

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2011-0001-EXEC

In the Matter of the Petition for Reconsideration of
Order Approving 1707 Petition for Dedication of Instream Flow

JOHN SPENCER

Pre-1914 Appropriative Right J000006

SOURCE: French Creek, tributary to Scott River

COUNTY: Siskiyou

**ORDER DENYING PETITION FOR RECONSIDERATION
AND AMENDING ORDER**

BY THE EXECUTIVE DIRECTOR:

1.0 INTRODUCTION

John Spencer (Petitioner) filed a petition for reconsideration of a February 25, 2010 order by the State Water Resources Control Board (State Water Board), Division of Water Rights (Division) which approved his petition under Water Code section 1707 to add instream use to his pre-1914 water right recognized in the French Creek Adjudication Decree. The petition alleges that the order, hereinafter referred to as "Division Order" is not supported by substantial evidence and is contrary to law. This order denies the petition for reconsideration because the Division Order is supported by substantial evidence and is not contrary to law. (See also Cal. Code Regs., tit. 23, § 770.) Even though the issues regarding coordination with the French Creek Watermaster do not constitute legal error, the Division Order would be improved by such coordination, and is therefore amended to that end as specified herein.

2.0 BACKGROUND

On February 4, 2009, John Spencer filed a petition under Water Code section 1707 to change the purpose of use under a pre-1914 water right recognized under the French Creek Decree, issued in *Mason v. Bemrod* (Siskiyou Co. Superior Court, 1958, No. 14478). The Division issued an order on February 25, 2010, approving the petition with monitoring and reporting conditions.¹

On March 29, 2010, Mr. Spencer petitioned for reconsideration of the Division Order, arguing that: (1) the order is contrary to law for allegedly failing to consider that petitioner is within an area administered as part of the French Creek Watermaster Service Area of the Department of Water Resources; (2) the order contains an error in law in that it potentially conflicts with the watermaster's authority; and (3) the order is not supported by substantial evidence and is contrary to law by using language that allegedly "attempts to commit Petitioner's water rights to permanent instream use." The petition included proposed revisions to the Division Order to address these concerns. The proposed revisions also include some changes not addressed in the points and authorities supporting reconsideration.

3.0 GROUND AND AUTHORITY FOR RECONSIDERATION

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.)

¹ 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. (State Water Board Order WR 2009-0061 at p. 2, fn. 1; see *California Correctional Peace Officers Ass'n. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1147-48, 1150-51 ; State Water Board Order WQ 98-05-UST at pp. 3-4.)

State Water Board Resolution 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 2002-0104. Accordingly, the Executive Director has the authority to refuse to reconsider a petition for reconsideration, grant or deny the petition, set aside or modify the decision or order, or take other appropriate action. (See Cal. Code Regs., tit. 23, § 770.) The State Water Board has not designated decisions by the Executive Director as precedent decisions pursuant to the Administrative Procedure Act. (State Water Board Order WR 96-1, at p. 17, fn. 11.)

4.0 DISCUSSION

4.1 The Division Order Does Not Fail to Consider the Watermaster Service Area, and Failure to Include Reference to the Watermaster does not Constitute Legal Error

Petitioner argues that the Division Order fails to consider that petitioner is within an area administered as part of the Scott River Watermaster Service Area of the Department of Water Resources, and that this failure constitutes legal error.

The State Water Board is not required to make findings whether a diversion is in a watermastered area before approving a change petition under Water Code section 1707. Under Water Code section 1707, the State Water Board may approve a petition to change the purpose of an existing water right to include instream beneficial uses where the change would not increase the amount of water to which the right holder is entitled, would not unreasonably affect any legal user of water, and otherwise meets the requirements of Division 2 of the Water Code, regarding appropriation of water. The Division Order addresses these findings, meeting all legal requirements.

The Division Order is based on the Petitioner's petition for change and other information submitted, which included information concerning the Scott River Watermaster Service Area. Staff duly analyzed and considered all information in the application. The file contains the record of information considered for the decision, including information documenting that Petitioner's water rights are located within a watermastered area. An order does not have to reference every piece of information in that application, and Petitioner provides no legal support

for the contention that all information staff considers, including a water diversion's location within or outside of a watermastered area, must be specifically noted in an order.

4.2 The Division Order Does Not Conflict with the Watermaster's Duties or Authority

Petitioner alleges that the monitoring and reporting conditions are potentially incompatible with requirements instituted by a watermaster under Water Code sections 4103, 4151, and 5101. Petitioner's allegations have no basis in law. These statutory provisions impose certain reporting requirements on water diversions not covered by permits and licenses and address certain watermaster functions. None of these provisions conflict with, or create an exception from, the monitoring requirements that the State Water Board may impose under its section 1707 authority.

Water Code section 4103 states that:

The owner of a conduit shall construct and maintain such water flow measuring devices at such points along the conduit as may be required and approved by the department for the purpose of assisting the watermaster in determining the amounts of water which are being diverted and applied to beneficial use.

The Division Order's requirement that Petitioner maintain measuring devices for the purposes of the Division Order does not conflict with this provision. The Division's Order does not prevent Petitioner from using measuring devices required by the Department of Water Resources for the purpose of assisting the French Creek Watermaster. Nor does the statute prevent water diverters from constructing or maintaining additional flow measurements beyond those "required and approved by the department" for its purposes.

Water Code section 4151 states:

The watermaster shall divide the water of the streams or other sources of supply among the several conduits and reservoirs taking water therefrom and so adjust or close the headgates of conduits and regulate the controlling works of reservoirs as may be necessary to insure a distribution of the water among the water users entitled to its use, according to the rights of the users.

This provision sets forth the duties of a watermaster; it does not create an exception from any other applicable reporting requirements. Nothing in this provision conflicts with the requirement in the Division Order that Petitioner measure and report water use or diversions. As Water

Code section 4151 details, a watermaster determines how much water a user is entitled to and ensures that distribution is according to rights. While Petitioner cannot divert more water than is authorized under his decreed right, and the French Creek Watermaster makes the annual determination of how much water Petitioner may divert, nothing in section 4151 precludes Petitioner from measuring and reporting to the State Water Board the amount of water he actually uses and for what purposes.

Water Code section 5101 sets requirements for the filing of Statements of Water Diversion and Use. Section 5101 operates as a reporting requirement for riparian, pre-1914 appropriative and other diverters who do not hold water right permits or licenses issued by the State Water Board. Like the requirements for monitoring and reporting to a watermaster, section 5101 does not exempt persons required to file Statements of Water Diversion and Use from any other applicable reporting requirements.

Water Code section 5101 contains certain exceptions for specific categories of water diverters and users. In particular, a Statement of Water Diversion and Use is not required for a diversion that is:

- (d) Regulated by a watermaster appointed by the department and included in annual reports filed with a court or the board by the watermaster, which reports identify the persons who have diverted water and describe the general purposes and the place, the use, and the quantity of water that has been diverted from each source. [or]
- (e) Included in annual reports filed with a court or the board by a watermaster appointed by a court or pursuant to statute to administer a final judgment determining rights to water, which reports identify the persons who have diverted water and give the general place of use and the quantity of water that has been diverted from each source.

(Wat. Code, § 5101, subds. (d) & (e).) An exception from Water Code section 5101 does not constitute an exception from other reporting requirements, however. By its terms, section 5101 exempts certain diversions from the requirement for filing a Statement of Water Diversion and Use under Part 5.1 (commencing with section 5100) of Division 2 of the Water Code. (See Wat. Code, § 5101 ["a statement is not required to be filed if the diversion is any of the following"....] Nowhere does section 5101 either state or imply that other reporting requirements are inapplicable. Indeed, it appears that the reason behind many of the exemptions is that the diversions are subject to other reporting requirements that serve to adequately provide the State

Water Board with the information it needs. For example, Licensees and Permittees are often required to file reports, even though they are exempt from filing Statements of Water Diversion and Use. (*Id.*, at subd. (b); see e.g. License No. 13788 (Application No. 24804).)

Moreover, the exceptions to the requirement to file Statements of Water Diversion and Use in certain watermastered areas applies only when the watermaster makes annual filings that meet certain minimum standards. (Wat. Code, § 5101, subds. (d) & (e).) The French Creek Watermaster has not so far filed these reports, although he has expressed a willingness to do so in the future. (See Contact Report, telephone conversation between Norm Ponferrada, State Water Board Environmental Scientist and Joe Scott, Department of Water Resources Watermaster, May 28, 2010.)

Although Petitioner provides no support for his argument that the Division Order's reporting requirements somehow conflict with the watermaster's authority to require reporting, Petitioner's arguments also serve to identify the possibility that monitoring and reporting required by or conducted by the watermaster may serve the purposes of the State Water Board's requirements. However, the State Water Board cannot assume that the watermaster will provide for the necessary reporting. The State Water Board also cannot require the watermaster to conduct or require from Petitioner the necessary monitoring and reporting. Furthermore, under certain conditions, the Department of Water Resources may discontinue watermaster service. (Wat. Code, § 4051.) The State Water Board would, however, like to encourage Petitioner to coordinate his reporting efforts with the Watermaster to improve reporting efficiency and avoid unnecessary duplication. Therefore, this order amends the Division Order to expressly clarify that the specified measurements and reports may come from the Watermaster or Petitioner.

4.3 The Division Order does not Commit Petitioner's Water Rights to Permanent Instream Use

Water Code section 1707 allows a person to petition the State Water Board for a change in their water right for purposes of preserving or enhancing wetlands habitat, fish and wildlife resources, or recreation in, or on, the water. Like any other authorized purpose of use, a use permitted pursuant to section 1707 allows, not requires, that water be put to that use. Approval of a change in purpose of use, where there are multiple uses authorized, does not in and of itself require a water right holder to use any water for the newly authorized purpose of use – it merely

provides the option. Thus, Water Code section 1707 generally allows a water right holder to apply water to instream use that would not otherwise be authorized. Adding a purpose of use to a water right gives the owner flexibility to use water for all, some, or just one of the uses listed at any given time.

Of course, there may be circumstances where a water right holder desires to make a commitment up front to apply water to instream flows. There may be tax benefits to an irrevocable dedication, or a change in water rights may be proposed in connection with a purchase by a public agency or nongovernmental organization that insists on guarantees that the purchase will protect instream flows, as opposed to merely providing the water right holder with the option of doing so. Under those circumstances, the petitioner may request that an instream use be instead of, not in addition to, other authorized uses, or that other conditions be imposed to ensure there will be the intended benefit to the instream beneficial uses. But that has not occurred here. Petitioner did not request, and the Division Order does not require any permanent dedication of water to instream use as a condition of the change, as opposed to an annual decision by Petitioner as to whether and to what extent to dedicate water to instream uses.

Petitioner alleges that the Division Order's use of the term "dedication" to describe water allowed to be applied for instream uses indicates an intention by the State Water Board to make such use mandatory. Petitioner misconstrues the word "dedication" used in this context. The term "dedication" is used to indicate that, for the reach of the water body described in the instream place of use, the water Petitioner uses for instream purposes as authorized by the Order is not available for other uses. That water is "dedicated to," and thus solely available for, instream use during periods in which Petitioner applies it to instream use. The term "dedication" has long been used to describe applying water for instream beneficial uses to the exclusion of other uses, and the State Water Board declines to add confusion to earlier decisions by changing its terminology now. (See, e.g., State Water Board Order WR 2007-0021-DWR; Assem. Com. On Wat., Parks & Wildlife, analysis of Sen Bill 970 (1999-2000 Reg. Sess.)) To alleviate Petitioner's concerns, however the Division Order will be revised to clarify it *authorizes* the dedication of water, without *requiring* that water in fact be dedicated to instream beneficial uses.

4.4 Changes proposed but not addressed in the memorandum of points and authorities supporting the reconsideration petition

Petitioner additionally proposes: (1) a methodology for measuring instream flows that refers to specific measuring devices and practices, and (2) a change to the clause allowing representatives of the State Water Board or other parties authorized by the Board reasonable access for compliance purposes to allow such access by representatives of the State Water Board or the Watermaster.

The Division Order will be amended to clarify that the method for measurements proposed in Petitioner's petition for reconsideration is acceptable, and to account for potential changes to the measurement methodology in the future. These changes add certainty to the requirements without sacrificing the flexibility to adapt should the proposed measuring devices or methods change. Additionally, the text allowing reasonable access will be changed to refer to reasonable access by State Water Board representatives or the Watermaster. The State Water Board finds that the greater access contemplated in the Division Order is not necessary to ensure compliance with this order.

ORDER

IT IS HEREBY ORDERED that the Division of Water Rights Order of February 25, 2010, "Order Approving 1707 Petition for Dedication of Instream Flow, Pre-1914 Appropriative Right J000006 (John Spencer)" be amended in accordance with the above discussion, as follows:

- To allow for either the Watermaster or the Petitioner, John Spencer, to comply with measuring and reporting requirements.
- To clarify that the change authorizes, but does not require, the dedication of water to instream beneficial uses.
- To give more specificity regarding measurement methodology.
- To limit those to whom Petitioner is required to give reasonable access to the project works for compliance purposes.
- To correct typographical errors.

The amended order is attached.

Dated: 1/24/2011

Thomas Howard
Thomas Howard
Executive Director

Attachment

STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD

John Spencer

**AMENDED ORDER APPROVING 1707 PETITION FOR
DEDICATION OF INSTREAM FLOW**

PRE-1914 APPROPRIATIVE RIGHT J000006

**AMENDED BY ORDER WR 2011—0001—EXEC
ON JANUARY 24, 2011**

SOURCE: French Creek tributary to Scott River

COUNTY: Siskiyou County

WHEREAS:

1. French Creek is a tributary to the Scott River. French Creek water rights have been adjudicated and are described in the French Creek Decree 14478 (Decree).
2. On February 4, 2009, John Spencer (Petitioner) filed a petition pursuant to Water Code section 1707 (1707) with the State Water Resources Control Board (State Water Board), Division of Water Rights (Division) to change the purpose of use under a water right listed in the Decree by adding preservation and enhancement of fish and wildlife resources and to change the place of use to include the reach of French Creek from the current point of diversion to the confluence of French Creek with the Scott River.
3. Petitioner is decreed 0.76 cubic foot per second (cfs) by direct diversion from Diversion # 48 (also known as Browne Ditch) for use on 53.2 acres. The location of the point of diversion is North 2,399,460 feet and East 6,327,200 feet by California Coordinate System of 1983, Zone 1, being within NW¼ of SW¼ of Section 11, T41N, R9W, MDB&M.
4. Inasmuch as the Browne Ditch diversion serves land that has no continuity to the stream system, the diversion cannot be based on a riparian right. Since there are no appropriative rights issued by the State Water Board for this diversion, presumably, the Court recognized the diversion based on a pre-1914 appropriative right.
5. The point of diversion from French Creek is listed in Table 6 of the Decree. The diversion season is throughout the year; however, diversion from October 1 of each year through March 31 of the succeeding year is limited to the amount of water required for domestic, stockwatering, or other beneficial uses. (Decree, p. 7.) Irrigation is not authorized in winter.

6. Dedicating water as authorized under the 1707 petition¹ is consistent with the Decree because the project will be: (1) operated in accordance with water rights recognized in the Decree, (2) will be subject to any seasonal diversion limits established in the Decree, and (3) does not change the priorities of rights.
7. The State Water Board finds that the change in point of diversion and place of use pursuant to the 1707 petition will not increase the amount of water that Petitioner is entitled to use, and will not initiate a new right or unreasonably affect any legal user of water. The State Water Board further finds that the changes are in the public interest, will not adversely affect fish, wildlife, instream beneficial uses, or public trust resources and otherwise meets the requirements of Division 2 of the Water Code.
8. The baseline for this project is conditions as of February 4, 2009. Pursuant to the California Environmental Quality Act, the State Water Board is issuing a Notice of Exemption based on existing facilities exemption (Cal. Code Regs., tit. 14, § 15301), and minor alterations to land (Cal. Code Regs., tit. 14, § 15304).

The 1707 petition authorizes the dedication of flow to the environment in lieu of using the water for consumptive purpose on the existing place of use. The project will not cause significant adverse impacts on any sensitive environment and will not result in significant cumulative impacts. The project will not involve removal of healthy, mature, scenic trees. The project does not involve an expansion in use beyond that which existed at the time the State Water Board began its environmental review.

9. The instream flow dedication is subject to the terms and conditions of the French Creek Adjudication, including limits on diversion based on priority of rights.

NOW, THEREFORE, IT IS ORDERED:

1. The purposes of use are modified to include preservation and enhancement of fish and wildlife resources.
2. The place of use is modified to include the reach of French Creek from the current point of diversion to the confluence of French Creek with the Scott River. This is the stream reach from North 2,399,460 feet and East 6,327,200 feet, being within NW¼ of SW¼ of Section 11 to North 2,400,440 feet and East 6,329,100 feet, being within NE¼ of SE¼ of Section 11, all within T41N, R9W, MDB&M. All coordinates are by California Coordinate System of 1983, Zone 1.
3. Petitioner shall install and maintain measuring devices satisfactory to the State Water Board. Alternatively, petitioner may coordinate with the Watermaster appointed to enforce the terms of the French Creek Decree to install and maintain measuring devices required by this order. Approximately weekly weir measurements and calculations made and maintained by the Watermaster or Petitioner during the irrigation season shall be sufficient to fulfill this requirement if they include, at a minimum: (1) the amount of water diverted into Browne Ditch for consumptive use and (2) the amount of water available for diversion but allowed to remain instream pursuant to the 1707 dedication at Browne Ditch. Petitioner and Watermaster may rely on instream flow measured continuously at the DWR Gage upstream of the diversion and reported on the

¹ The petition adds instream beneficial uses to the authorized beneficial uses, but does not remove any other authorized uses or reduce the amount of water that may be diverted for those uses. Thus, approval of the petition does not, in and of itself, operate to dedicate any water to the environment; the dedication occurs when Petitioner exercises the option, as authorized by the approved petition, of using water for instream beneficial uses instead of diverting and using that amount of water for other purposes. Approval of the petition assures that when water is dedicated, it cannot be diverted for other uses within the authorized place of use. (See Condition 2 of this order.) Neither approval of the petition nor Petitioner's later dedication of water for instream flow requires the water right holder to continue to apply a specific amount of water to instream use in the future.

California Data Exchange Center (CDEC) website, or equivalent measures of instream flow satisfactory to the State Water Board. The State Water Board will consider carefully the expertise of the Watermaster in evaluating a Watermaster-approved equivalent methodology.

(0510900)

4. On a triennial basis, starting January 1 of the third year following issuance of this order, Petitioner shall report to the State Water Board annual diversion: (a) for consumptive purpose of use, (b) the quantity dedicated to the environment, pursuant to the 1707 petition, and (c) the total quantity diverted under the water right. If the Watermaster files reports that meet the terms of this condition, then Petitioner does not need to file additional reports. No credit for instream flow dedication shall accrue for any year in which Petitioner fails to timely document the quantity set aside for the environment.

(0510900)

5. The State Water Board may supervise diversion and use of water under this order for the protection of lawful users of water and instream beneficial uses and for compliance with the conditions of this order. Petitioner shall allow representatives of the State Water Board and the Watermaster reasonable access to the project works to determine compliance with the terms of this order.

6. This order does not authorize any act which results in the taking of a threatened or endangered species or any act which is now prohibited, or becomes prohibited in the future, under either the California Endangered Species Act (Fish & G. Code, § 2050 et seq.) or the federal Endangered Species Act (16 U.S.C. § 1531 et seq.). If a "take" will result from any act authorized under this water right, the Petitioner shall obtain authorization for an incidental take prior to construction or operation of the project. Petitioner shall be responsible for meeting all requirements of the applicable Endangered Species Act for the project authorized under this petition.

(0000014)

7. Nothing in this order shall be construed as finding that the Petitioner has or has not maintained his pre-1914 appropriate rights by continuous, beneficial use.

STATE WATER RESOURCES CONTROL BOARD


Thomas Howard
Executive Director

Dated: JAN 24 2011

