

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2008-0039-EXEC

In the Matter of the Petition for Reconsideration of

Semitropic Water Storage District

Permit 17538 (Application 25117)

Regarding Order Denying Petition for Extension of Time

SOURCE: Poso Creek tributary to Tulare Lake Basin

COUNTY: Kern

ORDER DENYING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR:

1.0 INTRODUCTION

Semitropic Water Storage District (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 Permit 17538 (Extension Denial). Permittee asks the State Water Board to reconsider and approve an extension of time on Permit 17538 until 2012. In the alternative, Permittee would not object to licensing if allowed to present documentation of revised historical diversion records that were not presented earlier because of an inadvertent error of interpretation when Permittee compiled the records. Following a review of the record, the Executive Director finds that the Extension Denial was appropriate and proper and denies Permittee's petition for reconsideration. The Division will review all relevant data before issuing a license.

2.0 RECONSIDERATION OF A DECISION OR ORDER

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.)

The State Water Board may refuse to reconsider a decision or order if the petition for reconsideration fails to raise substantial issues related to the causes for reconsideration set forth in section 768 of the State Water Board's regulations. (*Id.*, § 770, subd. (a)(1).)

Alternatively, after review of the record, the State Water Board also 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.*, subd. (a)(2)(A)-(C).)

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 a petition for reconsideration falls within the scope of the authority delegated under Resolution No. 2002-0104. Accordingly, the Executive Director has the authority to refuse to reconsider a petition for reconsideration, deny the petition, set aside or modify the decision or order, or take other appropriate action. The State Water Board has not designated decisions by the Executive Director as precedent decisions pursuant to the Administrative Procedures Act. (Board Order WR 96-1, at p. 17, fn. 11.)

3.0 FACTUAL BACKGROUND

The State Water Board issued Permit 17538 to Permittee on February 14, 1979. The permit required that Permittee complete construction by December 1, 1982 and put water to full beneficial use by December 1, 1989. The 1980 Progress Report by Permittee documents that construction work was completed at that time. On January 17, 1992, the Division issued an order extending the time to complete full beneficial use to December 31, 1999. On December 12, 2002, Permittee requested another extension of time until 2012 to complete full beneficial use of water. Permittee submitted documentation stating that maximum diversion and use occurred in 1998, when 11,636 acre-feet were diverted.

On May 5, 2008, the Division of Water Rights denied Permittee's petition for extension of time on Permit 17538. On June 3, 2008, Permittee submitted a petition for reconsideration of the May 5, 2008 order denying an extension of time for Permit 17538.¹

4.0 DISCUSSION

In its petition, Permittee requests reconsideration under California Code of Regulations, title 23, section 768. The request is based on four arguments. As discussed below, none of these arguments warrants reconsideration.

4.1 Semitropic received a fair hearing on its petition.

Reconsideration is warranted where there is "[i]rregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing." Permittee does not explain in its petition what irregularity there was in the proceeding or ruling, or where there was an abuse of discretion. The only potential irregularity occurred when Permittee provided the State Water Board with documentation that Permittee now claims was inaccurate. Permittee may not base a claim of unfairness upon its own mistake.

4.2 The Extension Denial was supported by substantial evidence even if evidence not provided to the State Water Board would have supported a contrary outcome.

The evidence before the State Water Board was adequate to make the finding that the Board made. As such, the Extension Denial does not run afoul of California Code of Regulations, title 23, section 768(b). The evidence that Permittee believes the State Water Board should have considered was not before the Board, and the absence of this information was through the fault of the Permittee. (June 2, 2008 Declaration of Paul Oshel, para. 7.) When making findings, the State Water Board cannot consider information not available to it. Based on the information before the State Water Board, there was substantial evidence to support the Extension Denial.

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.)

4.3 The new relevant evidence that Permittee requests the State Water Board to consider could have been produced prior to issuance of the Extension Denial.

Regulations dictate that the State Water Board will only consider new evidence on petition for reconsideration where such evidence, "in the exercise of reasonable diligence, could not have been produced." (Cal. Code Regs., tit. 23, § 768(c).) As Permittee acknowledges, reasonable diligence could have timely produced the evidence at issue. (June 2, 2008 Declaration of Paul Oshel, para. 7-9.) Existence of evidence that could have been produced prior to issuance of the Extension Denial is not grounds for reconsideration.

4.4 The extension denial is not a final determination as to the maximum amount of Poso Creek water Permittee is entitled to divert for purposes of licensing.

The Extension Denial only denies the extension of time. Before a license is issued, the Division will consider all relevant evidence regarding Permittee's use of Poso Creek water during the relevant time period. Such consideration will not be limited to evidence available at the time the Extension Denial was issued.

5.0 CONCLUSION

The petition submitted by Permittee fails to raise substantial issues related to the causes for reconsideration. The State Water Board finds that the Division's order denying the extension of time was appropriate and proper. The Division will consider all relevant information regarding past water use before issuing a license.

ORDER

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

Dated: **OCT - 7 2008**


Dorothy Rice
Executive Director