

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2012-0005-EXEC

In the Matter of the Petition for Reconsideration of
Dismissal of the

PHELAN PIÑON HILLS COMMUNITY SERVICES DISTRICT

Protest to Application 31744 by City of Palmdale

SOURCE: Amargosa Creek

COUNTY: Los Angeles

ORDER GRANTING PETITION FOR RECONSIDERATION

BY THE EXECUTIVE DIRECTOR:

1.0 INTRODUCTION

This order grants reconsideration of an April 1, 2010 dismissal of a protest by Phelan Piñon Hills Community Services District ("PPHCSD" or "District") to an application to appropriate water from Amargosa Creek, based on extenuating circumstances that prevented PPHCSD from timely compliance with a request for information.¹

2.0 BACKGROUND

On January 27, 2009, the State Water Resources Control Board (State Water Board) received an application to appropriate water from the City of Palmdale. City of Palmdale's application, Application No. 31744, proposes to directly divert up to 100 cubic feet per second (cfs), and store up to 2,700 acre-feet per year (afa) of water from Amargosa Creek in Los Angeles County.

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.)

On June 5, 2009, PPHCSD filed a protest against Application No. 31744 based on concerns regarding the appropriateness of accepting an application for new diversions when an adjudication of the Antelope Valley Groundwater Basin is ongoing; environmental concerns; and potential injury to prior rights. PPHCSD's protest states that the District has ten active wells, nine of which were adjudicated in the *City of Barstow, et al v. City of Adelanto, et al.* (Supr. Ct. Riverside County, 2005, No. 208568) ("*City of Barstow*") and one of which, Well No. 14, is the basis for PPHCSD's participation in the ongoing Antelope Valley Groundwater Basin Adjudication (*Antelope Valley Groundwater Cases* (Supr. Ct. Santa Clara County , No. 1-05-CV-049053) ("*Antelope Valley Groundwater Cases*"). As PPHCSD's protest notes, Judge Komar in the *Antelope Valley Groundwater Cases* found that some of the rights adjudicated in the *City of Barstow* were part of the Antelope Valley Groundwater Basin, and these were excluded from the scope of the *Antelope Valley Groundwater Cases*. (PPHCSD protest, Exh. 7 *Antelope Valley Groundwater Cases*, Revised Order after Hearings on Jurisdictional Boundaries; see also Department of Water Resources Bulletin 118-2003.)

On August 6, 2009, the State Water Board, Division of Water Rights (Division), requested certain additional information regarding PPHCSD's injury to prior rights claim, namely a map showing the locations of PPHCSD's groundwater wells and information on diversion quantities and season of diversion. On September 3, 2009, PPHCSD responded to the information request with submittal of a map showing the locations of its groundwater wells, but did not submit the requested information on diversion quantities and season of diversion from these wells. On April 1, 2010, the Division sent a letter dismissing the prior water rights element of PPHCSD's protest, based on Water Code section 1335, subdivision (c). The Division letter left undisturbed PPHCSD's environmental grounds for protest.

On April 30, 2010, the State Water Board received a timely request for reconsideration of the decision to dismiss the prior rights basis for the protest. With the request for reconsideration, PPHCSD submitted evidence of pumping amounts for all its active wells. Additionally, on June 16, 2010, PPHCSD filed its first recordation of water extraction and diversion under Water Code section 5001 for its Well No. 14, covering water pumped in 2009. Recordation of water extraction and diversion under Water Code section 5001 is not required for the wells within the area adjudicated under *City of Barstow*. (See Wat. Code § 5001, subd. (c).)

3.0 GROUNDS 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.)

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 PPHCSD'S PETITION FOR RECONSIDERATION

PPHCSD asserts that the protest dismissal is not supported by substantial evidence and is based on error of law. It further asserts that there is relevant evidence which could not have been produced in the exercise of reasonable diligence.

PPHCSD offers three arguments as to why the Division's protest dismissal is not supported by substantial evidence: (a) no evidence suggests that PPHCSD did not commence pumping prior to City of Palmdale's proposed appropriation; (b) no evidence suggests PPHCSD is asserting prior rights to Amargosa Creek, which assumption PPHCSD suggests the Division made; and

(c) this purported assumption confused PPHCSD, because the district's actual concern is that City of Palmdale's proposed appropriation would affect groundwater basin recharge. PPHCSD asserts that the Division incorrectly put the burden of proof to show that it as a protestant will be injured by City of Palmdale's proposed diversion, when that burden rightfully lies with the City of Palmdale. It further alleges that the State Water Board erroneously confused laws concerning surface and groundwater by dismissing a protest for prior groundwater rights where the application would deplete the Antelope Valley Groundwater Basin's natural recharge when the basin is already in overdraft.

Finally, PPHCSD sets forth reasons why the information attached with the petition for reconsideration could not have been provided sooner in the exercise of reasonable diligence. These include the recent organization of PPHCSD from the consolidation of three separate special districts, the disorganized state of files left by predecessor agencies, and the unexpected death of PPHCSD's Project Manager in September 2009, who was the person most knowledgeable about prior pumping history and was a key employee overseeing the consolidation.

5.0 DISCUSSION

5.1 PPHCSD's Extenuating Circumstances

The State Water Board acknowledges that the extenuating circumstances surrounding the recent consolidation of several districts into PPHCSD and the unexpected death of the person most knowledgeable about prior pumping history would make timely compliance with the Division's request extremely difficult. While normally the State Water Board would require that a request for an extension of time to complete the request be filed before the end of the given period, we recognize that the death of the most knowledgeable person regarding operations would make even this difficult to do. Therefore, this order grants reconsideration on the grounds that there was additional information that could not have been provided sooner in the exercise of reasonable diligence.

5.2 Information Submitted After Dismissal of Protest

After issuance of the Division letter dismissing the portion of PPHCSD's protest based on prior rights, PPHCSD submitted information concerning historical diversion amounts for all its active wells and filed a 2009 statement of extraction for the only well for which such is required.

PPHCSD has not submitted information concerning the season of diversion from its wells. With one exception, the State Water Board does not need such information at this point in the proceedings. For all the wells except No. 14, the information submitted is sufficient to establish the seniority of the rights, the season of use information is not at this point necessary to determine potential injury, and the adjudication is sufficient to determine their validity and to remove PPHCSD from the obligation to file statements of diversion and use under Water Code section 5100 et seq. (See Wat. Code § 1336.) Therefore, the State Water Board declines to uphold the dismissal of the protest for failure to submit the information on season of diversion.

PPHCSD sent information stating that Well No. 14 was drilled in 2004, and has extracted between 1.11 and 558.65 acre-feet per year in the years 2005-2009. (See letter from Susan M. Trager to Victoria A. Whitney, dated April 29, 2010, but received June 16, 2010.) Well No. 14, located in Los Angeles County outside the area adjudicated in *City of Barstow*, is required to file a recordation of extraction and diversion under Water Code section 5001. PPHCSD filed its first recordation on June 16, 2010. Under Water Code section 5004, "failure to file with the board a notice for any calendar year within six months after the close of such calendar year shall be deemed equivalent for all purposes to nonuse for such year of any ground water..." Therefore, the State Water Board cannot recognize any use at Well No. 14 prior to 2009, and any such use cannot establish Well No. 14 as senior to City of Palmdale's application.

Because the City of Palmdale's date of application filing is January 27, 2009, its priority of right is that date. (See Wat. Code, § 1450.) The State Water Board must know whether PPHCSD's pumping at Well No. 14 began prior to January 27, 2009, in order to determine whether the right is senior or junior to the City of Palmdale's proposed diversion. This Order requires PPHCSD to submit to the Division information regarding the season of diversion in 2009 for Well No. 14 within 60 days of this Order. If PPHCSD does not submit this information, then the protest

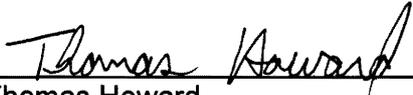
based on potential interference with this prior right is subject to cancellation under Water Code section 1335.

ORDER

NOW IT IS THEREFORE ORDERED:

1. The protest to Application 31744 by the City of Palmdale for water from Amargosa Creek in the Los Angeles County by Phelan Piñon Hills Community Services District's based on potential injury to prior rights is reinstated; and
2. PPHCSD shall submit to the Division within 60 days information demonstrating the season of diversion for Well No. 14 and documentation regarding whether pumping at Well No. 14 occurred between January 1 and January 27, 2009.

DATED: 2/16/12



Thomas Howard
Executive Director