

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2008-0026-EXEC

In the Matter of Petition for Reconsideration

California Department of Water Resources

Permits 20419 and 20418 (Applications 25435 and 25511)

SOURCE: Houston Creek tributary to East Fork of West Fork of Mojave River

COUNTY: San Bernardino

ORDER GRANTING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR:¹

1.0 INTRODUCTION

The State Water Resources Control Board (State Water Board), Division of Water Rights (Division) issued Permits 20419 and 20418 to Crestline-Lake Arrowhead Water Agency (CLAWA) on January 30, 1990, pursuant to Applications 25435 and 25511, respectively, in accordance with State Water Board Decision 1619. The two permits were subsequently assigned to the California Department of Water Resources (Permittee) on July 9, 1991.

Permit 20419 authorizes direct diversion of 2.59 cubic feet per second (cfs) from January 1 through December 31 each year, and 1,000 acre-feet per annum (afa) by storage to be collected from November 1 of each year to May 31 of the succeeding year. The total annual diversion shall not exceed 1,000 afa, and the purpose of use is municipal.

¹ State Water Board Resolution No. 2002-0104 delegates to the Executive Director the authority to conduct and 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 refuse to reconsider a petition for reconsideration, deny the petition, or set aside or modify the original order being petitioned.

Permit 20418 authorizes direct diversion in an amount not to exceed 0.78 cfs from January 1 through December 31 each year, and not to exceed 302 afa by storage to be collected from November 1 through May 31 of the succeeding year. The purpose of use is municipal.

Both permits require that construction work be completed by December 31, 1993, and that the water be applied to the authorized use by December 31, 1994. Condition 20 of the permits specifies that Permittee may only divert an amount of Houston Creek water stored in Silverwood Lake each year which does not exceed the amount of return flows from State Water Project water and other appropriated water for that year, up to the maximum of 1,302 afa authorized under the permits.

On February 6, 1997, Permittee submitted a letter requesting extensions of time until December 31, 2020 for both permits within which to apply water to beneficial use. Permittee submitted the required filing fees.

Pursuant to an October 8, 2004 request, Permittee submitted Petitions for Extension of Time and submitted Environmental Information for Petition forms on November 30, 2004. Public notice was issued on March 18, 2005.

On February 8, 2008, the State Water Board Deputy Director for Water Rights issued an order denying the Permittee's petition for extension of time to complete beneficial use of water under Permits 20419 and 20418. Permittee timely filed a petition for reconsideration of the Division's order denying the time extension.²

2.0 LAW GOVERNING REVOCATIONS AND REINSTATEMENTS

Any interested person may petition the State Water Board for reconsideration of a decision or order on any of the following grounds: (1) irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing; (2) the decision or

² 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.)

order is not supported by substantial evidence; (3) there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced; (4) error in law. (Cal. Code Regs., tit. 23, § 768.)³

After review of the record, the State Water Board 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); see also subd. (a)(1) [providing that State Water Board may refuse to reconsider a decision or order if the petition for reconsideration fails to raise substantial issues].) Before taking final action, the State Water Board has the discretion to hold a hearing for the purpose of oral argument, the receipt of additional evidence, or both. (§ 770; Wat. Code, § 1123.)

3.0 ANALYSIS OF ALLEGED CAUSES FOR RECONSIDERATION

Permittee alleges that the order denying Petitions for Extension of Time is not supported by substantial evidence and is based on error in law. Permittee also contends that the State Water Board should consider additional relevant evidence that could not have been produced when it filed its Petitions for Extension of Time in 2004.

The State Water Board may grant an extension of time within which to commence or complete construction work or apply water to beneficial use upon a showing of good cause. (Wat. Code § 1398.) Permittee must show that: (1) due diligence has been exercised; (2) failure to comply with previous time requirements has been occasioned by obstacles which could not be reasonably avoided; and (3) satisfactory progress will be made if an extension of time is granted. (§ 844.) Lack of finances, occupation with other work, physical disability, and other conditions incident to the person and not to the enterprise will generally not be accepted as good cause for delay. (*Ibid.*)

In connection with the first showing, Permittee contends that it acted with due diligence in putting water to beneficial use under its permits. Permittee also requests that the period for showing due diligence be expanded to include periods after the times specified in the permits. It

³ Unless otherwise indicated, all further regulatory references are to the State Water Board's regulations located in title 23 of the California Code of Regulations.

is unnecessary to consider whether those periods may be considered as part of a showing of due diligence, however, as the order denying Petitions for Extension of Time concluded that Petitioner acted with due diligence. (Order Denying Petitions for Extension of Time, ¶. 12.) Because that order was based on the periods provided in the permits for constructing facilities and putting water to beneficial use, there is no need to consider whether evidence of diligence after expiration of the periods specified in the permits can make up for a lack of diligence before those periods expired.

With regard to the second showing required by section 844 of the State Water Board's regulations, the evidence in the record demonstrates that Permittee's failure to comply with previous time requirements was due to obstacles that could not reasonably be avoided. The time allowed under Permits 20419 and 20418 to put water to beneficial use was very short — from January 30, 1990 to December 31, 1994. Permittee submitted water availability data showing that 1,302 af of Houston Creek flow was only available in two of those five years. In 1992, Permittee put 692 af of Houston Creek water to beneficial use; in three of the other four years less than that amount was available.

Furthermore, Permittee's water supply infrastructure is complete. Permittee has the physical ability to divert up to the full permitted amount, but has been limited by the amount of its return flows. Permittee has had little control over the pace of development necessary to increase return flows. Nonetheless, Permittee has shown a pattern of significant growth, which will result in increased return flows if an extension of time is granted. This would be Permittee's first extension of time for these permits.

The initial length of time under the permits, the availability of water during those years, and permit conditions limiting water use to the amount of return flows to Houston Creek are obstacles over which Permittee has little control. These obstacles are not incident to Permittee, and Permittee has exercised due diligence and otherwise shown good cause for its failure to comply with previous time limits.

Permittee has also made the third showing that satisfactory progress will be made if an extension of time is granted. As per the terms of Permits 20419 and 20418, Permittee's authorized diversions to storage from Houston Creek are limited to an amount not exceeding the amount of return flows for that year, up to a maximum of 1,302 afa. In 1992 Permittee

perfected rights to 692 afa under Permits 20419 and 20418. Permittee has documented return flows greater than 692 afa in six of the years following 1994. Permittee has also provided evidence of projected demand sufficient to allow for full beneficial use of water under Permits 20419 and 20418 if the extension were granted. Finally, Permittee has contracted to meet unmet Lake Arrowhead Community Services District (LACSD) water needs created by Order 2006-0001 (limiting LACSD's pre-1914 water right for consumptive use of Lake Arrowhead water) by importing and delivering additional SWP water. These additional imports will further enable Permittee to increase its return flows to Houston Creek.

4.0 ADDITIONAL REQUIREMENTS FOR ISSUANCE OF EXTENSION OF TIME

This order grants reconsideration of the Division's order denying Petitions for Extension of Time, but cannot approve the requested extension. Permittee's requested extension of time to complete beneficial use of water under Permits 20419 and 20418 requires completion of adequate environmental review under the California Environmental Quality Act (CEQA). CEQA review for a time extension should be based on the impacts associated with the difference between the existing level of development and the full permitted water use. (See *Environmental Planning & Information Council v. County of El Dorado* (1982) 131 Cal.App.3d 350, 353 [182 Cal.Rptr. 317, 318.]) The baseline under CEQA is the current environmental setting, as provided in section 15125 of the CEQA Guidelines. (Cal. Code Regs., tit. 23, § 15125) Since an extension may allow application of additional water to beneficial use beyond what is currently occurring, which may facilitate additional residential or commercial development in the area, an extension has the potential to have a significant effect on the environment, and the exemption for "existing facilities" under CEQA is inapplicable. (See *id.*, § 15301.) Permittee must comply with CEQA in determining and documenting the potential environmental impacts of going from current use to full use under the permit.

The deadline to apply water to the authorized use under Permits 20419 and 20418 was December 31, 1994. Permittee's Petition for Extension of Time dated November 30, 2004 lists 2016 as the estimated year in which water will be fully used. The Notice of Petition, dated March 18, 2005, also specifies that the requested extension be for 22 years, to extend the permits to 2016. The order denying Petitions for Extension of Time references a February 6, 1997 letter requesting extensions of time until December 31, 2020. Unless Permittee wishes to revise its Petition for Extension of Time to reflect another duration and end date, the Division will

consider the requested extension to reflect the 22-year duration and 2016 end date. The time extension to December 31, 2020 exceeds the 25 year cumulative extension that may be approved by the Deputy Director for Water Rights. Consequently, the extension would require approval by the Board.

ORDER

IT IS HEREBY ORDERED that Permittee's petition for reconsideration of the order denying Petitions for Extension of Time is granted, subject to further action of the Division of Water Rights to determine the appropriate action on Permittee's Petition for Extension of Time. The portion of the Order that denies an extension of time is suspended pending the State Water Board's issuance of an order after receipt of required CEQA documents.

Dated: 6-3-08



Dorothy Rice
Executive Director