When Approving Board Order WR 2009-0033

Board Order WR 2009-003 did not disclose and provides hydrology records showing the amount of water stored at project reservoirs managed by the CDWR and the USBR. Without these water supply records the Hearing Officer and his staff cannot assert that there is not enough water in storage at the project reservoirs until the rains commence in November of this year, which is about five (5) months away.

Because of recent rainfall that provided more water (inflow) into the State Water Project and Central Valley Project reservoirs, the amount of water in storage at project reservoirs was not disclosed and evaluated in the Board Order WR 2009-0033. The Governor's Emergency Drought Conditions were developed long before the recent rainfalls. Consequently there was no disclosure and evaluation by the Hearing Officer and his staff regarding the amount of new water stored at Project reservoirs. Without the disclosure of the above information, Board Order WR 2009-0033 is grossly deficient and based on interagency politics between the Board, CDWR, and the USBR.

Conclusion

Without the hydrology records for the State Water Project and the Central Project, the Board has no idea how much of the people's water is in storage at reservoirs managed by the Department of Water Resources Control Board and the US Bureau of Reclamation. Without specific information the approval of Board Order WR 2009-0033 was written without the necessary information to make a reasonable decision that would be in the public interest.

Biological Opinion Never Prepared for Millions of Endangered Chinook Salmon and Threatened Steelhead Trout Lost at the State Pumps

We know of no biological opinion prepared by the US Fish and Wildlife and the US NOAA Fisheries, which mitigates for the harm and damage to the millions of endangered Chinook salmon and steelhead trout lost at the state pumps.

Relief Requested

- 1. Rescind and Revise Board Order WR 2009-0033 to comply with the Public Trust Doctrine and mitigate the losses of million of striped bass, Chinook salmon, and steelhead trout at the State Pumps;**
- 2. Rescind and Revise Board Order WR 2009-0033 to comply with Article X, Section 2 of the California Constitution and mitigate the losses of million of striped bass, Chinook salmon, and steelhead trout at the State Pumps;**

3. Rescind and Revise Board Order WR 2009-0033 to comply with California Fish and Game Code 5937 from all CDWR and USBR storage reservoirs to the point of rediversion at the state and federal pumps in the Bay Delta Estuary;
4. Rescind and Revise Board Order WR 2009-0033 and require a Biological Opinion is prepared for millions of endangered and threatened anadromous fish losses at the State Pumps pursuant to the state and federal Endangered Species Act before the Board approves any further water transfers using the State Pumps.
5. Rescind and Revise Board Order WR 2009-0033 and require an accountability by the CDWR regarding the specific amount of water stored at all State Water Project reservoirs north and south of the Bay Delta Estuary and the amount of water to be used by the Project by November 30, 2009, including water conservation measures;
6. Rescind and Revise Board Order WR 2009-0033 and require an accountability by the USBR regarding the specific amount of water stored at all Central Valley Project reservoirs north of the Bay Delta Estuary and in the San Joaquin River watershed and the amount of water to be used by the Project by November 30, 2009, including water conference measures.

We request the Board grants the above relief requested.

Respectfully Submitted

Signed by Bob Baiocchi

Bob Baiocchi (Signed by Bob Baiocchi)
Executive Director, Agent
Water Rights and Fisheries Consultant
California Salmon and Steelhead Association
E-Mail Address: rbaiocchi@gotsky.com

Dated: May 28, 2009

Certificate of Service

All Parties of Record;
Other Interested Parties (cc and bcc)