

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2005-0017-EXEC

In the Matter of the Petition for Reconsideration of the
CITY OF BAKERSFIELD
Regarding the Rejection of Application No. X000264 and
Petition to Revise the Declaration of Fully Appropriated Streams
Concerning the Kern River

ORDER DENYING PETITION FOR RECONSIDERATION

BY THE EXECUTIVE DIRECTOR¹

1.0 INTRODUCTION

On October 10, 1996, the City of Bakersfield (City) filed an application to appropriate 100,000 acre-feet per year of water from the Kern River, and filed a petition to revise the State Water Resources Control Board's (State Water Board) Declaration of Fully Appropriated Streams (Declaration) regarding the Kern River. On October 8, 1999, the Division of Water Rights of the State Water Board (Division) advised the City that because the State Water Board had declared the Kern River System to be fully appropriated, its application could not be accepted. The Division also advised the City that prior to accepting and processing its application, a hearing must be held to revise the Declaration.

¹ State Water Board Resolution No. 2002-0104 delegates to the Executive Director the authority to supervise the activities of the State Water Board. Unless a petition for reconsideration raises matters that the State Water Board wishes to address or requires an evidentiary hearing before the State Water Board, the Executive Director's consideration of petitions for reconsideration falls within the scope of the authority delegated under Resolution No. 2002-0104. Accordingly, the Executive Director has the authority to deny a petition for reconsideration or set aside or modify the action of the Division of Water Rights.

The City filed its application and petition in anticipation of the outcome of pending litigation relating to water rights on the Kern River (*North Kern Water Storage District v. Kern Delta Water District et al.*; case no. 96-172919). In 1999 the Division advised the City that the State Water Board would defer any action on its application and petition until the litigation was resolved. The litigation has not been resolved to date and a completion date is unknown.

By letter dated May 26, 2005, the Chief of the Division of Water Rights (Chief) rejected the City's application and petition without prejudice. On June 27, 2005, the City filed a petition for reconsideration of the Chief's action.

2.0 RECONSIDERATION

The State Water Board may order reconsideration on all or a part of a decision adopted by the Division upon petition by any interested person. (Wat. Code § 1122.) The State Water Board's regulation lists the following causes upon which a petition for reconsideration may be filed:

“(a) Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;

“(b) The decision or order is not supported by substantial evidence;

“(c) There is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;

(d) Error in law.”

(Cal. Code Regs., tit. 23, § 768.)

This order addresses the principal issues raised by the City. To the extent that this order does not address all of the issues the City has raised, the State Water Board finds that these issues are unsubstantial.

2.1 Substance of the Petition for Reconsideration

The City cites all four grounds for reconsideration set forth in section 768 of title 23 of the California Code of Regulations in its petition for reconsideration. The City requests that its petition for reconsideration be granted and that the State Water Board reverse the rejection of the City's application and petition or, in the alternative, either institute proceedings to change the Declaration or grant the City a reasonable period of time to submit additional information to support its previously filed application and petition. The City contends:

1. That the State Water Board is estopped from rejecting the City's application and petition prior to resolution of the pending litigation based on the statements by the State Water Board that it would hold the City's application and petition until the litigation was resolved.
2. That the recent decision of the Tulare County Superior Court (now under appeal) constitutes "hydrologic data, water usage data or other relevant information" which necessitates the revision of the Declaration regarding the Kern River.
3. That the State Water Board should not have rejected the City's application without giving the City notice and an opportunity to amend.

3.0 DISCUSSION

3.1 The State Water Board is not Estopped from Rejecting the City's Application and Petition

The City contends that the State Water Board informed the City on three occasions that it would “hold” the City’s application and petition pending the resolution of the Kern River litigation and therefore the State Water Board is estopped from rejecting the City’s application and petition prior to the resolution of the litigation. The State Water Board shall not accept an application for a permit on a fully appropriated stream (Wat. Code, § 1206, subd. (a)) and it did not accept the City’s application to appropriate water from the Kern River because the Kern River system is listed in the Declaration as being fully appropriated. The City’s application and petition were filed prematurely and were not pursued with diligence because the Kern River litigation has yet to be resolved. The City appears to have anticipated a priority and decision of the State Water Board with no basis for doing so. The City’s application and petition are not ripe for consideration by the State Water Board; accordingly, the Chief’s action to reject them was appropriate. The City has no priority to lose because its application was never accepted by the State Water Board and therefore, it did not receive a priority. That the City took no action to obtain other water rights or store additional water during the time the State Water Board “held” its application and petition is not relevant to this action because the State Water Board could not and did not promise an outcome on the City’s application or petition.

3.2 The State Water Board has not Conducted any Proceedings to Revise the Declaration and has not Made any Findings that there is Unappropriated Water Available for Appropriation on the Kern River.

The City contends that the Tulare County Superior Court has determined that there is currently up to 60,895 acre-feet of unappropriated water available for appropriation on the Kern River. The Court of Appeal remanded the action back to the Tulare County Superior Court for a recalculation of the quantity of water forfeited by Kern Delta. The City contends that the Tulare County Superior Court has made that calculation and that the Court of Appeal should make the appropriate adjustments to its prior decision.

The City is confusing a finding by the court of the amount of water forfeited for nonuse under a pre-1914 appropriative right with a finding by the State Water Board that water is available for appropriation. The two are not the same. Even though all or some of a water right is or may be forfeited, water may not be available for appropriation because it is needed to protect instream public trust uses or prior rights. Only the State Water Board has jurisdiction to determine whether water is available for appropriation for post-1914 appropriative rights and to issue permits and licenses; the courts do not have that jurisdiction. (Wat. Code, § 1225.) Until the litigation determining the amount of water forfeited by Kern Delta is concluded with a final judgment, it is premature for the State Water Board to conduct a hearing on whether to revise the Declaration concerning the Kern River. Accordingly, the Chief's rejection of the City's application and petition was appropriate.

3.3 The State Water Board is not Required to Allow Time to Amend Applications and Petitions that have not been Accepted.

The City contends that the State Water Board should have given the City notice and/or an opportunity to cure or resolve any deficiencies with its application and petition before rejecting them. The City cites sections 678 and 679 of title 23 of the California Code of Regulations in support of its contention. The sections cited by the City do not apply to the circumstances of this case. Sections 678 and 679 apply after the State Water Board revises the Declaration and then accepts the proposed application that accompanied the petition to revise the Declaration. As stated above, it is premature to accept the petition and the application because the litigation is not yet resolved. The State Water Board has been holding the application and petition for approximately nine years, and there are no estimates of when the appellate process will be completed. The State Water Board is not a warehouse for premature applications and petitions. Therefore, it is appropriate to reject the application and petition as untimely and premature. The City may file a new application and petition after the litigation is resolved.

4.0 CONCLUSION

For the reasons discussed above, the State Water Board finds that the May 26, 2005 letter of the Chief rejecting the City's application and petition was appropriate and proper, and that the petition for reconsideration should be denied.

ORDER

IT IS HEREBY ORDERED that the petition for reconsideration is denied.

Dated: July 7, 2005

SIGNED BY HARRY M. SCHUELLER for
Celeste Cantu
Executive Director