

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2008 – 0021 - EXEC

In the Matter of the Petition for Reconsideration of

B. J. Deis, a California Corporation

(Permits 18257, 19159, 19160, and 19161, pursuant to
Applications 25917, 27087, 27088, and 27089)

Regarding Order Denying Petition for Extension of Time

SOURCE: Willow Creek

COUNTY: Lassen

ORDER DENYING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR:

1.0 INTRODUCTION

B. J. Deis, a California Corporation, (Permittee) petitions the State Water Resources Control Board (State Water Board or Board) for reconsideration of the Division of Water Rights' (Division) order denying an extension of time for water right Permits 18257, 19159, 19160 and 19161 (Applications 25917, 27087, 27088 and 27089, respectively). The Permittee requests the State Water Board approve an extension of time for Permits 18257, 19159, 19160 and 19161. The State Water Board finds that the order issued by the Deputy Director for Water Rights denying the time extension was appropriate and proper and denies the Permittee's petition for reconsideration.¹

¹ The State Water Board is directed to order or deny reconsideration on a petition within 90 days from the date on which the State Water Board adopts the decision or order. (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.4th 1133, 1147-1148, 1150-1151 [43 Cal.Rptr.2d 681]; SWRCB Order WQ 98-05-UST at pp. 3-4.)

3.0 FACTUAL BACKGROUND

The State Water Board issued Permit 18257 to Belfast Ranch, with Everd McCain as agent, on May 13, 1981. The State Water Board issued Permits 19159, 19160 and 19161 to Belfast Ranch, with Everd McCain as agent, on March 23 1984. All four permits were assigned to B.J. Deis, a California Corporation, by letter dated September 27, 2005. B.J. Deis is a corporation owned by Everd and Lola McCain and their four sons, Buz, John, Doug and Skeet.

Permit 18257 authorizes collection to storage of 60.7 acre-feet per annum (afa) (13.7 afa in the upper reservoir [Lake Skeet]) and 47 afa in the lower reservoir [Lake Buz] from December 1 through March 31 for irrigation, stockwatering and recreation. The permit requires that construction work be completed by December 1, 1984, with full beneficial use made of the water authorized under the permit by December 1, 1985. Orders approving new development schedules were issued on May 20, 1986, July 11, 1990 and December 15, 1995. The permit currently requires that construction work be completed by December 31, 2001 and full beneficial use of water be completed by December 31, 2005.

Permit 19159 authorizes collection to storage of 91 afa (49 afa in Pressure Reservoir and 42 afa in Collection Reservoir) from December 1 through March 1 for irrigation, stockwatering and recreation.

Permit 19160 authorizes collection to storage of 13.7 afa in Lake Skeet from December 1 to March 31 each year and direct diversion of 80 cubic feet per second (cfa) from January 1 through December 31 each year for power generation. The power project is not subject to regulation by the Federal Energy Regulatory Commission (FERC).

Permit 19161 authorizes collection to storage of 47 afa in Lake Skeet from December 1 through March 31 each year and direct diversion of 80 cfs from January 1 through December 31 each year for power generation. The power project is not subject to regulation by FERC.

Permits 19159, 19160 and 19161 require that construction work be completed by December 1, 1987, with full beneficial use made of the water authorized under the permit by December 1, 1988. Orders approving new development schedules were issued on September 11, 1989 and August 31, 1994. The permits currently require that construction work be completed by

December 31, 1998 and full beneficial use of the water be completed by December 31, 2003. Permittee filed a petition for a five-year extension of time for all four permits on May 13, 2003.

Lake Buz was originally constructed in 1982 and washed out due to high flows in 1983 or 1984. Reconstruction had begun by 1986 and was completed in 1990. Lake Buz Dam washed out a second time in 1993. Lake Buz Dam was repaired/reconstructed in the fall of 2002. Regional Board Order WDID No. 6A180105013 provided the conditions for repairing Lake Buz Dam, stating that the project will re-establish the lake that was created in 1982 when the dam was initially built. The California Department of Fish and Game (DFG) approved a Fish and Game Code section 1603 Agreement June 28, 2001 for repair of Lake Buz Dam. According to the Regional Board Order, Lake Buz Dam was repaired in 2002. According to Permittee, Lake Buz has been used for stockwatering and recreation during periods when it was in repair.

Lake Skeet Dam was completed July 25, 2005. According to Permittee, Lake Skeet was used for recreation between July 25 and December 31, 2005. Under the terms of Permit 18257, collection to storage at Lake Skeet is only authorized from December 1 through March 31. The reservoir could not have been used for recreation prior to December 1, 2005 unless water was diverted outside of the authorized season of diversion. Therefore, any use of water at Lake Skeet between July 25, 2005 and December 1, 2005 was unauthorized. Division staff inspected the site on October 25, 2005, and found Lake Skeet Dam still under final stages of construction, and not storing water.

Pressure Reservoir and Collection Reservoir have been completed, although no water has yet been diverted to either, as the pumps and piping are not yet constructed.

Both Lake Buz Dam and Lake Skeet Dam were considerably damaged during the 2006 New Year storms. Division complaint staff has concluded that the facilities only store a fraction of their original capacity.

All four permits require bypass of 10 cfs for protection of fish and wildlife. Permits 18257 and 19159 require that no water may be diverted until Permittee has installed a device, satisfactory to the State Water Board, which is capable of measuring the flow required by the conditions of the permits. Permittee did not install the required flow-measuring device at Lake Buz Dam.

Construction of the pumps and piping under Permits 19159, 19160 and 19161 has not yet been completed, nor has construction of the powerhouse under Permits 19160 and 19161. No water has been put to beneficial use to date under Permits 19159, 19160 and 19161.

Permits 18257 and 19159 include a condition stating that no water shall be diverted under the permit until Permittee has petitioned the Department of Water Resources (DWR) to include the diversion and use in the Susan River Watermaster Service Area. The Susan River Watermaster was not formally notified prior to the diversion of water into Lake Buz or Lake Skeet. Permittee alleges that the property has received Watermaster services since 1935 under the Susan River Adjudication, and that he was under the impression that he need only notify the Watermaster to inspect and control the diversions under the new permits, which was done verbally and which resulted in a visit by DWR personnel in late summer of 1982. Permittee was under the impression that he had complied with this condition until informed otherwise on August 25, 2005. Formal notification occurred in November 2005.

On June 28, 2007, Division staff inspected the project and found that Lake Buz and Lake Skeet Dams were at that time ineffective at impounding water to seasonal storage, and that Permittee had taken steps to stabilize the failed sides of the dam, but no construction to rebuild the dams had occurred. According to Permittee, he (1) completed work under a temporary stabilization plan in the summer of 2007 pursuant to a cleanup and abatement order issued by the Lahontan Regional Water Quality Control Board (Lahontan Regional Board), (2) has submitted a permanent stabilization plan to the Lahontan Regional Board, and (3) has received clearance from DFG to do the permanent stabilization work. The Lahontan Regional Board is currently pursuing an administrative civil liability order against Permittee for violations of (1) waste discharge prohibitions specified by the *Water Quality Control Plan for the Lahontan Region*, (2) Water Code section 13267, (3) Clean Water Act section 301, (4) Water Code section 13304, and (5) the Clean Water Act Section 401 water quality certification issued for Belfast Ranch – Skeet Dam and Buz Dam. These alleged violations are based on the failure of the Lake Buz and Skeet Dams in 2006.

Under the California Environmental Quality Act (CEQA), public agencies are required to evaluate potentially significant environmental effects of proposed projects. The State Water Board is the lead agency pursuant to CEQA for the time extension petitions at issue here. Repeated construction and failure of the dams (Lake Buz Dam washed out in 1983 or 1984,

1993, and 2006; Lake Skeet Dam washed out in 2006) have resulted in changed instream conditions, as compared to the original conditions evaluated in the October 6, 1982 Initial Study/Negative Declaration (ND) prepared by the County of Lassen. Rebuilding the dams requires that materials be obtained from borrow pits or other locations, and the impacts to those areas must be evaluated in the CEQA document, in addition to evaluating the changed instream conditions. Therefore, the 1982 ND cannot be used for purposes of processing the time extension petitions. The project does not qualify for an existing facilities exemption. On July 29, 2005, the Permittee agreed to pay the cost to prepare a CEQA document. However, because the Division concluded that the petition should be denied, and denials are exempt from CEQA, the Division has not proceeded to develop a CEQA document for building or rebuilding the dams.

By order dated January 8, 2008, the Division Chief denied the Permittee's petition for extension of time, citing the Permittee's failure to show that: (1) due diligence has been exercised, (2) failure to comply with previous time requirements has been occasioned by obstacles that could not reasonably be avoided, and (3) satisfactory progress will be made if an extension of time is granted. The Permittee timely submitted his petition for reconsideration to the State Water Board.

4.0 DISCUSSION

The Permittee requests the State Water Board reconsider the Division's denial of the time extension petition on the grounds that the petition was supported by substantial evidence.

4.1 Applicable Law

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. (See also Wat. Code, §§ 1395, 1397 [requiring a water right permit to identify periods of time to begin construction, to complete construction, and to apply water to beneficial use].) The State Water Board may approve a request for an extension of time if the State Water Board finds that there is good cause for the extension. (*Id.*, § 1398, subd. (a).) The State Water Board's regulations allow an extension of time to be granted only on such conditions as the State Water Board determines to be in the public interest, and on a showing to the State Water Board's satisfaction that (1) due diligence has been exercised, (2) failure to comply with previous time requirements has been occasioned

by obstacles that 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 State Water Board generally will not accept conditions incident to the person and not to the enterprise as good cause for delay. (*Ibid.*)

4.2 Due Diligence

"Diligence is the essence of a right to appropriate water." (SWRCB Order WR 82-5, at p. 7, quoting SWRCB Decision 884 (1958), at p. 71.) In determining whether there is good cause to approve the Permittee's request for an extension of time to complete the beneficial use of water, 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. (See also 25 Ops.Cal.Atty.Gen. 32, 40 (1955) [noting that due diligence may require something more than simply complying with time limits in permits].)

Lake Buz dam has repeatedly failed. Permittee contends that Lake Buz Dam has not "repeatedly failed," but that "the amount of diversion caused by the dam was reduced significantly due to erosion that occurred in three phenomenal storm events." (Petition for Reconsideration of Order Denying Petition for Extension of Time on Permits 18257, 19159, 19160 and 19161, January 29, 2008.) Regardless of how the partial-to-full destruction of the dam is characterized, Lake Buz has only been capable of storing water under Permit 18257 from 1982 to 1983 or 1984, 1990 through 1993, and 2003 through 2005. No irrigation use has been made of water under the permit. Water has not been put to beneficial use under Permits 19159, 19160 and 19161.

Dam failure is an obstacle that could reasonably be avoided. Even if, as Permittee contends, Lake Buz Dam did not "fail" but merely "the amount of diversion caused by the dam was reduced significantly due to erosion that occurred in three phenomenal storm events," Permittee should have designed the dams using good engineering practices and avoided this outcome. That this same impact has occurred three times at Lake Buz and occurred within months of completion of Lake Skeet Dam undermines any claim that failure of the dams was an unavoidable consequence of unforeseeable weather events. Diversion using dams that failed to use good engineering practices to avoid dam failure and the resultant water quality impacts

constitutes an unreasonable method of water diversion and use. The unreasonable method of water diversion and use could have been avoided.

A permittee must apply the water to beneficial use in accordance with the Water Code, the State Water Board's regulations, the terms of the permit, and within the period specified in the permit. (Wat. Code, § 1397.) A permittee cannot support an extension of time based on diversion or use that is not authorized by the terms of the permit. (See SWRCB Order WR 85-4 [concluding that a permittee's diversion of water at an unauthorized point of diversion and outside the season of diversion did not support an extension of time].) By the terms of the Permit 18257, no diversion is permitted at Lake Buz Dam until a measuring device has been installed, satisfactory to the State Water Board, which is capable of measuring the required bypass flows. Permittee's construction and use of the Lake Buz Dam, without installing the required measuring device, does not provide a basis for approval of an extension.

Similarly, the authorized purpose of use for Permits 19160 and 19161 is power generation. Failure to construct the pumps, piping and powerhouse necessary to use Lake Skeet Dam for the use authorized by the permits is not consistent with due diligence to put the water to use in accordance with the permits.

Finally, there is no evidence that Permittee has been diligent in constructing the project works and putting the water to beneficial use under Permit 19159, which authorizes storage at Pressure Reservoir and Collection Reservoir.

4.3 Failure to Comply With Previous Time Requirements

The State Water Board must also consider whether the Permittee's failure to comply with previous time requirements has been occasioned by obstacles that could not reasonably be avoided. Lack of finances and other conditions incident to the person and not the enterprise will not generally be accepted as good cause for delay. (§ 844.)

The Permittee experienced delays in implementing the project due to dam failure. After the Lake Buz Dam failed, the Permittee was involved in litigation with Lassen County from 1993 through 2000 regarding the validity of the conditional use permit. The County asserted that the conditional use permit expired and the Permittee contended that it had not expired. The

Permittee prevailed in Superior Court. The Army Corps of Engineers required the Permittee to obtain a new permit for reconstruction of the dam. Permittee states that obtaining the Army Corps permit and Regional Board Order WDID No. 6A180105013 regarding Lake Buz repair took three years. Since the dam was again damaged in 2006, authorization from the Army Corps, Regional Board and DFG will again be needed for the repair work in the waterway.

Permittee asserts that prior to construction of Lake Skeet Dam and the upper off-site storage reservoir, the location of the property lines had to be determined. The Permittee relied on the Bureau of Land Management (BLM) to perform this task, which BLM completed in 2004. The Permittee designed Lake Skeet Dam after receiving this information. The Permittee's reliance on others to determine the property line is not an obstacle that could not reasonably be avoided. The Permittee could have paid for a survey of the property line or designed facilities that were sufficiently far from the property line to avoid this issue.

Lake Skeet was built after the time to complete construction under the permits expired, but was damaged in 2006. The Permittee will need to obtain permits from the Regional Board, Army Corps and DFG for work in the waterway to repair the facility.

The Permittee acknowledges that petitions for extension of time normally will not be granted if failure to complete construction or to put water to beneficial use is related to the Permittee personally and not the enterprise, but contends that in this case the enterprise cannot be separated from the Permittee. Permittee contends that it is common practice in the area to build dams that erode during exceptional high or prolonged winter flows, and that he built his dams to the best of his financial ability at the time, figuring repairing such erosion as an annual maintenance cost. Since this practice led to the repeated failures described above, it cannot be seen as a reasonable basis for failing to comply with previous time requirements, and the failures cannot be said to have been unavoidable. Petitioner's argument that he built the dams to the best of his financial ability at the time simply underscores the fact that the delays are related to the Permittee and not the enterprise. "Lack of finances . . . and other conditions incident to the person and not to the enterprise will not generally be accepted as good cause for delay." (§ 844.)

4.4 Satisfactory Progress

The Permittee contends that he will make progress if an extension of time is granted and that the public interest will be served by granting additional time to put the water to beneficial use under the permit.

The Permittee has had two dam failures at Lake Buzz, and the dam was damaged on a third occasion. The dam at Lake Skeet has been considerably damaged. There is no information in the files to show that safe dams will be constructed, operated and maintained pursuant to Permits 18257, 19159, 19160 and 19161 if an extension of time is granted. After several dam failures, and in the absence of any demonstration that the problem will not be repeated if the extension were granted, granting the extension would not be in the public interest.

The Permittee was not authorized to construct Lake Skeet after the time to complete construction under the permit ended. Consequently, the construction work was unauthorized. Unauthorized construction work is not sufficient cause for granting an extension of time to complete full beneficial use of water. Permittee contends that since he timely applied for an extension in 2003 that was not acted on by the Division for several years, it is not reasonable to contend that Lake Skeet Dam construction was unauthorized. This argument ignores the fact that an extension of time to complete construction and beneficial use is not granted as a matter of right, and that the original permit authorizing construction of Lake Skeet Dam was issued in May 1981. Lake Skeet Dam was not completed until 2005, approximately 3 1/2 years after expiration of the third extension of time, and it failed within six months.

Despite Permittee's contentions otherwise, the Division's files do not include any information to document that satisfactory progress will be made if the extensions are granted. The progress made by Permittee to date includes a history of dam failures that released dam construction materials into the waterway. This is not a reasonable method of diversion of water. Permittee has not shown that reasonable water use will occur if further extensions are granted.

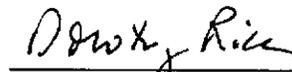
5.0 CONCLUSION

For the reasons discussed above, the State Water Board finds that the Division's order denying an extension of time was appropriate and proper and that the petition for reconsideration fails to raise substantial issues related to the causes for reconsideration. To the extent that this order does not address all of the issues raised in the petition for reconsideration, the State Water Board finds that these issues are insubstantial. The petition for reconsideration is denied.

ORDER

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

Dated: 4.18.08



Dorothy Rice
Executive Director