

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Alleged)
Waste, Unreasonable Use,)
Method of Use, or Method)
of Diversion of Water by)
LOS ANGELES COUNTY FLOOD)
CONTROL DISTRICT,)
Respondent,)
SIERRA CLUB ET AL.,)
Complainants.)

Decision 1460

DECISION DIRECTING PREVENTION
OF WASTE AND UNREASONABLE METHOD OF DIVERSION OF WATER

BY BOARD MEMBERS DODSON AND AUER:

The Sierra Club, having requested a hearing in the above captioned matter pursuant to Article 17.4, Title 23, California Administrative Code; an answer to that request having been received from the respondent; a public hearing having been held before the State Water Resources Control Board on November 12, 1975, in Calabasas, California; the Sierra Club, Los Angeles County Flood Control District, and other interested parties having appeared and presented evidence; the evidence received at the hearing and thereafter having been duly considered; the Board finds as follows:

Substance of the Project and Allegations

1. The Los Angeles County Flood Control District (hereinafter the District) has constructed a project on Dry Canyon and South Fork Dry Canyon (hereinafter Dry Canyon Project)

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in Los Angeles County which diverts all surface flows from the creeks into a storm drain, and also collects intervening tributary runoff by means of two lateral drains. The storm drain discharges back into the natural channel at a point downstream. The Dry Canyon Project affects approximately 3,500 feet of natural water course.

Complainant Sierra Club alleges that construction of the project has resulted in waste, unreasonable use, unreasonable method of use or unreasonable method of diversion of water, prohibited by Article X, Section 2 of the California Constitution (formerly Article XIV, Section 3).

Jurisdictional Matters

2. Respondent District contends that the Sierra Club lacks standing as an "interested or affected person" to initiate a request for a hearing under Article 17.4, Title 23, California Administrative Code. This contention is without merit.

The Board, as an administrative rather than a judicial agency, is authorized to conduct investigations, hold hearings, and initiate lawsuits on its own motion with respect to subjects within its jurisdiction. (See, for example, Water Code Section 275; Government Code Section 11180; People ex rel. State Water Resources Control Board v. Forni, 54 Cal.App.3d 743, 126 Cal.Rptr. 851.) The strict judicial concept of standing is therefore inapplicable to Board proceedings. The complaint of the Sierra Club, whose interest in preserving environmental values is well

known, merely served to trigger independent administrative action by the Board. This is the import of the second sentence of Section 764.11 (of Article 17.4), Title 23, California Administrative Code. Administrative precedent for the Board's conclusion on this issue is found in the provision for the public interest and environmental protest in water right application proceedings before the Board; the only requirement for "standing" as a public interest or environmental protestant is that the protest state facts supporting its allegations. (Section 719(e), Title 23, California Administrative Code.)

3. Respondent District further contends that it was acting within the scope of its statutory powers in constructing the project. There is no question that District is statutorily authorized to construct projects for flood control purposes. However, there is also no question that the District's authority cannot be interpreted to contravene express provisions of the California Constitution. (Hatfield v. People's Water Co. 25 Cal.App. 502, 144 Pac. 300.)

4. Other jurisdictional contentions of the District found to be without merit are the following:

a. That the Board lacks authority to conduct a hearing regarding a nonconsumptive, nonappropriative diversion.

Neither Water Code Section 275, nor the underlying constitutional provisions, nor any decisional law interpreting these provisions, make such a distinction.

b. That the jurisdiction of the Board is limited to the question of unreasonable method of diversion.

District advances no persuasive support for this contention and none can be found.

c. That environmental considerations of this project are not subject to further review.

Full disclosure of environmental impacts does not guarantee that a project will not adversely affect beneficial uses. Thus, compliance with the procedural requirements of the California Environmental Quality Act does not legitimize either waste of water or an unreasonable method of diversion of water within the meaning of Article X, Section 2 of the California Constitution.

Findings as to Waste, Unreasonable Use, Unreasonable Method of Use, and Unreasonable Method of Diversion

5. The preproject flows in Dry Canyon and South Fork Dry Canyon supported then existing legally cognizable beneficial uses, including recreation, and maintenance of wildlife habitat, esthetic values, and valued oak trees.

6. The District's project will remove all surface flows entering the upstream portions of the project area. Some runoff from the watershed tributary within the project reach will remain temporarily in the natural channels until removed by one of the two downstream laterals.

7. The removal of water by the project will have an adverse impact on the existing beneficial uses. There will be a

loss of vegetation; the lack of water in the channels will make the immediate area substantially less esthetically appealing to the local community; wildlife habitat will be lost.

Evidence was presented that the oak trees in the project area need water from 10 to 20 feet below the surface, that any significant lowering of the water table could offset the growth and vigor of the trees, and that they could die (see, e.g., RT 39, 46).

Although the evidence is insufficient to find to a certainty that the irreplaceable oak trees in the project area will necessarily die from lack of water, it is concluded that the trees bear a substantial risk of harm, a risk this Board believes need not be taken.

8. Rights to the water flowing in Dry Canyon and South Fork Dry Canyon are within the pueblo right of the City of Los Angeles. Evidence establishes that the project has no significant effect upon that right or upon the City's water supply. (RT 86, 87; District Ex. 2, "Correspondence", letter dated October 31, 1975, from Department of Water and Power of the City of Los Angeles to District.) On the other hand, no evidence was presented to show that, in the preproject condition, evapotranspiration loss in the reaches affected by the project was significant to the City's water supply, nor does the record show that salvage of water is a project purpose. It is therefore found that the project significantly adversely impacts existing beneficial uses associated with the affected reaches of Dry Canyon

and South Fork Dry Canyon without significantly augmenting the supply of water available for other beneficial uses.

9. The removal of all flows entering the upstream portion of the project area is not necessary to fulfill the flood control purposes of the project.

The record contains an unsubstantiated estimate that the flood control purposes could be met 90 percent as well with a low flow bypass. Evidence presented by qualified engineers and analysis thereof leads us to conclude otherwise.

10. The diversion of all flows is strongly opposed by residents of the immediate project area; students, faculty and administration of Calabasas High School, the grounds of which are traversed by the South Fork Dry Canyon channel; and persons expressing a regional and statewide environmental interest.

11. The adverse impacts on beneficial uses and associated risks to wildlife and other natural resources can reasonably be avoided if the District installs devices capable of bypassing low, nonflood flows at the entrance to the project facility on South Fork Dry Canyon (at the lower end of P.D. 1107) and at the inlets to the two downstream lateral drains.

CONCLUSION

THE BOARD FINDS THAT diversion of nonflood flows by the Los Angeles County Flood Control District in the Dry Canyon Project constitutes both a waste and an unreasonable method of diversion of water.

ORDER

IT IS HEREBY ORDERED that:

1. On or before January 1, 1977, the Los Angeles County Flood Control District shall submit to the Executive Officer of the State Water Resources Control Board, for his approval, design criteria for construction of devices capable of bypassing nonflood flows from its Dry Canyon Project into the natural channels at the entrance to the project facility on South Fork Dry Canyon (P.D. 1107) and at the inlets to the two downstream lateral drains.

2. On or before March 1, 1977, the Los Angeles County Flood Control District shall submit to the Executive Officer final plans and specifications for construction of such devices. The plan shall include a time schedule for completion of the necessary works, completion to be not later than October 1, 1977, and shall be satisfactory to the Executive Officer.

3. The Executive Officer is authorized to refer this matter to the Attorney General at any time for appropriate legal action, should the District fail to comply with the provisions of Nos. 1 and 2 above.

Dated:

Roy E. Dodson
Roy E. Dodson, Member

John E. Bryson
John E. Bryson, Chairman

Jean Auer
Jean Auer, Member

SEE ATTACHED
DISSENT FROM DECISION
W. Don Maughan, Member

SEE ATTACHED
DISSENT FROM DECISION
W. W. Adams, Member

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Dissent from
Decision

BY BOARD VICE CHAIRMAN W. DON MAUGHAN AND MEMBER W. W. ADAMS:

We respectfully dissent from the Board's Decision.

The key issue in this case concerns the absence of a low-flow bypass in the Dry Canyon Flood Control Project which, it is alleged, is needed to bypass water to sustain beneficial uses in the natural stream channels. Our review of the evidence, the staff report, and the Board's Decision does not persuade us. We find the Decision inappropriate both on the facts and as a matter of Board policy.

The Facts

First, we disagree with the conclusion drawn by the majority from the evidence. The majority conclude that the removal of water by the project constitutes both a waste and an unreasonable method of diversion of water. We believe that evidence on waste is not found in the hearing record. It is based on the unproven premise that the

project significantly adversely impacts on existing beneficial uses associated with the affected reaches of Dry Canyon and South Fork Dry Canyon without significantly augmenting the supply of water available for other beneficial uses. The evidence does not establish the extent of the relationship between preproject water, either surface flows or levels of ground water, and the natural vegetation, nor whether the flood control channel will reduce the availability of soil moisture to an extent that there will be significant adverse impacts on that vegetation. There was evidence that sources of surface and subsurface water will continue to be available under postproject conditions. There are conflicting statements, not hard facts, as to what might happen to existing vegetation.

Further, the evidence shows that the Department of Fish and Game representative testified that the project would not significantly affect wildlife habitat (RT 156, et seq.). The Department entered into an agreement with the District which the Director of that Department has characterized as providing adequate protection for wildlife resources affected by this project. (Letter of October 10, 1975, from E. C. Fullerton, Director, Department of Fish and Game.)

The majority conclude that the oak trees in the project area bear a substantial risk of harm from lack of water. However, as we have pointed out, the evidence is inconclusive as to the extent of surface and ground water before and after the construction of the project. In California, oak trees survive in natural conditions far removed from watercourses. Surely the roots of the oak trees must have access to moisture, but there is no hard evidence that this project will adversely affect these particular oak trees.

The remaining issue concerns whether or not the project constitutes an unreasonable method of diversion. As to this issue, we hold views similar to that stated above concerning the issue of waste resulting from the project. In addition, the record raises questions as to whether the full flood control purposes of the project can be met with a low-flow bypass modification. The District stated under cross-examination that 10 percent of the flood control protection might be lost with a low-flow bypass (RT 103). Others stated there would be no adverse effect on flood control. In light of the absence of conclusive evidence that the diversion would significantly impact on beneficial uses (i.e., the natural vegetation) and the conflicting testimony concerning flood control, we are unwilling to conclude that the method of diversion is unreasonable.

State Bond Policy

As a matter of policy, we do not believe that the Board has cause to require the District to obtain Board approval of design criteria, and of plans and specifications, for devices capable of bypassing non-flood flows, or to require construction of such works to be completed no later than October 1, 1977.


The project was approved by local authorities after completion of the entire Environmental Impact Report review process. The record shows that the District complied with the procedural requirements of the California Environmental Quality Act (CEQA). The majority seek not only to involve the Board in a new frontier concerning its authority, but seek to keep the books open indefinitely regarding environmental impacts of projects which relate to watercourses even where no water right permits are required, as with purely flood control projects. This


would mean that many highway culverts and almost any type of urban and rural development subject to CEQA that might affect riparian vegetation in stream channels, including those with intermittent flow, would not only have to abide by the regulations concerning environmental impacts, but would be subject to subsequent claim that the project results in a waste, unreasonable use, method of use or method of diversion of water.

It is apparent that the Board's hearing aroused the residents in the vicinity of the project much more than the District's EIR process. However, all had the opportunity during that process to participate. Perhaps the District did not inform the residents that they may be able to have both flood control and a low-flow bypass. But correction of the situation, if it is needed, sits on the doorstep of the Los Angeles County Board of Supervisors.

Finally, the extent and nature of the Board's authority under Water Code Section 275 has not been established. If the Board is legally authorized to take action against this project, a question on which we are not convinced, it should not do so without hard, conclusive evidence. Inadequate facts, as we believe we have in this case, risk poor legal precedent.

Dated: October 21, 1976


W. Don Maughan, Vice Chairman


W. W. Adams, Board Member

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Additional Concurring
Comments to
Decision 1460

BY BOARD MEMBER DODSON:

There is no doubt that the dissent expressed by Mr. Maughan and Mr. Adams is made in all sincerity. However, I feel compelled to point out that, having heard and read the same facts that the Dissent finds inconclusive and unconvincing, I come to exactly the opposite finding. Having toured the Dry Creek area I am convinced that, not only is there a threat of harm to the environment, there is a rather strong assurance of harm, even the destruction, of environmental values, especially of the many magnificent valley oak trees 100 or more years in age.

As to the policy question, it is easy to say that this Board should allow local agencies to decide local issues, and that this Board should exercise great caution in becoming involved in such a seemingly minor case which seems to threaten "home rule".

But when a very large and powerful and virtually independent single-purpose district makes no greater effort to consider the esthetic and other intangibles of the total environment than is evidenced in this case, I feel that this Board must be concerned and must take action.

There is no need to quibble about the meaning of various Code sections; the plain statements found in the California Environmental Quality Act and in the State Constitution are enough. The fact that this Board has not previously crossed into this "new frontier", merely indicates to me an overdue awakening as to what the law has said all along.

I would hope that the action of the Board, in adopting this perhaps landmark decision, will have a salutary effect on the Los Angeles County Flood Control District and on all other construction agencies in the State, to remind them that the law means what it clearly says.

Dated: OCT 27 1976



Roy E. Dodson, Member