

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

DIVISION OF WATER RIGHTS

In the Matter of Application 31807

ORDER CANCELING APPLICATION

SOURCE: North Shirrtail Canyon Creek tributary to Shirrtail Canyon Creek thence
North Fork American River

COUNTY: Placer

WHEREAS:

1. Donald Ryan (Applicant) filed water right Application 31807 with the State Water Resources Control Board (State Water Board), Division of Water Rights (Division), on October 28, 2009, requesting the right to directly divert up to 6 cubic feet per second (cfs) and collect to storage 450 acre-feet per annum (afa), with a maximum combined diversion of 450 afa by storage and direct diversion. The source is North Shirrtail Canyon Creek in Placer County. The proposed season of diversion is from November 1 of each year to July 1 of the succeeding year. Water diverted under Application 31807 will be used for domestic supply for the Forest Ranch project which is a proposed 2,615-acre urban development project that will include 2,200 residential units, an 18-hole golf course, two retreat facilities, a recreation vehicle park and a commercial reserve area. The place of use under Application 31807 is within Sections 23-27 and 34, T14N, R10E, MDB&M. Applicant proposes to divert and store water at the existing Sugar Pine Reservoir, which is owned and operated by Foresthill Public Utility District (Foresthill PUD).
2. Foresthill PUD operates Sugar Pine Reservoir pursuant to Permit 15375 (Application 21945). Foresthill PUD directly diverts 18 cfs and collects 15,400 afa to storage in the reservoir. Uses under the permit include irrigation, municipal, industrial, domestic, recreational and fishery maintenance and enhancement. Irrigation is authorized on a net 3,144 acres of the total 36,152-acre place of use.
3. A public notice of Application 31807 was issued by the Division on March 4, 2010. Protests were received by Shirrtail Corporation, Inc., Foresthill PUD, Placer County Water Agency, Mountain Counties Water Resources Association, Trout Unlimited, Foresthill Residents for Responsible Growth, California Sportfishing Protection Alliance, and the California Department of Fish and Game. None of the protests have been resolved. Comments regarding Application 31807 were submitted by the County of Placer and the Association of California Water Agencies.
4. Applicant requested Application 31807 be processed pursuant to Water Code section 1462, which states:

Where permission to appropriate is granted to any municipality for any quantity of water in excess of the existing municipal needs therefor, the board may, pending the application to beneficial use of the entire appropriation permitted, issue permits for the temporary appropriation of the excess of the permitted appropriation over and above the quantity being applied to beneficial use from time to time by the municipality.

5. In requesting appropriation of water pursuant to Water Code section 1462, Applicant referenced State Water Board Decision 858. Decision 858 in part approved issuance of: 1) water right Permit 10478 (Application 13156) to East Bay Municipal Utility District (EBMUD); and 2) pursuant to WC 1462, temporary water right Permit 10477 (Application 12842) to North San Joaquin Water Conservation District (NSJWCD). Permit 10477 temporarily allowed NSJWCD to use water that was not currently being used by EBMUD under Permit 10478.

In Decision 858, the State Water Board's predecessor determined whether to issue a water right to a senior applicant (Application 12842 of NSJWCD) or a junior applicant with municipal preference (Application 13156 of EBMUD). The decision reversed priority in favor of the junior applicant based on municipal preference, but allowed interim use by the senior applicant for irrigation and domestic uses.

In Decision 858, the State Water Board's predecessor indicated that NSJWCD's use of surplus EBMUD water would be temporary because it was determined that NSJWCD could ultimately obtain its permanent water supply from other sources. According to Decision 858, the entire diversion quantity under Permit 10478 is eventually intended for use by EBMUD.

The project proposed with Application 31807 will require a permanent water supply for domestic uses and there is no alternative supply proposed by Applicant that will satisfy the ultimate needs of the Forest Ranch project.

6. In the application, Applicant stated that: "Although the appropriation is being sought under the temporary appropriation statutes, it is expected that the water will be available to the applicant's project on a permanent basis as the Foresthill PUD 2008 Master Plan report assumed 100-percent build out of potential customers within the District boundaries." Only 524 of the 2,200 the project's residential units are within the existing Foresthill PUD service area. Consequently, Applicant has not provided supporting documentation showing that a long-term water supply is available for the entire project.
7. According to the July 2008 Final Environmental Impact Report for the Revised Foresthill Divide Community Plan (FDCP), because Foresthill PUD has adequate water rights to supply water to the Forest Ranch project, it was anticipated that Foresthill PUD would provide the water supply under Permit 15375. Based on the FDCP, measures such as raising the level of Sugar Pine Dam to increase its firm yield must be implemented before such service occurs.
8. Applicant must demonstrate that there is unappropriated water available to supply the application, after taking all senior right holders into consideration. (Wat. Code § 1375.) Applicant's showing of water availability that accompanied the application is a reservoir water balance for Sugar Pine Reservoir. Water subject to appropriation under California water law does not include water which has already been appropriated. (Wat. Code § 1201.) Applicant has not demonstrated the availability of unappropriated water, after taking Permit 15375, other senior rights and water to serve public trust uses into account.
9. Applicant does not have access to Foresthill PUD's facilities for the purpose of storing or diverting water. Applicant cites Water Code section 1810 as a basis for obtaining access. Water Code section 1810 states:

Notwithstanding any other provision of law, neither the state, nor any regional or local public agency may deny a bona fide transferor of water the use of a water conveyance facility which

has unused capacity, for the period of time for which that capacity is available, if fair compensation is paid for that use.

Applicant is not transferring water. Accordingly, Water Code section 1810 is not applicable.

10. In its protest, Foresthill PUD indicated that Applicant does not have approval from Foresthill PUD to utilize Sugar Pine Reservoir or its water supply distribution system in order to serve the Forest Ranch project pursuant to Application 31807.
11. The project proposed in Application 31807 requires approval from another public agency (Foresthill PUD), and it has become evident that regardless of the action taken by the State Water Board, such approval cannot be secured from the proper agency. (Cal. Code Regs., tit. 23, § 776.)
12. In the application cover letter, Applicant cites Water Code section 106.5 as a basis for approving Application 31807. Water Code section 106.5 states:

It is hereby declared to be the established policy of this State that the right of a municipality to acquire and hold rights to the use of water should be protected to the fullest extent necessary for existing and future uses, but that no municipality shall acquire or hold any right to waste water, or to use water for other than municipal purposes, or to prevent the appropriation and application of water in excess of its reasonable and existing needs to useful purposes by others subject to the rights of the municipality to apply such water to municipal uses as and when necessity therefore exists.

In the 2008 FDCP, Placer County determined that the proposed project would be served under Permit 15375 of Foresthill PUD. It appears therefore, that the allocation proposed for the project is not excess to the needs of Foresthill PUD but is considered to be part of the projected future service. Based on the local planning documents, there is no water surplus to the water allocated under Permit 15375 for assignment to Application 31807.

13. Applicant references Water Code section 1203 as supportive of the application. (May 22, 2010, Letter from Forest Ranch to Victoria Whitney.) Water Code section 1203 states:


Any water the right to the use of which is held by any municipality which is in excess of the existing municipal needs therefore may be appropriated by any person entitled to the possession of land upon which such excess water may be put to beneficial use but the right of such person to use such water shall continue only for such period as the water is not needed by the municipality.

Inasmuch as a long-term water supply is required for this project which Applicant has not shown to be available for appropriation, it is not in the public interest to assign water to Application 31807 based on this provision.
14. The appropriation of water as proposed in Application 31807 does not best serve the public interest. (Wat. Code, §§ 1253, 1255, 1256.)
15. The State Water Board has delegated the authority to cancel applications to the Deputy Director of the Division pursuant to Resolution No. 2007-0057. The Deputy Director has redelegated this authority to the Assistant Deputy Director in the absence of the Deputy Director, pursuant to redelegation order dated October 4, 2007.

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THEREFORE, IT IS ORDERED THAT APPLICATION 31807 IS HEREBY CANCELED.

STATE WATER RESOURCES CONTROL BOARD



*Barbara Evoy, Deputy Director
Division of Water Rights*

Dated: **FEB 10 2011**