

**STATE WATER RESOURCES CONTROL BOARD  
BOARD MEETING SESSION – DIVISION OF WATER RIGHTS  
SEPTEMBER 15, 2009**

**ITEM 11**

**SUBJECT**

CONSIDERATION OF A PROPOSED ORDER ON RECONSIDERATION OF A DIVISION OF WATER RIGHTS ORDER DENYING PETITIONS FOR EXTENSION OF TIME ON PERMITS HELD BY U.S. BUREAU OF RECLAMATION ON THE SANTA MARGARITA RIVER IN SAN DIEGO COUNTY

**DISCUSSION**

Permits 8511, 11357 and 15000B were issued between 1951 and 1965 and authorize construction of a two-dam project, diverting 185,000 acre-feet per annum (afa) from the Santa Margarita River. The project was since found to be environmentally and economically infeasible and has not been built. No water has been used under the permits. The permits had previously been granted a series of time extensions, with the most recent extension granted in 1998.

On November 14, 2008, the U.S. Bureau of Reclamation (Reclamation) filed time extension petitions seeking a 50-year extension of time to build a groundwater storage project that is in the planning stage. In lieu of constructing the permitted facilities, the conjunctive use project would move the diversion location downstream and route up to 16,000 afa into percolation basins for groundwater recharge. The Division of Water Rights (Division) returned the time extension petitions and advised Reclamation that it should submit time extension and change petitions to enable the Division to evaluate the proposed project as currently planned.

On January 15, 2009, Reclamation resubmitted the time extension petition, stating that the petitions are ready for processing. Reclamation indicated that the petitions are ready for either notice in the normal course of business, or to be held in abeyance from notice and processing pending receipt of the other filings needed to implement the reformulated project.

On June 15, 2009, the Division issued an Order Denying Petitions for Extension of Time, citing as primary bases for denial lack of development of the permitted project and lack of water use under the permits, despite 11 time extensions on Permit 8511, seven time extensions on Permit 11357 and four time extensions on Permit 15000B.

Reclamation, Fallbrook Public Utility District (Fallbrook) and the Department of Water Resources (DWR) filed petitions for reconsideration of the time extension denial. The petitioners assert that although the permitted project has not been built, diligence has been exercised because the existing permits could be used for an alternative project, the Santa Margarita Conjunctive Use Project, which is in the planning stage. The U.S. Naval Station, Camp Pendleton and Fallbrook would use the water supply developed by the conjunctive use project. DWR has been a funding source for the proposed project.

The proposed Order on Reconsideration upholds the Division Order denying the petitions because it is undisputed that no facility has been built, no water has been used under the permits and the permitted project has been abandoned.

**POLICY ISSUE**

Should the State Water Board adopt the proposed order?

**FISCAL IMPACT**

None.

**REGIONAL BOARD IMPACT**

None.

**STAFF RECOMMENDATION**

Staff recommends adoption of the proposed order.

State Water Board action on this item will assist the Water Boards in reaching Goal 5 of the Strategic Plan Update. Approval of this item will assist in fulfilling Objective 5.1 to improve the current Water Board systems, programs, functions, and core business process to enhance effective and consistent implementation of Water Board plans and policies, and State and federal laws and regulations, and to reduce processing time and costs.

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

**ORDER WR 2009-**

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In the Matter of the Petitions of the United States Bureau of Reclamation, Fallbrook Public Utility District and the California Department of Water Resources for

Reconsideration of Order WR 2009-0028-DWR, which denied the United States Bureau of Reclamation’s Petitions for Extension of Time for Water Right Permits 8511, 11357 and 15000B (Applications 11587, 12179 and 21471B, respectively)

**UNITED STATES BUREAU OF RECLAMATION**  
**Petitioner and Permittee**  
**FALLBROOK PUBLIC UTILITY DISTRICT**  
**Petitioner**  
**CALIFORNIA DEPARTMENT OF WATER RESOURCES**  
**Petitioner<sup>1</sup>**

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SOURCE: Santa Margarita River

COUNTY: San Diego

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**ORDER DENYING PETITIONS FOR RECONSIDERATION**

BY THE BOARD:

**1.0 INTRODUCTION**

By Order [WR 2009-0028-DWR](#), the State Water Resources Control Board (State Water Board or Board), Division of Water Rights (Division) denied time extension petitions for development of water diversion and use under United States Bureau of Reclamation (Reclamation) Permits 8511, 11357 and 15000B, which authorize construction of a two-dam project, diverting 185,000 acre-feet per annum (afa) from the Santa Margarita River. Reclamation and Fallbrook Public Utility District (Fallbrook) requested reconsideration of the Division’s order, and the Department of Water Resources (DWR) also submitted a memorandum in support of reconsideration.

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<sup>1</sup> The term “Petitioner” is used for ease of reference, and does not confer upon the California Department of Water Resources the legal status of petitioner.

Because Reclamation has not been diligent in putting water to beneficial use under the water right permits, the petitions for reconsideration are denied.<sup>2</sup>

Reclamation seeks an extension of time under its water right permits to pursue the proposed Santa Margarita Conjunctive Use Project (CUP). This denial does not reflect any judgment concerning the merits of the proposed CUP. Moreover, denying the time extensions does not hinder the development of the CUP. As this order outlines, the CUP partners may file to reopen the fully appropriated streams order and file new water right applications in order to pursue the project.

To implement the CUP under Reclamation's existing water right permits, Reclamation would have to obtain approval of both time extension petitions and change petitions (which have not yet been filed). Alternatively, the CUP partners could file new water applications to implement the CUP. The evidence needed to support the State Water Board's findings under either method is similar. Because the permitted project is not currently using any water and cannot do so without the approval of a change authorizing the CUP, the showing required to establish that the change would not injure any legal user of water is essentially the same as the showing required to demonstrate that unappropriated water is available for issuance of a new permit. The key difference between review of the CUP pursuant to a new application and review pursuant to change petitions is that to approve any change petitions the State Water Board would also have to approve extensions of time for the project, and Reclamation has not made the showing of due diligence necessary for approval of time extension petitions. "The requirement that an appropriation of water be completed within a reasonable time with the exercise of due diligence is a long-standing principle of California water law intended to protect the public interest by preventing the 'cold storage' of water rights." ([State Water Board Order WR 2008-0045](#) , p. 1.) In Order WR 2009-0028-DWR, the Division correctly determined that Reclamation had not exercised diligence in putting water to beneficial use in the decades that it has held its water right permits. Accordingly, the proper procedure for seeking approval of the

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<sup>2</sup> The Water Code directs the State Water Board to act on a petition for reconsideration within 90 days from the date on which the State Water Board adopts the decision or order that is the subject of the petition. (Wat. Code, § 1122.) If the State Water Board fails to act within that 90-day period, a petitioner may seek judicial review, but the State Water Board is not divested of jurisdiction to act upon the petition simply because the State Water Board failed to complete its review of the petition on time. (See *California Correctional Peace Officers Ass'n. v. State Personnel Bd.* (1995) 10 Cal.4<sup>th</sup> 1133, 1147-48, 1150-51 [43 Cal.Rptr.2d 681]; State Water Board Order WQ 98-05-UST at pp. 3-4.)

CUP is filing a new application, and not filing change petitions that depend on time extensions that cannot properly be issued.

## **2.0 BACKGROUND**

At issue in these petitions for reconsideration are time extension petitions for three water right permits held by Reclamation, Permits 8511, 11357 and 15000B, which authorize construction of a two-dam project to divert 185,000 afa from the Santa Margarita River.

Permit 8511 was issued in 1951, with an original completion date to fully apply water to beneficial use of December 1, 1958. Permit 11357 was issued in 1958, with an original completion date for full beneficial use of December 1, 1961. Permit 15000 was issued in 1961, with full beneficial use required by December 1, 1970. In 1973, Permit 15000 was split, with Permit 15000A being assigned and licensed to the United States Department of the Navy and Permit 15000B being assigned to Reclamation. Permits 8511, 11357 and 15000B have received, respectively, eleven, seven and four time extensions to put water to beneficial use. The most recent time extension, granted on February 2, 1998, required full development under all three permits by December 31, 2008.

Studies conducted in the 1980's found the two-dam project for which the permits were issued to be environmentally and economically infeasible. The project has not been built and no water has ever been used under Reclamation's permits. In the ten years since the last time extension was granted, Reclamation has not filed a change petition to propose an alternate project.

State Water Board staff have met with Reclamation and the other CUP partners over the past few years. State Water Board staff have repeatedly informed Reclamation that it would be required to meet due diligence and other requirements for any future time extension petitions, and that the outcome of any such additional petitions was uncertain.

On November 14, 2008, Reclamation filed petitions seeking a 50-year extension of time to develop the CUP with other water right holders in the watershed. The CUP is in the planning stages and has received funding from several sources, including Congressional authorization for \$60 million towards construction of the CUP and \$2.5 million in Proposition 50 funding from DWR, in which the State Water Board concurred. In lieu of constructing the permitted dams, the CUP would move the diversion location downstream and route up to 16,000 afa into percolation

basins for groundwater recharge. On December 11, 2008, the Division returned the time extension petitions and advised Reclamation that it should submit time extension and change petitions to enable the Division to evaluate the proposed project as a whole. The Division proposed to hold the matter in abeyance for up to one year, to allow Reclamation to submit the necessary documentation.

After the petitions were returned, Division staff spoke with representative of Fallbrook, one of the participants in the CUP planning process. Fallbrook expressed the desire to keep the time extension petitions on file. Division staff advised that the Division would accept the petitions as of their date of first submittal, but also advised that the petitions might be processed rather than held in abeyance if they were filed again.

On January 15, 2009, Reclamation resubmitted the time extension petitions. Reclamation indicated that the petitions were ready either to be noticed in the normal course of business, or to be held in abeyance from notice and processing pending receipt of the other filings needed to implement the reformulated project.

On June 15, 2009, the Division issued an Order WR 2009-0028-DWR Denying Petitions for Extension of Time. On July 14 and 15, 2009, Reclamation, Fallbrook and DWR filed timely petitions for reconsideration of the time extension denial.

### **3.0 APPLICABLE LAW**

Any interested person may petition the State Water Board for reconsideration of a decision or order on any of the following grounds:

- (a) [i]rregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
- (b) [t]he decision or order is not supported by substantial evidence;
- (c) [t]here is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;
- (d) [e]rror in law.

(Cal. Code Regs., tit. 23, § 768.)

After review of the record, the State Water Board may deny the petition upon a finding that the decision or order was appropriate and proper, set aside or modify the decision or order, or take other appropriate action. (*Id.* at subd. (a)(2)(A)-(C); see also *id.*, subd. (a)(1) [Board may refuse to reconsider a decision or order if the petition for reconsideration fails to raise a substantial issue].) At its discretion, the State Water Board may hold a hearing before issuing a decision. (Wat. Code, § 1123; Cal. Code Regs., tit. 23, § 768.)

Water Code section 1396 requires a permittee to prosecute project construction and beneficial use of water with due diligence, in accordance with the Water Code, the State Water Board's regulations, and the terms specified in the permit. The State Water Board may approve a request for an extension of time if the Board finds that there is good cause for the extension. (Wat. Code, § 1398, subd. (a).) The State Water Board's regulations allow an extension of time to be granted only on such conditions as the Board determines to be in the public interest, and on a showing to the Board's satisfaction that (1) due diligence has been exercised, (2) failure to comply with previous time requirements has been occasioned by obstacles which could not reasonably be avoided, and (3) satisfactory progress will be made if an extension of time is granted. (Cal. Code Regs., tit. 23, § 844.) The Permittee must demonstrate that it complies with each of these three factors: a strong showing of future progress alone, for example, cannot sustain a petition for time extension if the permittee has not been diligent in the past.

Lack of finances, occupation with other work, physical disability, and other conditions incident to the person and not to the enterprise will not generally be accepted as good cause for delay. (Cal. Code Regs., tit. 23, § 844.)

"Diligence is the essence of a right to appropriate water." (State Water Board Order WR 82-5, at p. 7, quoting State Water Board Decision 884 (1958), at p. 71.) In determining whether there is good cause to approve a time extension petition, the State Water Board must consider whether the permittee has exercised diligence in the past in putting water to beneficial use. Due diligence requires a demonstrable effort to put water to beneficial use within the time period specified in the permits. (But see 25 Ops.Cal.Atty.Gen. 32, 40 (1955) [noting that due diligence may require something more than simply complying with time limits in permits].) Such diligence must go beyond mere repeated requests for extension of time. ([State Water Board Order WR 2000-0013](#), p. 14.) As explained recently in State Water Board Order WR 2008-0045:

The purpose of the due diligence requirement is to ensure that appropriators do not hold water rights in “cold storage,” thereby preventing water resources from being put to beneficial use. (See *California Trout, Inc. v. State Water Resources Control Board* (1989) 207 Cal.App.3d 585, 619 [“the statutory requirement of diligence does not allow the Water Board to countenance a scheme placing water rights in ‘cold storage’ for future use”]; see also State Conservation Commission, Report of the Conservation Commission of the State of California to the Governor and Legislature of California (1913) pp. 20-21, 29-40 [not sound public policy to allow cold storage of a valuable natural resources such as water]; and see *Nevada County and Sacramento Canal Company v. G.W. Kidd* (1869) 37 Cal. 282, 314 [“The doctrine is that no man shall act upon the principle of the dog in the manger, by claiming water by certain preliminary acts, and from that moment prevent others from enjoying that which he is himself unable or unwilling to enjoy, and thereby prevent the development of the resources of the country by others”].)

(*Id.*, at p. 2.)

**4.0 RECLAMATION’S AND FALLBROOK’S PETITIONS FOR RECONSIDERATION**

Reclamation’s petition for reconsideration states that Order WR 2009-0028-DWR and the proceedings leading up to it were irregular and an abuse of discretion, and are not supported by the evidence, because the Division and Reclamation allegedly had agreed upon a method for proceeding with the necessary petitions for their water rights. Reclamation also alleges that the “alternate project” argument on which the order relies is contrary to law, and that this failure also means that the order is not supported by substantial evidence and is arbitrary and capricious. Reclamation further argues that it has fulfilled the due diligence requirement, and that withdrawing Order WR 2009-0028-DWR is in the public interest.

Fallbrook incorporates Reclamation’s petition for reconsideration by reference, and does not raise any additional legal arguments. In the discussion below, the arguments discussed as those of the Reclamation petition should also be understood to be the arguments of Fallbrook.

**5.0 DWR’S PETITION FOR RECONSIDERATION**

DWR requested reconsideration of Order WR 2009-0028-DWR. DWR states that the Santa Margarita CUP relies on the subject water rights, and that the CUP is valuable to the future reliability of water in San Diego County. DWR notes that it has funded the project, with the State Water Board’s concurrence.

## 6.0 DISCUSSION

### 6.1 Proceedings Leading to Issuance of WR 2009-0028-DWR

Reclamation alleges that the Division and Reclamation had reached an agreement regarding how to proceed with processing the petition for time extension, and that the failure to follow this process is a procedural irregularity that constitutes an abuse of discretion and a failure to have the decision be supported by substantial evidence.

To its petition for reconsideration, Reclamation attaches a declaration from Ms. Martha Lennihan, attorney for Fallbrook. Ms. Lennihan's declaration states that she had a discussion regarding the Reclamation time extension requests with Ms. Katherine Mrowka of the Division in which Ms. Lennihan stated that Reclamation, Fallbrook and Camp Pendleton intended to file change petitions in the time prescribed by the December 15, 2008, letter, and stated that the time extension petitions should remain on file. (Lennihan Decl.. at p. 1, lines 15–24.) Ms. Mrowka expressed concern with having the time extension petitions on file. (*Id.* at p.1, lines 26-28.) Ms. Lennihan's declaration states that she asked Ms. Mrowka to confirm with the Deputy Director for Water Rights (Deputy Director) regarding the process for filing the time extension petitions and to let her know if the Deputy Director disagreed. (*Id.* at p. 2, lines 1-4.) Ms. Mrowka agreed to do so. (*Id.* at lines 4-5.) Ms. Lennihan's declaration states that she did not hear anything further from the Division until the denial of the time extension petitions was received. (*Id.* at lines 6-7.) While the declaration indicates that Ms. Lennihan suggested that the Division could both receive the time extension petitions and evaluate the project as a whole, presumably by not processing the time extension petitions, the declaration does not indicate that there was any agreement to hold the time extension petitions in abeyance: the agreement the declaration references is to keep the time extension petitions on file. (*Id.* at pp. 1, lines 24-26; 2, line 3.)

The letter of January 15, 2009, to Ms. Victoria Whitney, Deputy Director, and Ms. Mrowka of the Division from Mr. William Steele of Reclamation that accompanied the resubmittal of the time extension petitions states:

To conform to applicable rules, we are returning the original November 14, 2008 petition to extend time, which we understand you will accept as complete as filed November 14, 2008 ... and then at your election, either notice it in the normal course, or hold it in abeyance from notice and processing ... Based on FPUD's [Fallbrook's] water counsel's conversations with Ms. Mrowka, who consulted with Ms. Whitney, we understand that returning to this standard approach to processing the petition ... is acceptable. If you disagree, please let Reclamation know as soon as possible.

The resubmittal letter indicates that Reclamation also understood the communications between the Division and Ms. Lennihan to indicate that the time extension petitions might be processed, rather than held in abeyance pending the filing of change petitions.

Because the Division permitted Reclamation to re-file the time extension petitions, the process went forward as agreed. The declaration does not indicate that Ms. Mrowka agreed to contact Ms. Lennihan regarding the outcome of processing the time extension petitions before filing. Indeed, such a contact would have been an inappropriate prejudgment of a petition before it was filed and any protests were heard. Therefore, there was no Division action inconsistent with their conversation.

The Division followed the process outlined in the letter and in the declaration: Reclamation re-filed the petitions for time extension and the Division accepted them as complete, processed and denied them.<sup>3</sup> Reclamation had been warned over a period of years that the outcome of any time extension requests filed would be uncertain. (See e.g., Letter of March 15, 2005 from Ms. Mrowka to Mr. Steele; Letter of December 11, 2007 from Ms. Mrowka to Mr. Westford.) No evidence suggests that an agreement on the outcome of petition processing was reached, and, even if it were, such an agreement would have been an improper abdication of the State Water Board's responsibility to evaluate the petitions themselves and any protests received.

Reclamation and Fallbrook's petitions for reconsideration on procedural grounds are denied.

## **6.2 "Alternative Project" Theory**

Reclamation asserts that it is contrary to law for the Board to deny a time extension for a water right permit on grounds that the permittee has made no progress towards putting water to beneficial use under the project described in the permit, and does not intend to build the water development project described in the permit, if the time extension petition describes progress towards an alternative project. Reclamation also asserts that Order WR 2009-0028-DWR depends on such an argument.

In order to receive a time extension, a petitioner must demonstrate that it has exercised due diligence, that delays in putting the water to use were occasioned by obstacles reasonably

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<sup>3</sup> Notice is only required for the granting of petitions, as the denial of a change petition or time extension petition simply affirms the status quo.

beyond the petitioner's control and that the petitioner is likely to put the water to use in the new time period granted. (Wat. Code, § 1398, Cal. Code Regs., tit. 23, § 844.) Reclamation does not argue that it can meet these requirements for a time extension for the permitted project.

### **6.2.1 Reclamation has not been diligent, independent of the project described.**

Order WR 2009-0028-DWR denies the time extension petitions in part because Reclamation has failed to exercise diligence in putting water to beneficial use. Contrary to Reclamation's claims, this finding does not depend on the fact that Reclamation is proposing to begin construction and water use under the CUP as opposed to the two-dam project. The lack of progress over decades provides a basis for denial independent of whether the project Reclamation now intends to pursue matches that described in the permits. Reclamation's water right permits were granted between 1951 and 1961, with project completion dates of between 1958 and 1970. (Order WR 2009-0028-DWR, ¶s 1-3.) Despite already receiving between 4 and 11 time extensions, Reclamation has only conducted preliminary studies: no facilities have been built, and no water has been put to beneficial use. (See *id.* at ¶s 5–9, 16.) The permitted project was declared infeasible based on environmental and water supply studies conducted in the 1980's. (*Id.* at ¶ 9.)

Reclamation argues that the successful pursuit of funding, the financial investment of the CUP partners, and the progress made in environmental review and planning demonstrate diligence for the CUP. In their petitions for time extension and reconsideration, Reclamation and the other CUP partners have documented concrete efforts to study, develop, and fund the CUP since about 2000, with an increase in activity in the mid-2000's. But this activity is insufficient to support a finding of diligence for water rights granted a half century ago. In the most recent decades, since the permitted project was found to be infeasible, Reclamation has failed to file change petitions for a feasible project, despite receiving extensions of the development period for the purpose of developing and implementing an alternative project. (*Id.* at ¶s 6-7.)

Reclamation has failed to begin construction or to put water to beneficial use under any project. (*Id.* at ¶ 9.)

In Order WR 2000-0013, which conditionally approved a petition for time extension for the City of San Luis Obispo, the State Water Board found due diligence under a 58 year old permit, based in part upon relatively recent activity by the City in meeting with affected parties, undertaking environmental review, undertaking a process to transfer title of a dam to the City,

and securing and spending funds in furtherance of the dam improvement project that would be required to fully develop water under its permits. (*Id.* at pp. 14-15.) The decision was a “close” one. (*Id.* at p. 14.) Reclamation has engaged in planning activity on a similar timeframe. However, the City of San Luis Obispo had already put more than half of the water to beneficial use, with an increase in usage over time. The City had certified an EIR for the project. Furthermore, the City did not own the dam, which slowed efforts to upgrade the facility. These facts distinguish the situation from that of Reclamation, which has no facilities, has not certified environmental documents, has not been slowed by facility ownership disputes, and has put no water to beneficial use.

There is substantial evidence for the determination that Reclamation has not exercised due diligence in putting the water to beneficial use under its permits, and to deny the extensions of time. (See Order WR 2009-0028-DWR at ¶ 15.)

### **6.2.2 Statutory and regulatory authority support evaluating the permitted project.**

Reclamation argues that Order WR-2009-0028-DWR invented a new standard when it evaluated diligence based on the project as permitted. However, the project described in a water right is an integral component of the right itself. A water right is defined not only by a particular amount of water from a source, but also by characteristics of the specific project, like a means of diversion, beneficial use, and place of use. (See e.g., Wat. Code, § 1260 et seq [defining the contents of a water right application]; *Central Delta Water Agency v. SWRCB* (2004) 124 Cal.App.4<sup>th</sup> 245, 253, 257 [ordering State Water Board to set aside permits where application lacked sufficient specificity as to actual uses, amounts and places of use].) As Reclamation points out, many of the attributes of a post-1914 water right may be changed. However, these changes may only be made through the change petition process and must meet certain conditions, including lack of harm to other legal users of water and compliance with requirements for the protection of instream beneficial uses. (Wat. Code, § 1700 et seq.)

Reclamation cites the statutory and regulatory scheme that governs change petitions as an argument why a time extension petition may focus on a different project than that allowed under the water right permit. The ability to change a permit may support a permittee’s showing that he or she will be able to make progress in putting water to beneficial use through a changed project in the future, based on change petitions it intends to submit. But the provisions of the Water Code and its implementing regulations establishing the process for changing a water right do

not override the requirement of diligence in prosecuting the project as permitted over the period before a change petition is submitted. If anything, the separate statutes and regulations governing changes in water rights serve to emphasize the importance of the project description approved in the permit. If the description of the place of use, purpose of use, and points of diversion for a water right permit can be changed only by undergoing specific analysis, it would be inconsistent with the overall statutory scheme to suggest that a water right permit that describes a specific project can be diligently undertaken by pursuit of another project altogether. Furthermore, at licensing, projects must demonstrate not only that they have applied water to beneficial use, but also that the “construction of the works and the use of the water therefrom is in conformity with ... the permit,” or face revocation of the permit. (Wat. Code, §§ 1605, 1611.) This further demonstrates the importance of the project described in the permit in the overall statutory scheme. (See *City of Huntington Beach v. Board of Administration* (1992) 4 Cal.4<sup>th</sup> 462, 468 [“all parts of a statute should be read together and constructed in a manner that gives effect to each, yet does not lead to disharmony with the others. [Citations.]”].)

The logical extension of Reclamation's argument is that the project described in a permit is immaterial to the analysis of good cause for the purposes of granting a time extension, and that if a time extension petition describes an intended new project, the fact that the underlying water right does not allow such a project is immaterial. Such a reading would render irrelevant the requirements that define a water right, and would be contrary to the overall statutory and regulatory scheme that governs water appropriations.

### **6.2.3 California Trout limits time extensions to the permitted project.**

Strong language in *California Trout, Inc. v. State Water Resources Control Board (California Trout)* (1989) 2007 Cal.App.3d 585, 619, indicates that a time extension is not valid if it contemplates a project different from that in the permit. For the water diversions at issue in *California Trout*, the State Water Board had granted multiple time extensions to Los Angeles Department of Water and Power (LADWP) under its 1916 and 1923 rights. LADWP had first constructed a dam and aqueduct to store and transport water under its permits, then decades later raised the dam to allow collection of more water and constructed a second aqueduct. *California Trout* states that these second actions constituted a “new project” that should have been the subject of a new permit, rather than of time extension petitions:

It is apparent that the ‘extensions’ were unjustified under the pertinent regulations of the board and the statutes calling for diligence in the completion of water projects. What L.A. Water and Power obtained was not an extension of its

permits, i.e., the right to complete its *original* project. Rather, it was the beneficiary of *new* permits authorizing or predicated upon an expanded project. The term ‘extension’ in this context is a palpable misnomer. (*Id.* at p. 619 [emphasis in original].)

The court then went on to treat the extensions as new permits for the purposes of retroactivity analysis:

Where a purported act of ‘extension’ occurs, as here, after the effective date of legislation affecting the conditions of such appropriation, and the ‘extension’ entails a new or different scheme of appropriation, the legislation is wholly prospective in its effect. (*Id.* at pp. 619-20.)

Reclamation asserts that *California Trout* does not require denial of its time extension because the language in *California Trout* regarding the validity of the time extension permits is *dicta* which the State Water Board rejected in Order WR 2000-0013.

In Order WR 2000-0013, the State Water Board conditionally approved the extension of time for the City of San Luis Obispo to develop its water right. The dam authorized under the City’s permits had been built to hold the maximum amount of water allowed under the permit, but because of seismic concerns did not include the spillway drum gate needed to operate the reservoir to its full capacity. (*Id.* at p. 2.) Protestants argued that, under *California Trout*, a new application, rather than a time extension, was the only appropriate method to move forward “where a permittee completes construction of facilities that are not capable of diverting the entire amount authorized under a permit and later seeks to ... use additional water *as would have been authorized under the original permit.*” (*Id.* at p. 11 [emphasis added].) The State Water Board rejected protestant’s argument, noting that:

There is nothing in Water Code section 1398 or in the SWRCB’s regulations that would preclude the granting of an extension to allow construction of a project *consistent with what was authorized under the original permit*, simply because the applicant first built and operated a project on a smaller scale. (*Id.* at p. 11 [italics added].)

The argument at issue in Order WR 2000-0013 concerned whether it was possible to extend the time to build the permitted project, not a project different from that in the permit, as Reclamation proposes to do. In fact, the State Water Board distinguishes San Luis Obispo’s position from that of the water user in *California Trout* because, “unlike LADWP, San Luis Obispo is not requesting an extension of time to construct facilities that were not contemplated under the terms of the original permit.” (*Id.* at p. 12.)

Order WR 2000-0013 does note that the State Water Board's approval of the extensions was not at issue in *California Trout*, which centered on the applicability of Fish and Game Code section 5946. (Order WR 2000-0013, p. 12.) The order also recites that the appellate court in *California Trout* did not take the remedial actions it could have, had those extensions been directly challenged. (*Ibid.*) These statements indicate agreement with Reclamation that the *California Trout* language is not a direct holding in the case.

Nevertheless, the strongly worded, considered opinions in an appellate decision can be persuasive, regardless of whether they are part of the decision's central holding:

To say that dicta are not controlling ... does not mean that they are to be ignored; on the contrary, dicta are often followed. A statement which does not possess the force of a square holding may nevertheless be considered highly persuasive, particularly when made by an able court after careful consideration...

(*Mero v. Sadoff* (1955) 31 Cal.App.4th 1466 [quoting 9 Witkin Cal. Proc. (3d ed. 1985) Appeal § 785, p. 756]; accord *Rose v. Hudson* (2007) 153 Cal.App.4th 641, 650 ["Dictum of a higher court is to be followed where it demonstrates a thorough analysis of the issue or reflects compelling logic"].)

In *California Trout*, the analysis of the permit extensions constitutes approximately six pages of the decision, and that analysis was an important component of the decision's ultimate holding that Fish and Game Code section 5946 could be applied. (*California Trout, supra*, 2007 Cal.App.3d at pp. 614-20.) While the State Water Board did not accept the arguments of protestants in Order WR 2000-0013 that *California Trout* applied there, its analysis rested on distinguishing the situation of San Luis Obispo, which wanted to complete the permitted project, rather than build a new one.

Here, Reclamation is proposing an entirely different project from that authorized under its permits. It neither constructed the permitted project, nor put any water to beneficial use at all. The project is even more different from the permitted one than that at issue in *California Trout*, where the court characterized the new project as an extension of the existing one.

#### **6.2.4 State Water Board precedents support denying time extension requests where the permitted project will not be built.**

The State Water Board has issued precedential orders denying time extension requests at least in part because the petitioners did not intend to move forward with the permitted project. For example, in [Order WR 82-5](#), the State Water Board denied a time extension petition where the petitioner admitted that the project as proposed in the permit was no longer an appropriate project, and based its decision in part on the fact that the “project as authorized by the permit is not the project that would actually be built.” (*Id.* at pp. 2, ¶ 7; 9, ¶ 19.) The State Water Board rejected claims that diligence on other water projects related to regional development should be viewed as diligence on the permit at issue. (*Id.* at p. 5 ¶ 10.) The CUP proposed by Reclamation and others has a clearer plan and more funding than that at issue in Order WR 82-5. While this difference may affect the likelihood of future progress, it does not impact the analysis of whether diligence on another project constitutes diligence on a permitted one.

In Order [WR 80-22](#), the State Water Board similarly denied a petition for time extension where the ability to implement the proposed project was doubtful, and the water right permittee had instead begun developing plans for other, smaller projects. (*Id.* at p. 1, ¶ 3.) The Order notes that the project was likely to undergo extensive changes and “the resemblance of the final project to the current project is unknown.” (*Id.* at p. 2, ¶ 6.) Again, the State Water Board looked to whether the permitted project would be implemented in determining whether to grant the time extension petitions.

Reclamation cites two non-precedential orders, which it inaccurately labels as precedent, and one precedential order as support for the State Water Board granting time extensions to permittees to pursue different projects than those permitted. Government Code section 11425.60, subdivision (a), prohibits reliance on a decision as precedent unless it is so designated by the agency issuing the decision. All of the cited instances are distinguishable from the situation at hand.

Order WR 2008-0016 concerned the denial of a time extension for the North San Joaquin Water Conservation District (North San Joaquin). [Order WR 2008-0016](#) is non-precedential in part because the showing of diligence supporting the time extension was “close,” and the State Water Board did not believe the order should be used to justify extensions in other cases. (*Id.*

at pp. 10, 10 fn. 13.) The State Water Board expressed its intent to “rigorously apply the applicable law governing diligence, time extensions, and revocations in all other similar proceedings.” (*Id.* at pp. 10, p 10 fn. 13.) Several material factors distinguish the situation in Order WR 2008-0016 from that at issue here: (1) North San Joaquin had put almost half of its permitted water right to use as anticipated in its permit in at least one year; (2) it had received approval of change petitions to conduct a pilot conjunctive use project under its permits; and (3) it had filed an additional change petition to increase the amount of water it wished to use through new conjunctive use projects. (*Id.* at pp. 7-10; Order WR 2006-0018-DWR, pp. 2-6.) There is no indication that the time extension petition would be needed only if the State Water Board approved the new change petition: the project as permitted was anticipated to expand. The fact that North San Joaquin had continuously used water under its permitted project, and intended to continue to do so, distinguishes Order WR 2008-0016 from Reclamation’s case.

[State Water Board Order WR 2000-17-DWR](#) is a non-precedential order, issued by the Division of Water Rights, not by the State Water Board at a public meeting. (See generally [State Water Board Order WR 96-01](#) at p. 17, fn. 11 [orders issued by State Water Board staff under delegated authority are not precedential].) State Water Board Order WR 2000-17-DWR approved both a change petition to substantially alter a permitted project, and a petition for extension of time in which to develop the modified project and put the water to beneficial use. The permittee had shown diligence by constructing and storing water in a reservoir authorized by the original permit, and Division was not considering a time extension for a modified project without an accompanying change petition to authorize the project modifications.

Similarly, in [Order WR 97-05](#), the State Water Board simultaneously approved substantial change petitions and a petition for extension of time. The State Water Board did not grant a time extension petition for a project different than the one described in the permit; rather, it amended the permit. Therefore, Order 97-05 also does not address the situation in which the permitted project and the project that received a time extension request are different. In Order WR 97-05 the permittee had constructed a reservoir and other major project facilities, and had put the hydroelectric component of the originally authorized project into operation. This contrasts with the extensions requested in this case, where the permitted dams have not been constructed and no water has been put to beneficial use, over a period since issuance of the original permits that is almost twenty years longer than was the case with the extensions granted in Order WR 97-05.

### **6.2.5 Prior time extension approvals do not mandate approval of the current petition.**

Reclamation argues that denying the current time extension request based on the fact that Reclamation does not intend to proceed with the two-dam alternative project conflicts with prior State Water Board actions. In 1996 and 1997, after it was clear that the permitted two-dam project would not proceed, the State Water Board granted Reclamation time extension petitions to enable Reclamation to work with Fallbrook and Camp Pendleton in developing a conjunctive use project.

The validity of the 1996 and 1997 time extension approvals was not challenged by any party, and while the approvals themselves may not be subject to challenge at this time, it should not be simply presumed that the Division's action was appropriate or should be followed if another extension is requested.<sup>4</sup> The orders approving the extensions are not precedential. At each time extension petition, the State Water Board looks at all the circumstances surrounding the request, including permittee's receipt of prior extensions, to assess whether good cause exists to support granting an extension.

It appears that ten years ago, the Division believed that it was reasonable to allow Reclamation a short time extension to develop and implement new plans for a joint conjunctive use project. Now, after a decade in which Reclamation still has put no water to beneficial use and has not developed the environmental documentation for the project necessary to support a change petition request, and has not submitted a change petition, Reclamation has requested an additional time extension of fifty years. Even assuming the Division's decision to grant extensions in 1996 and 1997 was reasonable, those approvals do not require that further extensions be granted despite the relative lack of progress both before and after the previous extensions were granted.

### **6.3 DWR's Petition**

DWR's petition fails to meet the requirements for petition submittal described in California Code of Regulations, title 23, section 769 and fails to raise substantial issues related to the causes for

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<sup>4</sup> State Water Board Resolution Nos. 95-36 and 97-06, which describe the authority delegated to the Chief of the Division at the time these time extension petitions were granted, only allow the Division to grant permit extensions for up to a cumulative total of ten years, unless no Board member objects after a workshop or other appropriate communication. The water right files are silent as to whether the required consultation occurred.

reconsideration set out in California Code of Regulations, title 23, section 768, and is therefore dismissed.

## **7.0 PROCEDURE FOR MOVING FORWARD WITH THE CUP**

The State Water Board supports the development of conjunctive use projects as an important tool in more fully developing the waters of the state. (Wat. Code, § 1011.5, subd. (a) ["it is the policy of this state to encourage conjunctive use of surface water and groundwater supplies"].) Coordinated surface and groundwater use can be an important vehicle for ensuring that the waters of the State are put to their fullest beneficial use and are not wasted or unreasonably used. (Cal. Const., art X, § 2.) Such projects can be particularly beneficial in areas like the Santa Margarita watershed that have limited, highly variable surface waters. The State Water Board appreciates that the CUP has obtained wide support on local, state and national levels as a concrete way to increase water use and reliability in the region. The decision before the state Water Board is limited to the merits of the time extension for Permits 8511, 11357 and 15000B and not on the merits of the proposed CUP. The State Water Board's decision in this order should not be construed as any judgment on the viability or worth of the CUP.

The State Water Board encourages the CUP partners to apply for water rights to implement this project. In Order WR 98-08, the State Water Board declared the Santa Margarita River System to be fully appropriated. Accordingly, the CUP partners must file a petition to revoke or revise the declaration that the stream system is fully appropriated before filing a new application for water rights to implement the project. (Wat. Code, § 1205, subd. (c).) Given that 185,000 afa of the river was obligated under a project that Reclamation does not intend to pursue, and that the CUP would be constructed to take advantage of excess flows in years in which a greater amount of water is available, the CUP partners would be in a good position to argue for making a change to the fully appropriated stream system declaration. (See [State Water Board Order WR 2000-12](#) [amending declaration of fully appropriated streams to allow consideration of specific projects making use of water available during periods of high flow].) Because of the statewide policy encouraging conjunctive use projects, the State Water Board would expedite such a hearing on the declaration of fully appropriated streams.

The substantive and administrative burdens for Reclamation for filing a new application are essentially the same as for filing the petitions for change that Reclamation has stated it intends to file, because change must undergo public trust analysis and are not permitted to

unreasonably impact other legal users of water, including junior users. While the new CUP would not have the early priority dates of Reclamation's current permits, limits on change petition approvals would already prevent Reclamation from unreasonably affecting junior users. (Cal. Code Regs., tit. 23, § 791, subd. (a) ["the proposed changes will neither in effect initiate a new right nor injure any other legal user of water"]; [State Water Board Order WR 99-12](#), p. 12 ["the no injury rule, a fundamental tenet of water rights law, protects a junior right holder from injury due to a change in the exercise of a senior water right".]) Therefore, Reclamation is already prevented from exercising its earlier priority date to the detriment of any junior water right holders.

Where, as here, a permittee is not currently using any water and would not be able to use any water but for a change in the permit, the "no injury" rule for junior water right holders relies essentially on the same analysis as the water availability analysis required for new applications. In other words, in order for a senior permittee who currently uses no water to change its permit in a way that enables usage, yet does not injure junior users, there must be water available for the senior user after junior users' needs have been met.

Additionally, the junior water right holders in the Santa Margarita watershed are also partners in the CUP, making it even less likely that a change in process will interfere with moving forward to implement a mutually beneficial project.

## **8.0 CONCLUSION**

Order 2009-0028-DWR does not suffer from the procedural, legal or evidentiary inadequacies alleged by petitioners. This order therefore affirms Order 2009-0028-DWR and denies the petitions for reconsideration. However, in keeping with state policy supporting conjunctive use, the State Water Board encourages the CUP proponents to move forward with this potentially beneficial project, as outlined in Section 7 of this order.

ORDER

**IT IS HEREBY ORDERED** that the petitions for reconsideration are denied.

**CERTIFICATION**

The undersigned Clerk to the 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 September 15, 2009.

AYE:

NAY:

ABSENT:

ABSTAIN:

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Jeanine Townsend  
Clerk to the Board