

Ninth Circuit: Changes in Water Flows Benefiting Fish Don't Require SWRCB Permission

On February 21, 2017 the Ninth Circuit Court of Appeals in the case *San Luis and Delta-Mendota Water Authority v. Haugrud* found that water releases under California Fish and Game Code Section 5937 to keep fish in "good condition" creates an exception to the requirement to obtain a water right permit change from the State Water Resources Control Board (SWRCB).

The *Haugrud* case addresses the Bureau of Reclamation (BOR) 2013 release of Trinity River water from the Lewiston Dam. The release was above the amount designated in the applicable water release schedule and was designed to benefit the lower Klamath River, where winter-run salmon were beginning their migration upriver to their spawning grounds. BOR released the water to help prevent a mass die-off of these salmon in the lower Klamath, which are threatened when the Klamath River runs low. The water right permits issued to the BOR in the 1950s to divert water from the Trinity River do not list the lower Klamath River as a place of use.

The water contractors who opposed the flow augmentation challenged the BOR's authority to release the water under a number of federal statutes including the Act of August 12, 1955 related to the Trinity Division of the Central Valley Project, the Central Valley Project Improvement Act and the Endangered Species Act. However, the issue that most directly implicates California Water law is the way the Ninth Circuit addressed the issue of fish flows under California Fish and Game Code section 5937, associated changes to water rights and the SWRCB permitting authority.

The water contractors argued that BOR did not comply with California law when it implemented the 2013 flow release, because the water rights permits did not list the lower Klamath River as "an approved place of use," and BOR did not obtain permission from the SWRCB to change the place of use of the permits. The court recognized that a water rights permit holder may only change the point of diversion, place of use, or purpose of use from that specified in a permit upon obtaining SWRCB permission under Water Code section 1701.

However, the Ninth Circuit found that Fish and Game Code

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section 5937 creates an exception to the general rule that water permit holders must obtain permission from the SWRCB before making such a change. Fish and Game Code Section 5937 requires that

"The owner of any dam shall 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."

The court found that the use of the unconditional "shall" indicates that such required releases are not dependent on having a proper water permit.

This holding appears to be inconsistent with the requirement to obtain permission from the SWRCB for water right changes, including changes for instream beneficial uses for fish preservation. (Water Code § 1243.) It is unclear how the *Haugrud* decision may impact the balancing of fish flows under Fish and Game Code section 5937 (with other public trust resources) generally conducted by the SWRCB for permitted water rights.

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