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State of California

Before the State Water Resources Control Board

**Yolo County Flood Control and Water Conservation District,
Applicant**

Notice of Application 30358 to Appropriate Water

**Sacramento River thence the San Francisco Bay - San
Joaquin - Sacramento Delta Estuary thence Pacific Ocean**

**Public Trust Protest
by the California Sportfishing Protection Alliance**

We the California Sportfishing Protection Alliance (hereinafter known as "CSPA") of P.O. Box 357, Quincy, CA 95971, c/o Bob Baiocchi, Consultant, CSPA, have carefully read a copy of, or a notice relative to the above mentioned application to appropriate water from the Sacramento River.

Public Trust Protest

We desire to protest against the approval of said water right application because the proposed application has the potential to have adverse cumulative impacts to: (a) fresh water flowing into the Bay Delta Estuary; (b) fresh water flowing through and out of the Bay Delta Estuary; (c) water quality in the Bay Delta Estuary; (d) potential direct impacts to the environment at the site of the new reservoir; and (e) entrainment impacts to the public trust fishery resources at the point of diversion.

Application 30358

The applicant proposes to construct facilities for diversion of 250 cfs, not to exceed 45,000 acre-feet per year, from the Sacramento River. A portion of the water will be used directly for (1) municipal purposes within the cities of Davis, Woodland and Winters; and (2) irrigation and agricultural, aquacultural, and fisheries research purposes at the University of California at Davis. The remaining water will be used in a conjunctive-use program. Under this

program, water diverted from the Sacramento River will be used for irrigation of various crops on a portion of 168,600 acres within the District, thereby reducing the amounts of ground water that are pumped to irrigate these lands. Similar amounts of groundwater then could be pumped for municipal purposes by the cities of Davis, Woodland and Winters, and by the University of California at Davis. The applicant claims that the conjunctive-use program will help arrest land subsidence, minimize municipal, irrigation and research demands.

Four alternative points of diversion from the Sacramento River are being considered for the project, including four regulating reservoirs.

Diversion Point A is located at the existing Tehama-Colusa Canal diversion in Tehama County (Red Bluff Diversion Dam). The existing Tehama-Colusa Canal would be extended appropriately 92,000 feet from its present terminus in Yolo County. Water would then be conveyed to a regulatory reservoir via approximately 40,000 feet of buried reinforced concrete pipe 6 and 1/2 feet in diameter.

Diversion Point B is located at the existing Conaway Ranch diversion. Water would be diverted from the Sacramento River by a 4500 horsepower pump and conveyed to a regulatory reservoir via 55,000 feet of eight foot diameter reinforced concrete pipe.

Diversion Point C is located at the existing City of West Sacramento diversion. Water would be initially diverted through the existing diversion structure, but a new structure would be ultimately constructed. Water would be diverted from the Sacramento River by a 5000 horsepower pump and conveyed to a regulatory reservoir via approximately 72,000 feet of eight foot diameter reinforced concrete pipe.

Diversion Point D is located at a new diversion site on the west side of the Sacramento River about 12,000 feet downstream from the Interstate Highway 5 crossing. Water would be diverted from the river by a 4500 horsepower pump and conveyed to a regulatory reservoir via appropriately 53,000 feet of eight foot diameter reinforced concrete pipe.

Diversion Points B, C and D are located within Yolo County.

The place of use consists of 168,000 acres within all but the most northerly and westerly (along Cache Creek) portion of the District. This area generally lies between Putah Creek on the south

and Cache Creek on the north, and from the Yolo Bypass on the east and to the west of Interstate 505, including the communities of Esparto, Madison, Winters, Davis, and Woodland, and the University of California at Davis.

Under all alternatives, the applicant proposes to divert 250 cfs, not to exceed 45,000 acre-feet of water during all water year types.

We reference the October 14, 1994 public notice of application 30358 to appropriate water from the Sacramento River.

Statement of Facts

Facts which support the foregoing allegations are as follows:

1. We believe the San Francisco Bay - San Joaquin - Sacramento Delta is fully appropriated and in fact over appropriated. Consequently the application should be cancelled. We reference the data, information and findings contained in the State Water Resources Control Board's Draft Water Right Decision 1630 for the San Francisco Bay/Sacramento - San Joaquin Delta Estuary, dated December 1992.

2. We believe the public trust resources of the San Francisco Bay - San Joaquin - Sacramento Delta Estuary have been adversely impacted by the diversions of fresh water from tributaries flowing into the San Francisco Bay - San Joaquin - Sacramento Delta. We believe that the proposed project under application 30358 will in fact adversely impact the public trust resources of the San Francisco Bay - San Joaquin - Sacramento Delta Estuary. We reference the data, information and findings contained in the State Water Resources Control Board's Draft Water Right Decision 1630 for the San Francisco Bay/Sacramento - San Joaquin Delta Estuary, dated December 1992.

The State Water Board made the following findings as a result of testimony and evidence in the records for D-1630:

a) "The San Francisco Bay/Sacramento - San Joaquin Delta Estuary (Bay/Delta Estuary or Estuary) is at the center of California's water dilemma. The need for water to be exported from the Bay/Delta Estuary is obvious. Millions of people rely upon the water exported from the Bay/Delta Estuary for municipal, industrial, and agricultural purposes. At the same time, the detrimental impact of these exports on fish and wildlife living in or going through the Delta has been clearly established. This impact is recorded and documented in prior State

Water Resources Control Board (State Water Board or Board) decisions, water quality control plans, and in publications of other involved public agencies." (We reference the following: See Introduction - Page 4; State Water Resources Control Board's Draft Water Right Decision 1630 for the San Francisco Bay/Sacramento - San Joaquin Delta Estuary, dated December 1992)

b) "The public trust resources of the Estuary are in a state of decline. Adult fall-run Sacramento River salmon escapement was greater than 100,000 in the late 1960s; the 1991 escapement was less than 50,000. Adult spring-run Sacramento River salmon abundance is about 0.5 percent of the wild fish formerly seen in historic runs. San Joaquin River fall-run salmon escapement was approximately 70,000 in 1985; the 1991 estimated escapement was 430. Delta smelt have had a variable decline to persistent low abundance levels; the 1985 population level was 80 percent lower than the 1967-1982 average population. Adult striped bass abundance was estimated to be about 3 million in the early 1960s, and 1.7 million in the late 1960s; the 1990 estimate of naturally produced adult fish was 590,000. Abundances of shrimp and rotifers have declined between 67 percent and 90 percent from levels in the 1970s and 1980s. White catfish abundance has declined severely since the mid-1970s. Overall fish abundance in Suisun Marsh has been reduced by 90 percent since 1980." (We reference the following: See Public Trust Resources - Pages 29 and 30; State Water Resources Control Board's Draft Water Right Decision 1630 for the San Francisco Bay/Sacramento - San Joaquin Delta Estuary, dated December 1992)

Spring-run chinook salmon in the San Joaquin River watershed were extinguished by water projects. Water projects in tributaries to the Bay Delta have significantly reduced the amount of fresh water flowing into the Bay Delta, and from the Bay Delta to the Pacific Ocean. Sacramento River winter-run chinook salmon were nearly extinguished and are protected under the federal Endangered Species Act. Delta smelt were recently listed for protection under the federal Endangered Species Act. Steelhead trout populations have also declined and losses at the State Water Project Pumps have been documented by the Department of Fish and Game. Losses to American Shad population have occurred at the State Pumps, but are not documented by the Department of Fish and Game. Striped bass population have declined to historically low levels. Had the striped bass species been a nature fish, this species would have been listed for protection under the federal Endangered Species Act. However, striped bass species are a de facto endangered species and are the property of the people of the State of California.

c) "The declines in fish populations relate strongly to the location, method, and timing of diversions of water from and upstream of the Delta. Export pumping in the southern Delta, because of the amounts of water being pumped, the rate of pumping during the spring, and the resulting reverse flows, is a major cause of the fish population declines. The present drought has also been a contributing factor to these declines." (We reference the following: See Public Trust Resources - Page 30; State Water Resources Control Board's Draft Water Right Decision 1630 for the San Francisco Bay/Sacramento - San Joaquin Delta Estuary, dated December 1992)

d) "Sacramento River Salmon: The Sacramento River winter-run salmon is designated as a threatened species under the federal Endangered Species Act and an endangered species under the California Endangered Species Act. In the lower Sacramento River and Delta, the most effective method of protecting winter-run Chinook salmon is to prevent the diversion of outmigrating juveniles from their migration route down the Sacramento River from February 1 to April 30. Diversion occurs at the Delta Cross Channel, Georgiana Slough, and when there are reverse flows on the lower San Joaquin River. The National Marine Fisheries Service's (NMFS) recommendations for protection of winter-run Chinook salmon includes closure of the Delta Cross Channel, reduction or elimination of reverse flows in the lower San Joaquin River, and reduced exports. In the upper Sacramento River, protection of winter-run Chinook salmon requires the prevention of delays of upstream migrating adult salmon at the Red Bluff Diversion Dam and the maintenance of suitable water temperatures for spawning. " (We reference the following: See Public Trust Resources - Pages 31 and 32; State Water Resources Control Board's Draft Water Right Decision 1630 for the San Francisco Bay/Sacramento - San Joaquin Delta Estuary, dated December 1992)

e) "The Sacramento River fall-run Chinook salmon migrate through the lower Sacramento River and the Delta from April 1 to June 30. The survival problems encountered by this species in the Delta and the methods available to reduce these problems are the same as those cited above for the winter-run Chinook salmon. The fall-run salmon encounter the additional problems of elevated temperatures in the Delta. Upstream of the Delta during fall-run Chinook salmon spawning, the major concerns are high water temperatures and flow fluctuations after spawning which causes dessication of redds and the stranding of fry." (We reference the following: See Public Trust Resources - Page 32; State Water Resources Control Board's Draft Water Right Decision 1630 for the San Francisco Bay/Sacramento - San Joaquin Delta Estuary, dated December 1992)

f) "On the Sacramento River, flow objectives at Rio Vista were recommended for fall-run Chinook salmon smolt outmigration. The USFWS recommended a range of 2,500 to 6,000 cfs, depending on the level of protection, from April 1 to June 30 in all year types. The USFWS recommended the objective to insure that flow conditions in the Sacramento River do not get any lower than historically occurred. Flows required in the Sacramento River for winter-run Chinook salmon were not specifically identified." (We reference the following: See Public Trust Resources - Page 33; State Water Resources Control Board's Draft Water Right Decision 1630 for the San Francisco Bay/Sacramento - San Joaquin Delta Estuary, dated December 1992)

g) "Striped bass have been intensively studied and monitored in the Estuary. Because of this extensive effort, and because striped bass are assumed to be representative of a large group of estuarine resident fish species, it has been used as an indicator of the overall condition of the Estuary." (We reference the following: See Public Trust Resources - Pages 38 and 39; State Water Resources Control Board's Draft Water Right Decision 1630 for the San Francisco Bay/Sacramento - San Joaquin Delta Estuary, dated December 1992)

h) "DFG has been studying variations in abundances of estuarine species. For many species, no pattern of abundance has been observed which can be related to variations in Delta outflow or other obvious factors (salinity, temperature, etc.). However, strong correlations have been observed between variations in outflow and abundance of three species. The abundance of immature shrimp, Crangon franciscorum, correlates with average March-May Delta outflow, and the abundance of mature C. franciscorum correlates with average March-May Delta outflow of the previous spring. Significant correlation for other species of shrimp were not found. DFG also found a significant correlation between average February-May Delta outflow and the abundance of longfin smelt, Spirinchus thaleichthys. Likewise, DFG found a significant a significant correlation between the abundance of one-year-old starry flounder, Platicthys stellatus, and the average March-June Delta outflow of the previous spring. Shrimp and longfin smelt are important forage species, and starry flounder have been an important fishery in the Estuary. All three species have declined in recent years, at least in part because of the continuing drought. However, DFG expressed concern that increased freshwater consumption and export could result in a higher frequency of low-flow years, and thus make it more difficult for these species to recover." (We reference the following: See Public Trust Resources - Page 41; State Water Resources Control Board's Draft

Water Right Decision 1630 for the San Francisco Bay/Sacramento - San Joaquin Delta Estuary, dated December 1992.

i) "Suisun Marsh: Upstream water diversion and use reduce outflow from the Delta, thus increasing salinity in Suisun Marsh. Waterfowl habitat requiring lower salinity levels on the Channel Islands (Roe, Ryer, Freeman, and Snag) is, therefore, degraded by the impacts of upstream diversions." (We reference the following: See Public Trust Resources - Page 43; State Water Resources Control Board's Draft Water Right Decision 1630 for the San Francisco Bay/Sacramento - San Joaquin Delta Estuary, dated December 1992)

"Numerous rare, threatened, and endangered species of plants and animals inhabit Suisun Marsh and the tidal marshes along the south shore of Suisun Bay. Salinity levels are of concern for the marshes. Most of the legally-designated Suisun Marsh consist of managed marshes where controlled flooding and draining promotes waterfowl food production." (We reference the following: See Public Trust Resources - Page 43; State Water Resources Control Board's Draft Water Right Decision 1630 for the San Francisco Bay/Sacramento - San Joaquin Delta Estuary, dated December 1992)

j) "Delta exports have adversely affected the Bay/Delta Estuary's valuable resources. Direct and indirect impacts of export operations are significant causes of the Bay/Delta Estuary's decline." - "The present drought has also contributed to recent fishery declines." (We reference the following: See Water, Mitigation and Monitoring Funds - Page 50; State Water Resources Control Board's Draft Water Right Decision 1630 for the San Francisco Bay/Sacramento - San Joaquin Delta Estuary, dated December 1992)

k) "Storage capacity of major downstream reservoirs (Shasta, Oroville, New Bullards Bar, Folsom, Camanche, New Don Pedro, New Melones, Lake McClure and Millerton) on rivers that support substantial salmon runs in the Central Valley totals approximately 16.5 MAF. Storage capacity in CVP and SWP reservoirs constitutes approximately 73 percent of this amount of which 71 and 29 percent are owned by the CVP and SWP, respectfully." (We reference the following: See Water, Mitigation and Monitoring Funds - Pages 50 and 51; State Water Resources Control Board's Draft Water Right Decision 1630 for the San Francisco Bay/Sacramento - San Joaquin Delta Estuary, dated December 1992)

l) "The CVP has direct diversion water rights for consumptive uses and reservoir storage capacities totalling approximately 62,200 cfs and 13.7 MAF, respectfully, including Trinity River imports. The SWP

has direct diversion water rights for consumptive uses and reservoir capacities totalling approximately 23,500 cfs and 3.7 MAF, respectfully. The other major water users subject to this decision have direct diversion water rights claims for consumptive uses and reservoir storage capacities totalling approximately 107,000 cfs and 10.9 MAF, respectfully. Some duplication of water rights for the same water exists, e.g., for nonconsumptive and consumptive rights; for permits or licenses duplicating pre-1914 rights. Further, not all pre-1914 claims are verified and not all permits are pursued to full development. Therefore, the actual total rights are less than these figures indicated." (We reference the following: See Water, Mitigation and Monitoring Funds - Page 51; State Water Resources Control Board's Draft Water Right Decision 1630 for the San Francisco Bay/Sacramento - San Joaquin Delta Estuary, dated December 1992)

m) "Water development projects, other than the SWP and CVP, in the Bay/Delta watershed have also adversely affected fisheries. These diversions contribute to the decline of the Estuary's biota through habitat loss, flow reductions, and larvae and fish entrainment. Upstream exports from the watershed adversely affect public trust resources more than in-basin uses because upstream exports irretrievably divert flow from the watershed and the Delta." (We reference the following: (We reference the following: See Water, Mitigation and Monitoring Funds - Page 51; State Water Resources Control Board's Draft Water Right Decision 1630 for the San Francisco Bay/Sacramento - San Joaquin Delta Estuary, dated December 1992)

3. The proposed project has the potential to have direct and cumulatively adverse impacts to fresh water flowing into and through the Bay Delta Estuary.

4. The proposed project has the potential to have direct and cumulatively adverse impacts to water quality in the Bay Delta Estuary.

5. The proposed project has the potential to have direct and cumulatively adverse impacts to winter-run chinook salmon at the Red Bluff Diversion Dam and at the Tehama-Colusa diversion on the basis of a year round diversion. (Diversion Point A) Winter-run chinook salmon are protected under the federal ESA.

The proposed project has the potential to have direct and cumulatively adverse impacts to steelhead trout at the Red Bluff Diversion Dam and at the Tehama-Colusa diversion on the basis of a year round diversion. (Diversion Point A) A petition to list steelhead

trout in California as either threatened or endangered is before the U.S. National Marine Fisheries Service. A decision for said listing will be made by February 14, 1995. The CSPA is a party to said petition. We reference said petition.

6. The proposed project has the potential to have direct and cumulative adverse impacts to winter-run chinook salmon at the Conaway diversion. (Diversion Point B) Winter-run chinook salmon are protected under the federal ESA.

The proposed project has the potential to have direct and cumulative adverse impacts to steelhead trout at the Conaway diversion. (Diversion Point B) A petition to list steelhead trout in California as either threatened or endangered is before the U.S. National Marine Fisheries Service. A decision for said listing will be made by February 14, 1995. The CSPA is a party to said petition. We reference said petition.

7. The proposed project has the potential to have direct and cumulative adverse impacts to winter-run chinook salmon at the City of West Sacramento diversion. (Diversion Point C) Winter-run chinook salmon are protected under the federal ESA.

The proposed project has the potential to have direct and cumulative adverse impacts to steelhead trout at the City of West Sacramento diversion. (Diversion Point C) A petition to list steelhead trout in California as either threatened or endangered is before the U.S. National Marine Fisheries Service. A decision for said listing will be made by February 14, 1995. The CSPA is a party to said petition. We reference said petition.

8. The proposed project has the potential to have direct and cumulative adverse impacts to winter-run chinook salmon at the new point of diversion. (Diversion Point D) Winter-run chinook salmon are protected under the federal ESA.

The proposed project has the potential to have direct and cumulative adverse impacts to steelhead trout at the new point of diversion. (Diversion Point D) A petition to list steelhead trout in California as either threatened or endangered is before the U.S. National Marine Fisheries Service. A decision for said listing will be made by February 14, 1995. The CSPA is a party to said petition. We reference said petition.

9. The proposed project has the potential to have direct and cumulative impacts to threatened and endangered wildlife and plant

species and their habitat at the proposed reservoir site under all points of diversion.

10. The Applicant must prepare an Environmental Impact Report for the following reasons and pursuant to the following points of law:

A draft EIR must discuss "cumulative impacts" when they are significant. (CEQA Guidelines, section 15130, subd. (a).) These are defined as "two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts." (CEQA Guidelines, section 15355; see also section 21083, subd. (b).) "Individual effects may be changes resulting from a single project or a number of separate projects." (CEQA Guidelines, section 15355, subd. (a).) "The cumulative impacts from several projects is the change in the environment which results from the incremental impact of the project when added to the closely related past, present, and reasonably foreseeable probable future projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time." (CEQA Guidelines, section 153, subd. (b).)

A legally adequate "cumulative impacts analysis" thus is an analysis of a particular project viewed over time and in conjunction with other related past, present, and reasonably foreseeable probable projects whose impacts might compound or interrelate with those of the project at hand. Such an analysis is necessary because the full environmental impact of a proposed action cannot be gauged in a vacuum. (Emphasis Added)

The State Water Resources Control Board needs to review alternatives to the proposed water right application such as the "No Project alternative".

Like the requirement to describe mitigation measures within an EIR, the requirement to set forth project alternatives within the document is also crucial to CEQA's mandate that avoidable significant environmental damage be avoided where feasible. (Section 21002; CEQA Guidelines, sections 15002, subd. (a)(3), 15021, subd. (a)(2), 15126, subd. (d).)

To allow agencies to effectuate this substantive requirement at the findings stage of the CEQA process, EIRs must produce information sufficient to permit a reasonable choice of alternatives so far as environmental aspects are concerned. A draft EIR thus must describe a range of reasonable alternatives to the proposed project, or to its location, that could feasibly attain the project's basic

objectives, and must evaluate the comparative merits of each alternative. (CEQA Guidelines, section 15126, subd. (d); section 21100, subd. (d).)

The discussion of the project must focus on alternatives capable of either eliminating any significant adverse environmental effects or reducing them to a level of insignificance, even if such alternatives would be more costly or to some degree would impede the project's objectives. (CEQA Guidelines, section 15126, subd. (d)(3).)

One of the alternatives analyzed must be the "no project alternative". It must describe what condition or program preceded the project. If the no project alternative is environmentally superior to all others, the EIR must also identify which of the others, as among themselves, causes the least environmental damage. (CEQA Guidelines, section 15126, subd. (d)(2).)

11. The federal Environmental Protection Agency (EPA) has recommended water quality standards to protect water quality in the Bay Delta Estuary. The State Water Board is holding workshops to determine new water quality standards for the Bay Delta Estuary.

Consequently until the State Water Board adopts new standards for the Bay Delta Estuary, the Bay Delta must be considered fully appropriated.

12. The Division's notice does not limit the amount of water to be diverted during above normal, normal, below normal and critical water year types. The Applicant must prepare a hydrology analysis which shows the amount of water available during all water year types.

13. The State Water Board must prepare an analysis to determine whether the Bay Delta is fully appropriated and whether this application should be accepted in: above normal water years, normal water years, below normal water years and critical water years. The Board's analysis which determines whether the Bay Delta is fully appropriated must be included in the CEQA document for said project.

The CSPA Public Trust Protest is Based on the Following:

The Public Trust

The State Water Board has a duty to protect public trust resources when administering water rights, and, in situations where damage has already been done by water users, to reallocate water to preserve the trust. It is the latter duty which the Board must perform for the Bay Delta Estuary.

The State Water Board has the continuing authority over all water rights under the common law public trust doctrine to protect public trust resources. [See National Audubon Society v. Superior Court of Alpine County (1983) 33 Cal.3d. 419, 189 Cal. Rptr. 346.]

The public ownership of the State's waters and water courses has its roots in Roman Law of the 6th Century A.D. The public ownership of fish and wildlife also has its roots in ancient Roman Law from the 6th Century A.D. [See Althaus 1987] This fish and wildlife (includes shellfish, birds, mammals, and other classes of wild animals) in their natural state can be regarded as property belonging to the people, with governmental agencies such as the State Water Board and the Department of Fish and Game as trustees.

The California Supreme Court in its Mono Lake Decision [National Audubon Society v. Department of Water and Power, City of Los Angeles (33 Cal.3d 419, 658 P.2d 709-1983)] reiterated and clarified some of its past rulings regarding public trust properties, uses and values. The Court further emphasized the State's overall duties and responsibilities to protect the people's common heritage of streams, lakes, marshlands and tidelands for the many uses covered by the public trust.

In this 1983 ruling, the California Supreme Court also stated:

- o Parties acquiring rights in trust property (in this case water), hold those rights subject to the trust, and can assert no vested right to use those rights in a manner harmful to the trust.

- o The public trust is more than an affirmation of the State power to use public property for public purposes, it is the duty to take public trust properties (fish, wildlife and water quality) into account in the planning and allocation of water and to avoid or minimize any harm to these properties, interests or associated uses whenever feasible.

- o The State, under its public trust responsibilities, has the affirmation of the duty and continuing authority to vigorously protect the public trust uses and to avoid or minimize harmful impacts to such uses.
- o The public trust is more than an affirmation of the state's power to use public property for public purposes. It is an affirmation of the duty of the State to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.
- o The Public Trust doctrine protects navigable waters from harm caused by diversion of non-navigable tributaries.
- o The State can reconsider previous water allocations at any time under its continuous authority.
- o The public trust includes the protection of ecological and biological values of water and waterways.
- o Any member of the general public has standing to raise a claim of harm to the public trust. (Emphasis Added) This CSPA public trust protest is in accordance with that court ruling.

The CSPA protest is based on the Public Trust Doctrine. The statement of facts clearly shows that the public trust resources of the Bay Delta Estuary has been neglected and damaged by existing practices by the SWP and the CVP, and the failure of the State Water Board to carry out its duty to protect the Bay Delta Estuary.

California Fish and Game Code 5937 - Water for Fish

There has been a long history of concern for California's fishery resources. The California Legislature in 1852 enacted a statute designed to protect migrating steelhead trout and salmon on their spawning runs by outlawing obstructions in any river or stream as a public nuisance. The law is that "the running water of the State of California are public property. One who obstructs them obstructs them under license or permission from the state, but only upon such conditions as to their use as the state may impose" [See Schaezlien v. Cabaniss (135 Cal 466, 470, 67 Pac Rpt. 755, 757-1902)] The State can impose conditions upon owners of a dam or other structure as it sees fit to permit the free running of water or migration of fish up or down a stream.

In 1870 the California Legislature enacted Penal Code 637 which required "as far as practicable" fishways over obstructions in the State's rivers and streams. The court ruled that Taylor's dam on Papermill Creek violated Penal Code 637 by failing to keep the fishway in repair to allow fish to move upstream [See Taylor v. Hughes (62 Cal 32 1882)]

In 1915 another statute was enacted requiring continuous water release from dams through fishways for the purpose of keeping fish below such dams in "good condition". In 1937, what is now California Fish and Game Code 5937 was enacted by the California Legislature. Fish and Game Code 5937 states that 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. [See Use it or Lose It - Fish and Game Code 5937; Law Review Article; Joel Baiocchi; U.C. Davis, 1980]

The State Water Board was challenged in the courts over not enforcing Fish and Game Code 5937 involving the construction of four (4) dams on tributaries to Mono Lake and the diversion of their entire flow by the Los Angeles Department of Water and Power for municipal and industrial water supply and hydropower uses. There were no instream flow provisions incorporated into water right permits issued by the State Water Board to keep trout alive and in "good condition" in streams below the dams. [See California Trout v. State Water Resources Control Board, et al (207 Cal.App.3d 585 (1989))]

The Appellate Court's findings in California Trout v. State Water Resources Control Board supported the concept that trust properties, such as fish, have a unique status. The title to the fish property in State waters is vested in the State and held in trust for the people.

Other important points of the decision include:

- o Fish and Game Section 5937 mandates that 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. (Emphasis Added)
- o Limits the amount of water that may be appropriated by diversion by requiring that sufficient water first be released to assure the continued existence in good condition of fish life below the dam. (Emphasis Added)

- o Compliance with Fish and Game Code 5937 was not negated by the agreement to build a trout hatchery.
- o The public trust interest as to a fishery in a non-navigable stream is in the nature of a state property interest
- o There are a variety of public trust interests in addition to fish and the fishery that pertain to non-navigable streams.
- o Water right permit actions or the failure to take action is not time barred. The nature of the State's property interest in both fish and water is such that one may not oust the State's property or trusts interests by a statute of limitation. " The public is not to lose its rights through the negligence of its agents, nor because it has not chosen to resist an encroachment by one of its own number, whose duty it was, as much as that of every other citizen, to protect the state in its rights." [See People v. Kerber (1908) (152 Cal. 731, 732, 736, 93 P. 878) in California Trout v. State Water Resources Control Board, et al (207 Cal.App.3d 585 (1989))]
- o If a nuisance is an ongoing conduct that can be discontinued by an order to stop such acts, the nuisance is viewed as continuing and hence abatable. There are no statute of limitations that permit such acts to continue.
- o The licenses to appropriate water must be conditioned by the State Water Board mandating that the dam owner allow sufficient flow of water to pass downstream of the dam to keep the fish alive and in good condition.

The Appellate Court also found that Fish and Game Code 5937 are expressions of both the California Constitution and the California Legislature for protecting the value of the State's instream waters as an ecosystem and the fishery resources that utilize that ecosystem. The effect of that provision is to limit the amount of water that may be appropriated by diversion by requiring that sufficient water first be released to assure that fishlife below the dam are maintained in "good condition". (Emphasis Added)

The criteria "in good condition" is not defined in Fish and Game Section 5937. However, "in good condition" must include the conservation and protection of the biological, physical, and chemical aspects of the aquatic environment that are necessary to support self-maintaining or renewable fish populations, associated ecological values and other beneficial and public trust uses of the Bay Delta Estuary.

The State Water Board cannot continue to ignore its duty to enforce the law against water users. In the words of the United States Supreme Court;

"The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties except in the instances of parcels mentioned for improvement of the navigation and use of the waters and when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police power in the administration of government and preservation of peace." [Illinois Central Railroad Co. v. State of Illinois, (1892) 146 U.S. 452.]

Water Quality - The Fish

In People v. Truckee Lumber Co. (116 Cal. 397, 48 Pac. 374 (1897)) the actions of Truckee Lumber Co. were declared a nuisance and enjoined. The lumber mill allowed the dumping of saw dust, shaving, edgings and other wastes into the Truckee River. The material was polluting the river and was deleterious to aquatic life, killing trout and other life in the river and destroying the fishery. The chemical, biological and physical components in a significant reach of the Truckee River were being impacted by such wastes.

The California Supreme Court in its Truckee decision stated:

"the fish within our waters constitute the most important constituent of that species of property commonly designated as wild game, the general right and ownership of which is in the people of the state -- and the right and power to protect and preserve such property for the common use and benefit is one of the recognized prerogatives of the sovereign, coming to use from the common law and preserved and expressly provided for by the statutes of this and every state of the Union --.

--The Dominion of the State, for the purposes of protecting its sovereign rights in the fish within its water and their preservation for the common enjoyment of its citizens is not confined--. It extends to all waters within the State, public or private, wherein these animals are habited or accustomed to resort for spawning or other purposes, and through which they have freedom of passage to and from the public fishing grounds of the State". (Emphasis Added)

The State Water Board must not neglect its duty to protect water quality and the public trust fishery resources of the Bay Delta Estuary when either approving or not approving the proposed project.

The Right To Fish - Abundance of Public Trust Resources

The State Water Board when issuing water right permits to use the waters of the state has responsibilities for preserving and protecting the public trust resources and public interest by incorporating mandatory protection requirements into water right permits. In this situation recreation, fishery resources, water quality, riparian habitat, and other public trust resources of the Bay Delta Estuary must be protected against harm or degradation by this project and other projects.

The California Constitution, Article 1, Section 25, clarifies the public fishing right.

" The people shall have the right to fish upon and from the public lands of the State and in the waters thereof and no land owned by the State shall ever be sold or transferred without reserving in the people the absolute right to fish there upon -"

The right to fish the Bay Delta Estuary can not be enjoyed by the people unless public trust fishery resources are in sufficient abundance to be harvested and enjoyed.

The continued existence, renewability and abundance of such resources in their broadest context, the integrity of water as an aquatic environment upon which such resources depend, rests upon the State Water Board.

Under what conditions may this public trust protest be disregarded and dismissed?

None at this time. The application should be cancelled by the State Water Board. In the event the application is not cancelled by the Board or its staff we expect the staff of the State Water Resources Control Board to require the preparation of a EIR. Upon review of the final EIR, the CSPA will submit dismissal terms or require a hearing before the Board.

We are requesting copies of the NOP and the draft EIR so that we can provide comments to the applicant and the State Water Board.

A true copy of this protest has been served upon the applicant and other interested parties by first class mail.

Bob Baiocchi

Robert J. Baiocchi, Consultant

For: California Sportfishing Protection Alliance

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Date: October 31, 1994

Certificate of Service

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Interested Parties