

STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

In the Matter of Permits 11966, )  
11967, 11968, 11969, 11970, )  
11971, 11973, 12364, 12365, )  
12720, 12721, 12722, 12723, and )  
12724, and Licenses 9956 and )  
9957, on permitted Applications )  
5625, 5626, 5627, 5628, 9363, )  
9364, 9365, 15374, 15375, 15376, )  
16767, 17374, 17375, and 17376, )  
and on Licensed Applications )  
10588 and 15424 of )

ORDER: WR 91-03

UNITED STATES BUREAU OF )  
RECLAMATION. )

ORDER AFFIRMING ORDER WR 91-01 AND DENYING RECONSIDERATION

BY THE BOARD:

1.0 INTRODUCTION

Order WR 90-5 having established terms and conditions for fishery protection in the upper Sacramento River below Shasta Dam, Keswick Dam, and the Spring Creek Power Plant; litigation having been filed inquiring into the validity of Order WR 90-5 (United States v. State Water Resources Control Board, E.D. Cal.

No. CIV-S-90-0731 RAR/JFM, filed June 6, 1990; Central Valley Project Water Association v. State of California, Sacramento County Superior Court

No. 364286, filed June 6, 1990); the parties to the litigation having reached a negotiated settlement under which the Board on January 10, 1991 amended Order

WR 90-5 by adopting Order WR 91-01 and the litigation was dismissed; the California Sportfishing Protection Alliance (CSPA) having timely filed a petition for reconsideration of Order WR 91-01, the Board finds as follows:

2.0

**EFFECT OF CHANGES IN ORDER WR 90-5**

In Order WR 91-01 the Board made the following amendments to Order WR 90-5:

- a. The Board amended Condition 2 at pages 55-56 of Order WR 90-5 by (1) adding the phrase "subject to all the requirements of law, including the enactment by Congress of any necessary legislation" at the beginning, (2) amending the task descriptions for tasks regarding the Spring Creek Power Plant, (3) extending the required completion dates for each of the tasks, and (4) clarifying the procedures for preparation of any environmental documentation.
- b. The Board amended Condition 3 at pages 56-59 of Order WR 90-5 to substitute the phrase "measure water quality at the" for the phrase "collect water samples from" and to substitute for the column title "SAMPLING FREQUENCY" the title "MEASUREMENT FREQUENCY".

c. The Board added a condition which provides for the expiration of certain terms and conditions either 12 months after the Bureau of Reclamation (Bureau) has submitted the information required by Condition 2 at pages 55-56 of Order WR 90-5 as revised in Order WR 91-01, or 12 months after the Bureau has notified the Board in writing that there is an irreconcilable disagreement between the Board and the Bureau over the information required to satisfy Condition 2.

None of these amendments removes the immediate protection required by Order WR 90-5 for the salmon fishery in the upper Sacramento River. While Order WR 91-01 allows more time than Order WR 90-5 for the Bureau to construct the temperature control device on Shasta Dam and to provide the required information, the Bureau nevertheless is required to find a way to maintain the required temperature in the river. The Board did not change this protection when it adopted Order WR 91-01.<sup>1</sup>

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<sup>1</sup> The expiration of certain interim terms and conditions under Order WR 91-01 will not eliminate these protections. When the Bureau produces the required information, the Board will adopt permanent terms and conditions to replace these interim terms and conditions. Also the Bureau is obliged, under the federal Endangered Species Act, to protect the winter-run Chinook salmon.

3.0

**ALLEGED GROUNDS FOR RECONSIDERATION**

CSPA alleges as cause for its petition that the Board made errors in law when it approved Order WR 91-01. The Board's regulation at 23 Cal. Code Regs. Section 768 provides that error in law is a cause for reconsideration of a water right decision or order. CSPA alleges that the Board violated the California Environmental Quality Act and its regulations (CEQA), the California Water Code, the Public Trust Doctrine, the California Endangered Species Act, and the federal Endangered Species Act when it approved Order WR 91-01.

CSPA alleges five reasons for its position. Two, numbers 1 and 4, are essentially alike, since both allege that the Board violated CEQA when it adopted Order WR 91-01. In reason number 2, CSPA alleges that both Order WR 90-5 and Order WR 91-01 are unprotective of the salmon fishery because neither requires a reservation of cold water in Shasta Reservoir. CSPA asserts that not analyzing the effect of not adding such a requirement violates CEQA and the state and federal Endangered Species Acts.

In reason number 3, CSPA asserts that because the Board did not prepare an environmental document on Order

WR 91-01, it violated the public trust doctrine and Water Code Sections 1253 and 1257. (Both of these sections address the Board's responsibility when it considers applications to appropriate water. Section 1253 directs the Board to allow appropriations of unappropriated water for beneficial purposes under terms and conditions which in its judgment will best develop, conserve, and utilize in the public interest the water. Section 1257 directs the Board to consider the relative benefits from all beneficial uses of the water and the reuse or reclamation of the water, as proposed by the applicant.)

In reason number 4, CSPA contends that the Board should have prepared written findings regarding the amendments adopted in Order WR 91-01, to comply with CEQA, the Endangered Species Acts, and the Public Trust Doctrine.

Based on these allegations, CSPA asks the Board to (1) set aside Order WR 91-01 and prepare environmental documentation for the amendments to Order WR 90-5 under CEQA, the Public Trust Doctrine, and the Endangered Species Act, and (2) amend Orders WR 90-5 and 91-01 to require the Bureau to retain cold water in Shasta Reservoir for salmon spawning.

#### 4.0

#### DISCUSSION

#### 4.1

#### Environmental Documentation and Other Findings

CSPA's basic assumption is that Order WR 91-01 and Order WR 90-5 both require CEQA documentation. CSPA's other assertions, that the Board must make findings under the Public Trust Doctrine and the Endangered Species Acts, apparently are founded on the premises that Order WR 91-01 will have an adverse effect on the salmon fishery, so that findings are required under CEQA. Apparently CSPA believes that if a CEQA document and findings are required, findings will also be necessary under the other laws. CSPA has provided no explanation why CEQA documentation is necessary for either order.

In Order WR 90-5, the Board explained that Order WR 90-5 was exempt from CEQA because it was an enforcement action and because it was an action by a regulatory agency to protect natural resources and the environment. These exemptions were available because, based on the evidence, there was no reasonable possibility that Order WR 90-5 would have an adverse effect on the environment.

The only endangered species affected by Order WR 90-5, winter run Chinook salmon, was benefitted. When an action is exempt from CEQA, the Board is not required to consult formally with the Department of Fish and Game to satisfy the requirements of the California Endangered Species Act. See Fish and Game Code Section 2090. The Public Trust Doctrine does not require any specific findings, and the findings in the order explain that the order furthers protection of the fishery, a public trust use.

The Board's approval of the stipulated dismissal of the two lawsuits and adoption of Order WR 91-01 did not constitute a change in the Board's position regarding CEQA documentation for Order WR 90-5. Order WR 90-5 was exempt from CEQA. (The Board will proceed in accordance with Order WR 91-01.)

As was the case with Order WR 90-5, Order WR 91-01 is exempt from CEQA under 14 Cal. Code Regs. Sections 15307, 15308, and 15321(a)(2). Order WR 91-01 relies on the same evidentiary record as Order WR 90-5. No additional evidence has been received. Contrary to CSPA's assertions, nothing in Order WR 91-01 provides less in the way of current protection for the salmon fishery than Order WR 90-5 provided. While Order

WR 91-01, authorized additional time for the Bureau to comply with the construction and reporting requirements in Order WR 90-5, it did not change the operational requirements for temperature, ramping of changes in flow rates in the river, minimum instream flow rates, and Trinity River salmon fishery protection.

The change in completion dates does not result in any adverse change in the existing environment. The completion dates were established in order to set a reasonable and enforceable amount of time to complete the written materials and construction required by Order WR 90-5. Allowing additional time for construction of the temperature control device will allow a delay in the Bureau's being able to simultaneously generate power under low storage conditions when it releases cold water from Lake Shasta for fishery temperature control. This may affect power generation under certain conditions, but will not reduce the current fishery protection.

Once the temperature control device is installed and operating, the Bureau may be able to provide somewhat better protection of the fishery than can be provided only by releasing cold water from lower elevations in



the reservoir, but this does not mean that environmental documentation is required before the Board can extend the compliance schedule. CEQA requires environmental documentation when a state agency approves a project which may result in a significant adverse change in the existing environment, not when the agency takes no action or authorizes delays in implementing actions which would improve the existing environment. Likewise, delaying the completion of written submittals obviously also will have no effect on the environment.

#### 4.2 Request for Additional Requirement

CSPA also requests that the Board amend both Order WR 90-5 and Order WR 91-01 to require specifically that the Bureau retain in storage in Lake Shasta sufficient cold water for successful spawning of winter-run and other Chinook salmon.<sup>2</sup> The Board is not legally obliged to add this requirement, and made no error of law by not including it. Such a change was not within the scope of the meeting to adopt Order WR 91-01, which was convened to resolve the litigation. Further, we lack adequate information in the record to determine the exact parameters for such a requirement.

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<sup>2</sup> CSPA misinterprets the nature of these orders: each amends the Bureau's permits in succession. Literally CSPA is requesting that the Board reconsider both orders and add the requirement to the Bureau's permits twice. CSPA is too late to request reconsideration of Order WR 90-5.

The lack of a specific requirement to retain cold water in Lake Shasta for successful spawning of the Chinook salmon does not mean that the Bureau is free to release cold water that will be needed for temperature control later in the year. If the Bureau failed to meet the temperature control requirements in Order WR 90-5 because it did not retain sufficient cold water in storage, and retention of sufficient cold water was within the Bureau's reasonable control, the Bureau would be in violation of Order WR 90-5. Condition 1 of Order WR 90-5, at pages 54-55, requires the Bureau to meet a daily average water temperature of 56°F in the Sacramento River at Red Bluff Diversion Dam whenever higher temperatures will be detrimental to the fishery. The only exception to this requirement is when factors beyond the Bureau's reasonable control prevent the Bureau from maintaining 56°F at Red Bluff Diversion Dam. In such a case, the Bureau may, under specified circumstances after consultation with certain agencies, designate a location upstream where the Bureau will meet this temperature. Any new location must be reported to the Board's Chief of the Division of Water Quality and Water Rights, together with an operation plan. The Chief of the Division of Water Quality and Water Rights may approve or disapprove the change in

location. If the Bureau contemplates releasing an amount of water from Lake Shasta that could preclude subsequently meeting the Temperature requirement at Red Bluff Diversion Dam, the Bureau should immediately commence the required consultation and report to the Chief of the Division of Water Quality and Water Rights. In order to obtain approval for a shift in the control location, the Bureau would have to establish that retaining the water in storage instead of releasing it, is beyond the Bureau's reasonable control.

Based on these considerations, the Board rejects CSPA's request to specify the Bureau's operations to meet the temperature requirements.

## 5.0

### CONCLUSIONS

CSPA's assertion that the Board must prepare environmental documentation, conduct consultation, and adopt findings under CEQA, the Water Code, the Endangered Species Act, and the Public Trust Doctrine for Order WR 91-01 is unfounded. Likewise, the Board did not commit any error by not including in Order WR 91-01 any specific term establishing the cold water pool to be retained. The petition for reconsideration should be denied.

ORDER

IT IS HEREBY ORDERED that:

1. The petition for reconsideration filed by California Sportfishing Protection Alliance is denied.
2. Order WR 91-01 is affirmed.

CERTIFICATION

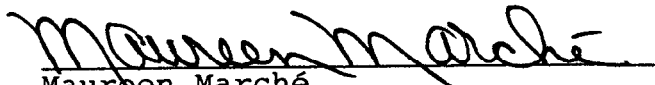
The undersigned, Administrative Assistant to the State Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on April 1, 1991.

AYE: W. Don Maughan  
Eliseo M. Samaniego  
John Caffrey

NO: None

ABSENT: Edwin H. Finster

ABSTAIN: None

  
Maureen Marché  
Administrative Assistant  
to the Board