

STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

In the Matter of Licensed )  
Applications 1389 )  
(License 9407), 2221 )  
(License 6000), and 2614 )  
(License 3987) )  
WALKER RIVER IRRIGATION )  
DISTRICT, )  
Licensee. )

ORDER: WR 90-16  
SOURCE: East Fork Walker  
River and West Fork  
Walker River  
COUNTY: Mono

ORDER TAKING FINAL ACTION  
ON PETITION FOR RECONSIDERATION

BY THE BOARD:

1.0 INTRODUCTION

On June 21, 1990, the Board adopted Order WR 90-9, which added a condition to each of the above-named water right licenses. The added condition directs the District to fully comply with Section 5937 of the Fish and Game Code by keeping the fish in good condition below the dams associated with the water right licenses.

2.0 PETITION FOR RECONSIDERATION

District filed a timely petition for reconsideration of Order WR 90-9. (Water Code Section 1357.) Grounds for reconsideration urged by District are that it was prevented from having a fair hearing and error in law. (23 Code of Calif. Regs 768(a), 768(b).)

10-11-90

### 3.0

#### THE FAIR HEARING GROUNDS

District alleges that it was prevented from having a fair hearing because it was not allowed to present evidence on two questions: (1) whether the appropriative water rights evidenced and confirmed by the licenses vested before September 9, 1953, the effective date of Fish and Game Code Section 5946; and (2) what stream flows associated with these licenses are necessary to keep fish in good condition.

### 3.1

#### The Vested Rights Question

The Board's predecessor issued water right permits to the District which authorized it to divert and reasonably and beneficially use waters of the East Walker River and the West Walker River. These permits underlie the water right licenses at issue herein. There is no material dispute over the timing and amounts of District's beneficial use of water pursuant to its permits; these facts are matters of record.<sup>1</sup> Accordingly, no evidentiary hearing is required to establish the timing and amount of District's water use. The issue is one of law.

#### 3.1.1

As authority for the action taken in Order WR 90-9, the Board relied upon two recent California appellate court

<sup>1</sup> These facts are shown by the Board's records associated with the District's water right applications in the form of periodic reports of water use filed by the District. No reason exists to challenge the veracity of these reports at this late date and no party has done so.

decisions which dealt explicitly with the scope of the Board's duty to implement Fish and Game Code Section 5946 with respect to water right entitlements issued in Fish and Game District 4 1/2. These decisions are California Trout, Inc. v. State Water Resources Control Board, 207 Cal.App.3d 585, 255 Cal.Rptr. 184 (1989) (hereinafter "Cal-Trout I"); and California Trout, Inc. v. Superior Court, 218 Cal.App.3d 187, 266 Cal.Rptr. 788 (1990) (hereinafter "Cal-Trout II").

3.1.2 District has presented its position on this issue in a letter sent to the Chief, Division of Water Rights, prior to the Board's adoption of Order WR 90-9. (Letter dated June 1, 1990, from Alan B. Lilly to Walter G. Pettit, subject: "Complaint by California Trout, Inc. Against Walker River Irrigation District Regarding East Walker River, Mono County".) We do not agree with District's legal argument on the issue. District argues that an important factual distinction exists between the license at issue in the Cal-Trout cases and the licenses under consideration here. In the Cal-Trout cases the court found that the licensee had not perfected its appropriation until many years after enactment of Section 5946. In contrast, it is argued, the District applied its full appropriations to

beneficial use well before enactment of Section 5946. Therefore, the District concludes, Section 5946 cannot be applied in this case without improperly and retroactively infringing on its vested water rights.

3.1.3 Although Cal-Trout I discussed the timing of the build-up in the licensee's utilization of water under its appropriation, that language appears in the context of an arguendo discussion. The court concluded that consideration of licensee's retroactive application argument would not produce a result more favorable to the licensee; the court did not hold that if water is put to use before 1953, Section 5946 would not apply to a license issued after 1953. The actual holding in Cal-Trout I is found in the following language:

"As related, the history of the section strongly suggests that section 5946 is meant to be applied to all projects of appropriation in District 4 1/2 that had not proceeded to license status prior to its effective date." (207 Cal.App.3d 585, 608.)

This point was confirmed in Cal-Trout II. There, the court observed:

"Hence, the appropriator can be compelled as the price of continued appropriation to take reasonable steps to attain the same end [i.e., restoration of creeks and fisheries] in a manner that does not involve unreasonable use of water." (218 Cal.App.3d 187, Fn. 6; emphasis added.)

3.2 Quantified Criteria for Compliance With Section 5937  
District poses the question, also on the grounds of fair hearing denial, of what stream flows associated with these licenses are necessary to keep fish in good condition? We have two responses.

3.2.1 First, Cal-Trout II clearly holds that the Board is not to delay compliance with Fish and Game Code Section 5946 pending development of quantified criteria. (218 Cal.App.3d 187, passim.)

3.2.2 Second, the Board is proceeding to develop quantified criteria. With regard to License 9407 (Bridgeport Reservoir), on July 26 and 27, 1990, the Board held a hearing on a complaint by California Trout, Incorporated, against the District's operations. The goal of that hearing was development of an order prescribing specific criteria for implementing the general requirement of Fish and Game Code Section 5937 that the fish below Bridgeport Dam be kept in good condition. An order proposing adoption of such criteria is expected to be presented for our consideration at the same Board Meeting at which the instant order will be considered.

We will proceed diligently to develop such specific criteria for the Topaz Lake licenses as well as other water right entitlements issued in District 4 1/2.

4.0

THE ERROR IN LAW GROUNDS

District's other contention is that the Board erred by not including certain additional language in the condition ordered added to the subject licenses by Order WR 90-9.

4.1

The first additional sentence that District would have us add is as follows:

The licensee shall release sufficient water into the streams from its dams to reestablish and maintain the fisheries which existed in them prior to its diversion of water.

District notes that the Court of Appeal's decision in Cal-Trout II, supra, directed the Board to include that sentence in the condition of the licenses under consideration by the Court in that case. District argues that "if the State Board is going to follow the Court of Appeal's directions on one sentence, then it also should follow those directions on the other sentence." We decline to add the requested sentence.

4.1.1

In Cal-Trout II, the court had before it a record which led it to conclude that restoration of the pre-project fishery was the correct implementation of Section 5937 on the facts of that case. Section 5937 also permits, under appropriate circumstances, an alternative

implementation which would require the dam owner to keep in good condition any fish "that may be planted" below the dam.<sup>2</sup> As is apparent from our related proceeding on License 9407 (Bridgeport Reservoir), the goal of implementing Section 5937 therein is not restoration of a pre-project fishery but maintenance of a highly valued fishery consisting most importantly of an introduced, and periodically restocked, species.<sup>3</sup> As noted above, we will address in our order in the related proceeding the specific criteria for implementing Section 5937 in License 9407. Accordingly, we decline to adopt the general language proposed by the District.

4.1.2 As for Licenses 3987 and 6000 (Topaz Lake), at this time we have no record upon which to determine whether additional implementing language is necessary, and, if it is, what the thrust of that language should be. Accordingly, we conclude that it would be inappropriate to add the requested sentence.

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<sup>2</sup> Fish and Game Code Section 5937 provides in pertinent part:

*The owner of any dam shall allow sufficient water at all times to pass through a 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.*

<sup>3</sup> There may be other situations where the language suggested by District would be inappropriate. For example, if the pre-project fishery had been impaired by pollution or illegal diversions, and these problems have been corrected, a dam owner's duties under Section 5937 should not be limited to maintenance of the pre-project fishery.

4.2

Finally, District would also have us add the following sentence:

In the case of a reservoir, this condition shall not require the passage or release of water at a greater rate than the unimpaired natural inflow into the reservoir.

In support of this request District notes that the language of a Board rule (23 Calif. Code of Regs 782) includes the requested qualification of the general condition.

4.2.1

While the rule does include that qualification, the rule is not applicable to this case. It applies only to permits issued after the regulation was adopted in 1975. (See 57 Ops.Cal.Atty.Gen. 557, 580 (1974).) Moreover, by the terms of the rule, the language that District would have us add applies only when the Board does not set a more specific provision for protection of fish. The rule cannot be understood as adopting an interpretation of Section 5937 that releases in excess of concurrent inflows to the reservoir are never required.

4.4.2

We cannot accept an interpretation of Section 5937 which in no case would allow compliance through releases which may exceed concurrent inflows to the reservoir at certain times of the year, because such an interpretation would be inconsistent with the rule



favoring a physical solution to promote maximum beneficial use of water. (See City of Lodi v. East Bay Municipal Util. Dist., 7 Cal.2d 316, 60 P.2d 439 (1936).) For example, in a particular case, there may be two ways of maintaining fish in good condition. One flow regime may require very high winter and spring flows but allow for very low summer flows, with flows never exceeding natural levels. Another flow regime may allow storage of large volumes, and moderate stream flows, in the winter and spring, with higher than natural flows in summer.<sup>4</sup> Under the District's interpretation, the Board would have to adopt the former flow regime, even if the latter provided equal protection for fish and allowed more water to be diverted and used for other purposes. Such an interpretation would be inconsistent with Article X, Section 2, of the Constitution. Accordingly, District's request to add the above-quoted qualification to the condition ordered added to the subject licenses by Order WR 90-9 should be denied.

#### ORDER

1. The relief sought by District in its Petition for Reconsideration is denied.

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<sup>4</sup> We do not, by stating this example, imply that it is necessarily applicable to the operation of Bridgeport Reservoir pursuant to License 9407.

2. This Order shall constitute the Board's final action on the  
Petition for Reconsideration.

CERTIFICATION

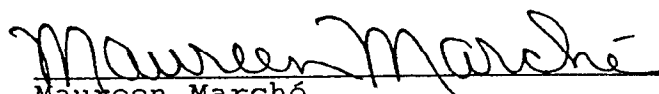
The undersigned, Administrative Assistant to the State Board,  
does hereby certify that the foregoing is a full, true, and  
correct copy of an order duly and regularly adopted at a meeting  
of the State Water Resources Control Board held on November 7,  
1990.

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

NO: None

ABSENT: Darlene E. Ruiz

ABSTAIN: Edwin H. Finster

  
Maureen Marché  
Administrative Assistant  
to the Board