

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Application 19351)
and Permits 12947A, 12949, 12950, and)
16596 Issued on Applications 12919A,)
15736, 15737, and 19351,)
SONOMA COUNTY WATER AGENCY,)
Applicant and Permittee.)

ORDER: WR 86- 9

SOURCES: East Fork Russian
River, Russian River,
and Dry Creek

COUNTIES: Sonoma and Mendocino

ORDER AMENDING DECISION 1610 AND DENYING
PETITIONS FOR RECONSIDERATION OF DECISION 1610

BY BOARD MEMBER FINSTER:

1.0 BACKGROUND

On May 16, 1986, Mendocino County and Mendocino County Flood Control and Water Conservation District (hereinafter together referred to as Mendocino) and Mendocino County Russian River Flood Control and Water Conservation Improvement District (hereinafter referred to as Improvement District), petitioners, filed with the State Water Resources Control Board (hereinafter Board) petitions for reconsideration of Water Right Decision 1610.

In Water Right Decision 1610, the Board approved in part Application 19351 for direct diversion of 180 cubic feet per second (cfs) of water from the Russian River and approved in part several petitions of the Sonoma County Water Agency (hereinafter sometimes referred to as SCWA or permittee). The Board approved the following petitioned changes:

1. An extension of time under Permits 12947A, 12949, and 12950, to complete construction by December 1, 1995, and to complete the application of water to beneficial use by December 1, 1999;
2. An increase in the maximum combined rates of direct diversion and rediversion of stored water at Wohler and Mirabel Park under Permits 12947A, 12949, 12950, and 16596 from 92 cfs and 37,544 acre-feet per annum (afa) to 180 cfs and 75,000 afa;
3. A change in the place of use, adding the service area of the Redwood Valley County Water District to Permit 12947A;
4. Removal of restrictions in Permit 16596 on use of stored water; and
5. Authorization to divert stored water up to 75,000 afa under Permit 16596 at Wohler and Mirabel Park.

2.0 MENDOCINO'S PETITION

In its petition for reconsideration, Mendocino makes eight separate requests. Requests 2 and 3 are similar and can be discussed together. Generally, Mendocino's requests are directed toward preventing what Mendocino believes is an impairment of existing or inchoate future water rights within Mendocino County. For reasons set forth below, Mendocino's fears are unfounded.

2.1 Finding 14.3.2:

First, Mendocino requests that Finding 14.3.2 be deleted. In finding 14.3.2 the Board found that inadequate water is available to serve

fully all of the beneficial uses of water from the Russian River and its tributaries above Healdsburg. Therefore, the Board further found that no permits should be approved from the river or any tributary without an affirmative showing that the applicant has an alternate supply of water during any period of unavailability of water.

Finding 14.3.2 was included both to resolve protests and because water users along the Russian River and its tributaries should be made aware that the amount of water that will be available to them in the future is limited. In order to sustain predicted development, additional water supplies may be needed. This finding refers back to findings 7, 8, 9, 10, and 13. Contrary to Mendocino's assertion in its points and authorities, this finding is based on copious data which constitutes substantial evidence.

Mendocino seems to fear that this finding will put an extra burden on future applicants to appropriate water from the Russian River or its tributaries. It will not have this result. It is a prerequisite of the granting of any permit to appropriate water that there be unappropriated water available to supply the applicant. Water Code §1375. The burden of supplying information upon which this determination may be founded rightfully falls upon the applicant who will benefit from its production.

This finding does not preclude future appropriations from the Russian River and its tributaries in excess of the 10,000 acre-foot reservation for Sonoma County and the 8,000 acre-foot reservation for use under Permit 12947B. Appropriations in excess of these reservations

could be approved against Permit 16596 or against Permits 12949 and 12950, pursuant to the terms of those permits and pursuant to the County of Origin Law (Water Code §10500, et seq.).

2.2 Mendocino requests that the Board delete all findings which have the effect of "defining, limiting and determining" the scope and extent of the rights of Improvement District (request 2), and that all parts of the decision which impact Permit 12947B should be deferred until Permit 12947B is before the Board (request 3).

Mendocino's requests misunderstand the nature of the Board's findings. The Board's findings in Decision 1610 serve the sole purposes of supporting the permit terms and conditions set forth in the order and determining approximately the amount of water available to the permittee. Thus, they serve only to decide the rights of the permittee. They do not in any way impair or amend the water rights of the Improvement District. To the extent that they mention the Improvement District's rights, the Board's findings do so only for the purposes of determining, by accounting generally for senior rights, the amount of water available to permittee under its priority dates and to resolving points upon which protests have been made. It is long-standing law that the Board need not adjudicate the rights of all senior water users before finding that water is available for appropriation. Temescal Water Co. v. Department of Public Works, 44 Cal.3d 90, 280 P.2d 1 (1955). The Temescal decision recently was reaffirmed by the Court of Appeal, First Appellate District, in United States of America, et al. v. State Water Resources Control Board, Nos. A0 27690 and A0 30014, filed May 28, 1986.

2.3 Mendocino requests, in request 4, that the county of origin protection in Permit 12949 be amended to include the main stem of the Russian River.

The term in Permit 12949 to which Mendocino refers was neither affected by nor amended in the present proceeding. Amending the permit term as requested would have reduced the rights of the permittee by expanding the county of origin reservation over and above that originally placed on the permit. Such a change would be unrelated to any issue raised in the notice of hearing on this proceeding. Further, no nexus exists between the approval of any of the permittee's petitions and the imposition of the requested permit amendment. Thus, the requested change cannot be made in this proceeding.

Assuming for sake of argument that the requested amendment is appropriate, the time to have amended Permit 12949 as Mendocino now requests was in Order WR 74-30. In that order, the Board amended Permit 12947A to make 10,000 afa from Permit 12947A available for appropriation by other water users in the Russian River Valley in Sonoma County. The action on Permit 12947A, together with the deletion of points of diversion in Permit 12949 above Wohler and Mirabel Park, may have indirectly increased permittee's ability to export water from the Russian River under Permit 12949. If the action in Order WR 74-30 is the "expansion" which Mendocino cites, Mendocino should have challenged it in a petition for reconsideration of Order 74-30 or in a petition for writ of mandate filed within 30 days after final action by the Board in

that proceeding. Water Code §1360. Mendocino is too late to challenge that action at this time.

Mendocino's request for a finding on why the Board has not decided to amend Permit 12949 in the manner requested is inappropriate. If the Board attempted to make findings on every action that it did not choose, its decisions would be excessively long and largely irrelevant to the actions taken. The purpose of making findings is to support conclusions and orders made by the Board in its decision. Topanga Association for a Scenic Community v. County of Los Angeles, 11 Cal.3d 506, 522 P.2d 12 (1974). Consequently, when the Board makes no order, no finding is required.

- 2.4 Mendocino's fifth request is that the Board amend Order paragraph B.12 regarding Permit 12947A in Decision 1610 (page 56) to provide that jurisdiction may be exercised if the import of Eel River water is substantially reduced pursuant to a court judgment. Mendocino's request is based in part on an assertion that certain Indians in Mendocino County may file suit to increase the flows of the Eel River downstream from Pacific Gas and Electric's diversion point at Lake Van Arsdale. Since the hearing record is closed and the offered evidence is hearsay of a speculative nature, the Board will not receive the evidence on this point offered on May 16, 1986 by the Mendocino County Counsel, and will not base its decision on such evidence. However, Mendocino's argument is well-taken that order paragraph B.12. is too narrowly drawn.

A result of an increase in the flows in the Eel River below Lake Van Arsdale would be a decrease in the imports of Eel River water to the East Fork Russian River. In Decision 1610 the Board reserved jurisdiction in its order to deal with specified possible future events that could affect the appropriateness of the minimum flow requirements for the Russian River. Order paragraph B.12. is too restrictive to respond to all possible court or administrative decisions that could affect the minimum instream flows. Therefore, we will amend Order paragraph B.12. as it applies to final administrative or judicial actions. Further, since identical reservations of jurisdiction are included in each of the four permits before the Board in this proceeding, we will likewise amend the corresponding order paragraphs.

2.5 Mendocino's sixth request is that permittee be required to participate in further fishery studies, contrary to finding 14.3.1. We will not grant this request. No substantial evidence exists in the record to support a requirement that the permittee participate in further fishery studies. Also, any future adverse effects on the fisheries will be caused by other diverters and the diminishment of the storage capacity of Lake Pillsbury through sedimentation, not the permittee. Since the other diverters are primarily individual citizens of Mendocino and Sonoma Counties, the two counties in carrying out their public interest duties are proper entities to do any fishery studies, along with the Department of Fish and Game.

2.6 Mendocino's seventh request is that the minimum flow requirement in the Russian River be changed to not exceed 150 cfs. Mendocino asserts that there is no evidence that 185 cfs is needed or is more beneficial

than 150 cfs. However, Mendocino submitted no evidence showing that the flows should be reduced to 150 cfs during the times when 185 cfs is required. A 185 cfs flow is required only in certain months during years when normal water supply conditions exist.

We disagree with Mendocino's assertion that the 185 cfs flow requirement is unsupported by the evidence and not better than 150 cfs. The factual bases for requiring the 185 cfs flow during the spring and summer under normal water supply conditions are:

- a. The evidence provided by the Department of Fish and Game shows that in the range of flow levels considered by the Board, a flow reduction will cause reductions in fishery habitat and population proportionate to the flow reduction;
- b. 185 cfs is the flow closest to historical summer flows in the Russian River for fish;
- c. A reduction below the level available under normal water supply conditions would cause a significant adverse environmental impact compared with the existing physical situation prior to the Board's recent action. (See 14 Cal.Admin.Code §§15382, 15064, and 15065.);
- d. Based on the evidence, 200 cfs is the flow requirement for steelhead trout rearing habitat from May through August. This flow will be provided more often by a minimum flow requirement of 185 cfs, allowing for a 15 cfs operating range, under normal year conditions than it would be provided by a 150 cfs minimum flow requirement.

The change in minimum instream flow requirements does not require an increase in stream flows. Instead, the required minimum flows of 185 cfs are somewhat less than those which regularly have existed since Coyote Dam was constructed. Further, as expected levels of demand take place and sedimentation continues in Lake Pillsbury minimum flows for normal water supply conditions will be operative less and less frequently. Thus, the 185 cfs minimum flow will be required only when adequate water is available to support it.

Mendocino attempts to support its attack on the minimum instream flow requirements by asserting, first, that the release requirements violate the Improvement District's rights under 23 Cal.Admin.Code §763.5, and second, that the minimum flow requirements exceed permittee's rights under Permit 12947A and should not in any way depend on natural flow in the watershed below Coyote Dam.

The requirement of 23 Cal.Admin.Code §763.5 is that the Board will not require a permittee to release or bypass water authorized to be appropriated under the permit unless certain prerequisites exist. These prerequisites include: (a) reservations of jurisdiction to require the bypass or release of water and (b) exercises of the Board's continuing authority. Both of these prerequisites are available to support the Board's action as to the permittee, and only the permittee's rights are affected by the minimum flow requirements in Decision 1610. Decision 1610 in no way requires the Improvement District to release or bypass water which it is entitled to use. To construe the joint storage authorization under Permits 12947A and

12947B as meaning that the Improvement District must give permission for withdrawals from storage under SCWA's permit is without basis. Mendocino in its attempt to protect the Improvement District's rights is confusing the joint right to store water in Lake Mendocino with the individual rights of the two permittees to withdraw water from Lake Mendocino separately under their two permits.

Mendocino makes a second point to support its opposition to the minimum instream flow requirements. However the point is hard to understand. Apparently, Mendocino finds fault with the idea that any remaining unappropriated water in the Russian River might be devoted to public trust uses rather than being appropriated for consumptive uses. Contrary to Mendocino's implication, the Board's jurisdiction to require minimum instream flows is not restricted to reservations of jurisdiction; it includes continuing authority under the public trust doctrine. Assuming for sake of argument that flows in the river exceed the amount appropriated by permittee under all of its permits and not simply Permit 12947A, there is no reason why such other flows cannot replace otherwise required storage releases to meet minimum flows. Nor is there any reason why flows needed for public trust uses cannot be withheld from appropriation. National Audubon Society v. Superior Court, 33 Cal.3d 419, 189 Cal.Rptr. 346 (1983).

- 2.7 Mendocino's final request is that the Board make a specific detailed finding on why the provision of a canoeing flow in the summer is required by the public trust and better serves the public interest than other beneficial uses.

However, the Board provided no minimum flow requirement specifically for canoeing. While the higher of the minimum flow requirements may accommodate canoeing under normal water supply conditions, insufficient water will be available to support canoeing every year. To the extent that the minimum flow requirements proposed by the permittee and the Department of Fish and Game would have tended to support canoeing at the expense of fishlife during the normal water supply conditions after a dry spring, we decreased the required minimum flow during the summer season, which is the peak canoeing season, to 150 cfs in order to provide flows of 150 cfs in the fall for passage of fish and in order to prevent the drastic reduction in habitat if flows were reduced to 75 cfs in the fall. Thus, it is a miscomprehension of Decision 1610 to suggest that it provides flows specifically for canoeing. Insufficient water is available to continue to support canoeing at the flow levels which existed between 1959 and 1985.

2.8 Finally, Mendocino asserts in its points and authorities that flows from Lake Mendocino should not be used for public trust purposes. Apparently Mendocino thinks that the public trust applies only to water naturally present in a watercourse. Mendocino is incorrect in this assumption. Several cases have been decided in this state in which public trust uses of waters artificially present in a watercourse have been protected. State v. Superior Court (Fogerty), 29 Cal.3d 240, 172 Cal.Rptr. 713 (1981); Bohn v. Albertson, 107 Cal.App.2d 738, 238 P.2d 128 (1951).

Further, the most recent decision on the public trust, National Audubon Society v. Superior Court, 33 Cal.3d 419, 435, 189 Cal.Rptr. 346, 356 (1983) makes it clear that the public trust applies to all navigable waterways; not just those that would exist without man's influence.

3.0 IMPROVEMENT DISTRICT'S PETITION

Generally, the Improvement District's petition makes the same points as Mendocino's petition. To the extent that a discussion of the Improvement District's petition would repeat the discussion of Mendocino's request, we herein refer to part 2 of this Order.

3.1 The grounds of the Improvement District's Petition for Reconsideration all are based on the assumption that the Board in some fashion impaired, interpreted, altered or amended the Improvement District's water rights by adopting Decision 1610. As discussed in part 2.2 above, the Board did not affect Improvement District's rights by its decision. Instead, it amended only the water rights of permittee Sonoma County Water Agency. To the extent that it discussed Improvement District's rights, it repeated almost verbatim such provisions of Permit 12947B and the related assignment of the original state filing as were necessary to deduce the amount of water available to permittee and interpret permittee's rights.

3.2 In its points and authorities, Improvement District requests rehearing on several grounds related to its assumption that its rights were limited, amended, altered or interpreted in Decision 1610. These are discussed briefly below.

- 3.2.1 Regarding point A-1, to the extent that the Improvement District's right may be limited to 8,000 afa, it is so limited by Permit 12947B, not by Decision 1610. Decision 1610 merely repeats the contents of Permit 12947B.
- 3.2.2 In point A-2, the Improvement District asserts that in Finding 15.4 (apparently Improvement District meant to refer to Finding 15.5) the Board has interpreted the Improvement District's rights to approve exports of water outside the service areas of the Improvement District and the permittee. However, the Improvement District misreads finding 15.5. The finding determines instead the right of SCWA to export water under Permit 12947A, notwithstanding Improvement District's opposition to such export. Thus, this finding resolves a basis for Improvement District's protest against SCWA's petitions. It is appropriate for the Board to make such a determination in the course of its decision. As set forth above, the Board may, in the course of deciding rights under entitlements that are before it, take account of senior rights without making binding determinations as to the senior rights. Temescal Water Company v. Department of Public Works, 44 Cal.3d 90, 280 P.2d 1 (1955). If the Board accepted Improvement District's argument, it would be impossible to make a decision on any single permit, and an adjudication would have to be conducted before approving every application.
- 3.2.3 In point A-3, Improvement District asserts that in Finding 15.4 the Board has interpreted Improvement District's Permit 12947B, as to the right to buy water rights from SCWA. This is incorrect. The Board

has interpreted SCWA's rights under Permit 12947A, not Improvement District's permit. This result is supported by Temescal Water Company, supra.

3.2.4 In Point B, Improvement District states its belief that in Finding 7.1 the Board found no water would be available for direct diversion under Application 19351 after year 2020 demand levels are reached. Consequently, Improvement District asks that SCWA be given no permanent right to divert water from the Russian River, and that Permit 16596 be conditioned on the right to divert only so long as water is available.

First, the Board did not find that no water would be available at all by direct diversion under year 2020 demand levels for Permit 16596. Instead, it found that the supply would become less reliable. When it is available, however, SCWA will have a right to take it.

It is unnecessary to add any terms or conditions to Permit 16596 to ensure that SCWA can take only so much water as is available under the direct diversion portion of the permit. This permit, like all other permits, is subject to prior rights and to the availability of water for its priority date. It is also subject to all present and future appropriations for use of water within the Russian River watershed and to maintenance of minimum downstream flows.

3.2.5 In point C, Improvement District asserts that the minimum instream flow requirements in Decision 1610 are not supported by the evidence and that the environmental studies (presumably the Environmental

Impact Report and its supplement) were inadequate. We disagree with the assertion that the instream flow requirements are unsupported by the evidence, for the reasons stated in paragraph 2.6 above. Further, the environmental documentation was adequate for the Board's use.

While it is correct that the Department of Fish and Game did not perform the elaborate state-of-the-art study that would have produced the most definitive estimate of stream flow requirements, the Department did do studies of the Russian River to estimate streamflow requirements. Additionally, the Department's expert witness had long-term experience with the Russian River, and testified based on his own observations concerning streamflow requirements. His testimony, together with the historical streamflow data, is sufficient to support the minimum flow requirements imposed by Decision 1610.

We did not, as Improvement District asserts, find that an additional study is necessary. Instead, we found that one should be done. We also found that we did not need an exact study to adopt Decision 1610 because there was inadequate water available to provide fully for the fisheries. We anticipated that a detailed study likely would provide information on factors that limit the salmonid fish populations, with instream flows being only one such factor.

Finally, we reiterate that the minimum flow requirements in Decision 1610 will not result in an increase in stream flows. Instead, the flows present in the river will decrease under these requirements as compared with flows since Coyote Dam began operating.

3.2.6 Improvement District asserts in point D that the Board did not adequately consider the environmental impact of future growth of population, agriculture and industry in Mendocino County and in the Alexander Valley.

Since the scope of this project is the distribution and use of water rather than an approval of future growth, we are unsure what the Improvement District means. However, if it is assumed that the Improvement District means to speak of the impact of Decision 1610 on these factors, then we can say that we did analyze the effects of projected future growth on the water supply, and assumed in Decision 1610 that future growth in these areas will be unchecked. Thus, Decision 1610 allows for growth in population, agriculture and industry, and will have no adverse impact on these interests up to the year 2020 if the population and land use projections used to estimate water demands are correct.

3.2.7 In point E, Improvement District raises the same issue raised by Mendocino in its first request. It is discussed in paragraph 2.1 above, which is incorporated by reference herein.

Finding 14.3.2 is not, as Improvement District asserts, a prejudgment of future applications to appropriate water. Future applications will be considered individually. Finding 14.3.2 serves, among other things, as a warning to the people within the Russian River watershed that at some time in the future additional water supplies may be needed.

3.2.8 In point F, Improvement District alleges that the Board's finding under 23 Cal.Admin.Code §729 is inadequate, and requests full and thorough findings.

As the administrative agency which adopted §729, the Board is uniquely qualified to interpret this section, and has done so. As we stated in finding 15.2, the requirement of §729 is satisfied.

3.2.9 In point G, the Improvement District expresses the belief that the Board should have considered effects on public trust uses caused by water users other than SCWA. The Board did this, by taking account of all the present and expected future diversions within the Russian River watershed up to the year 2020 and balancing them against the public trust uses. These diversions constitute a component of the public interest in using water outside of the stream.

ORDER

NOW, THEREFORE, IT IS ORDERED THAT:

1. The petitions are denied.
2. Decision 1610 is amended at Order paragraphs A.12., B.12., C.7., and D.7., to read as follows:

"The State Water Resources Control Board reserves jurisdiction over this permit to modify, delete, or add minimum flow requirements or related criteria for the protection of fish and wildlife and the maintenance of recreation in the Russian River should (1) additional fishery studies be conducted in the Russian River, (2) unforeseen adverse impacts occur to the fishery or recreation in the Russian River, or (3) final administrative or judicial action result in modified minimum flow requirements in the Eel River."

"Action by the Board will be taken only after notice to interested parties and opportunity for hearing."

3. Decision 1610 is affirmed as amended herein.

CERTIFICATION

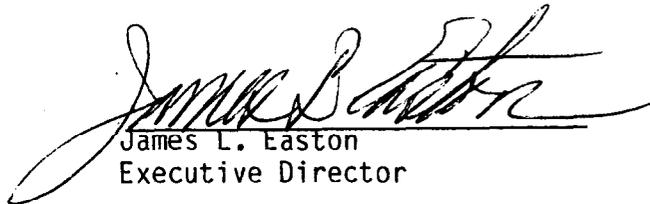
The undersigned, Executive Director of the State Water Resources Control Board does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on July 3, 1986.

AYE: Darlene E. Ruiz
Edwin H. Finster
Eliseo M. Samaniego
Danny Walsh

NO: W. Don Maughan

ABSENT: None

ABSTAIN: None


James L. Easton
Executive Director