In the matter of Proposed Revocation of License 659 Hearing, Morongo Band of Mission Indians, Millard Canyon in Riverside County: Enforcement Team-Closing Brief

Introduction

Use it or lose it is a primary tenant of the appropriation doctrine, founded on important public policy implications, including fairness, providing certainty and maximizing beneficial use. If the facts establish nononuse, and a valid defense does not exist, the Board should revoke the unused permit or license. In this case, Prosecution Team has met its burden in establishing nonuse of water under License 659. As both a matter of law and sound policy, the subsequent acquisition of the license cannot reverse the failure of the previous licensees to put the water to use. As the agency responsible for the administration of water rights in the State of California, the Board should uphold well-established principles of water rights law and policy and revoke License 659.

Evidence Confirms Nonuse of Water under License 659 for Five or More Years.

Starting in the 1960s, two inspection reports establish that irrigation on the 13 acre place of use under License 659 had ceased completely. Division of Water Rights (Division) staff Walt Pettit conducted an inspection in 1964, and verified his findings (WR-3), that among other things, "[q]uite likely there has been an extended period of non use." (WR-20.) In 1968, Division staff again visited the property and noted that "no use has been made of water under this license for 3 to 4 years other than some for non-licensed domestic and stockwatering use." (WR-23.) The findings in these reports are corroborated by additional evidence in the file, including a lapse in the submittal of Licensee Reports (WR-1 at 3; WR-19 & 22), the purchase of the companion right License 660 by Cabazon Water District in 1961(WR-2 at 3), and aerial photographs (WR-12). There is no question that water was available for diversion under the license, as evidenced by notes in the inspection reports and Cabazon Water District's use of water

from the same source under License 660. There is also no evidence that after 1968 irrigation ever resumed. Prior to 1980, revocation occurred automatically after nonuse for three years and this right was permanently lost at that time.[1]

The nonuse continued as the license was transferred through a series of developers and finally purchased by Dorris and Ferydoun Ahadpour in the early 1990s. At the hearing, Mr. Mozafar Behzad, agent for the Ahadpours, testified that during the time of the Ahadpour's ownership (1991-2000), no water was used pursuant to License 659 and the property was vacant. (RT at 41; WR-4.) He testified that he visited the property "every few months" and that there was always water flowing from a pipe down into the canyon. (RT at 9.42-43.) Mr. Behzad's testimony is consistent with evidence in the file during that time period.[2] In 1995, the Ahadpours filed a petition to change the purpose of use under License 659 to drinking (commercial or industrial use) through bottling or some other method. (WR-4 & 30.) In the transmittal letter, Mr. Behzad stated "at the present time the water is being completely wasted and runs down along Millard Canyon." (WR-30.) "There has never been, nor presently is there any agricultural activities that this water can be used for." (WR-31.)

When the Division noticed the change petition in October of 1995, the Morongo Band of Mission Indians (Tribe) protested because the Ahadpours did not have an easement across the Tribe's land and as such lacked the right or ability to exercise License 659.

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[1] Prior to 1980, Water Code section 1241 provided:

"When the person entitled to the use of water fails to use beneficially all or any part of the water claimed by him, for which a right of use has vested, for the purpose for which it was appropriated or adjudicated, for a period of three years, such unused water reverts to the public and shall be regarded as unappropriated public water."

In 1980, the Legislature amended section 1241 to extend the statutory time period for forfeiture from three years to five years.

[2] See also Licence 660 for evidence of water availibility from the source in the 1990's. Cabazon Water District submitted complete and credible reports of its use of water in this time period.

(WR-34.) This protest also suggested an injury to the Tribe's downstream water rights if the proposed project was allowed. The Tribe's protest and the licensee's own statement that the spring water was being wasted and ran down Millard Canyon triggered additional investigation and file review to determine whether the water was actually being used. (RT at 110.) It was at that time that Division began questioning the validity of certain reports in the file that appeared inconsistent with what was actually taking place on the property. (Id. at 111.)

Official water rights files are not perfect; they may contain information gaps or inaccurate reports. For example, the self-monitoring reports of water diversion and use that are submitted by licensees often contain insufficient information, errors and overestimations of water use. Although these reports are accepted by the Division as being "filed", the acceptance of the "filed" report does not constitute confirmation of the contents of the reports. When a file contains conflicting information, it may be appropriate for staff to review other documents contained in the file or otherwise ask for additional information to get a clearer picture of what is going on. As the Tribe's water expert stated, one would "generally accept the contents of a report unless there was some reason not to." (RT at 241.) Division staff confirmed that "unless there is a problem that occurs, something that triggers or brings it to our attention, typically no, we would believe what the party told us." (RT at 115.) In this case, however, the 1995 change petition did trigger Division staff to scrutinize the reports, and request additional information that would support the claims made. That information was not provided.

By letter dated September 28, 2000, the Division informed the Ahadpours, through their agent, that the Division had concerns about the validity of the water right based on the identified periods of non-use and reported periods of implausible excessive unauthorized use. (WR-35.) The Division advised the Ahadpours that the right may have

already been lost if documentation substantiating use could not be provided, and requested submittal of the missing reports for 1995 through 2000 and documentation of actual monthly beneficial use. (Id.) Having received no documentation supporting the use of water the Division began development of a Notice of Proposed Revocation. The Ahadpours sold the property to Great Springs of America in June, 2001. (WR-39.)

The Tribe Provided Scant Evidence to Rebut Showing of Nonuse of Water under License 659 in the 1960s and 1990s.

In an attempt to show use of water pursuant to License 659, the Tribe points to a few Licensee Reports where use is noted. Three of these Reports of Licensee were submitted by the Ahadpours for 1991-1995, each reporting no quantity of water used and noting that water returned to the source via seepage. (WR-29.) These Reports, however, also contained conflicting information listing 200+ acreage irrigated and 100+ stock. These numbers appear to have been carried forward from reports submitted for 1989-1991, which grossly overstate any realistic use under the license. The licensed amount of 0.16 cfs, at 1cfs per 80 acres, is only sufficient to irrigate 13 acres. (WR-2 at 2.) Division staff testified that often licensees simply repeat what is listed in the previous report. (RT at 109-110.) There is no evidence to suggest that such use was actually occurring, and the Tribe offered no explanation. Considering the conflicting information in the Reports themselves, along with the more specific and credible testimony and evidence provided at the hearing, the only reasonable conclusion is that the irrigated acreage and stock numbers were simply reported in error.

Second, when Great Springs purchased License 659, it attempted to cure the problem of lack of evidence of water use by filing amended reports for 1988-1995 and new reports for 1996-1999. (RT at 192, 223-224.) In a letter dated June 28, 2001, Mr. Saperstein, agent for Great Springs, reiterates that Division staff "have agreed to

allow GSWA to complete the forms for years prior to their ownership, *provided we have reliable information regarding the water use* and can include an explanation regarding the source of that information." (WR Exhibit 36 [italics added].) On July 6, 2001, Great Springs submitted amended and new reports for the years 1988 through 1999 (Amended Reports). (WR-37.) The Amended Reports indicated a relatively constant flow of water present at the source, but failed to explain how, if at all, that water was used. (Id.) The exact same amount of use was reported every single month without regard to season or number of days in the month, which is implausible for irrigation use. Some of the Amended Reports directly contradicted the statements by the agent for the actual owners of the property at the time. Great Springs did not provide the requested reliable information supporting the reports, and instead only included a short paragraph about the availability of water in the spring. (Id. at 2 "Basis of Information Regarding Exercise of License 659".)

At the hearing, Mr. Saperstein still did not provide any additional evidence that would support his Amended Reports, despite that being a central question for the hearing. (MB-20.) Furthermore, neither John Covington nor Stephen Johnson, the two engineers appearing as witnesses for the Tribe could provide information to support the Amended Reports, and neither engineer had visited the property in the 1990s in support of the Amended Reports. (RT at p. 208 [Covington never visited the site from 1990-1999]; RT at 192-194 [Johnson did not assist Mr. Saperstein in preparing his Amended Reports and does not remember visiting the site from 1990-1999].) Johnson admitted that when he did visit the site, he found only "remnants of irrigation system and facilities." (RT at p. 238.) An appropriative water right is based on *actual* beneficial use, and not necessarily what the licensee reports is used. Division staff, having noted an issue with water use under License 659, agreed to accept missing information from the subsequent purchaser

provided that it included reliable information regarding past water use. The Amended Reports that were submitted were not supported by reliable information necessary to rebut the existing evidence of nonuse for that time period.

Delay in Enforcement Defense to Forfeiture for Nonuse.

The Tribe did not present any valid defense to forfeiture, and instead chose to suggest that Division staff should have better administered License 659. The Tribe argues that if all this solid information of nonuse existed in the 1960s and the 1990s, the Division should have initiated revocation proceedings at those times. "Mere failure to enforce the law, without more, will not estop the government from subsequently enforcing it." (*Feduniak v. California Coastal Com'n* (2007) 148 Cal.App.4th 1346, 1369.) This is true as a matter of law as well as sound public policy.

In the 1960s, following the two inspections that established that irrigation had ceased completely, Division staff allowed the licensee an opportunity to provide additional information before making any recommendations. "Information regarding any use that has been made in the last 3 years will be submitted by Mr. Zimmer." (WR-20 at 2.) "A re-inspection will probably be required to confirm whatever information is submitted, particularly if revocation is indicated." (Id. at 3.) "It is recommended that no action be taken at this time. However another visit should be made in 1969 in order to determine if the use of water has recommenced." (WR-23 at 2.) A final recommendation was not made because the Division did not re-inspect the property; however, this does not change the fact that additional information was never submitted by the licensee and there is no evidence that use recommenced.

License 659 came back to the attention of the Division when a petition for change was filed in 1995. By the late 1990s and in 2000, Division staff was earnestly investigating the possibility that License 659 had been forfeited. (RT at 108.) The Tribe is critical of the

Division for not immediately converting the change petition process into a revocation proceeding, but this contention does not take into account how the administrative process actually works. It is not unusual for Division staff to give licensees the benefit of the doubt initially, and allow them the opportunity to produce substantial evidence that would support their claims. In the 1990s, the Division had no particular reason for conducting a thorough file review of License 659, out of the 11,000 or so licenses on file. However, upon receipt of the Tribe's protest and the licensees failure to provide supporting evidence, Division staff did conduct this thorough review. (Id.) If the Division had unlimited resources, a more prompt and efficient process may have occurred; however, this would not have changed the pertinent facts and delayed enforcement cannot cure the failure to put water to beneficial use. In this case, past licensees were provided a chance to produce credible evidence to show water use and that evidence was not produced. The length of time to commence enforcement proceedings is not a valid legal defense to the underlying facts establishing forfeiture and would be unworkable as a matter of policy.

The Subsequent Purchaser of an Unused Right Cannot Revive a Water Right Lost for Nonuse by the Previous Owner. The Tribe Was Aware or Should Have Been Aware of the Risk that License 659 had been Forfeited for NonUse.

The Tribe argues that it conducted a reasonable review of License 659 and found nothing to suggest that there was a problem. The Tribe submits that it had no idea that the Division was reviewing License 659 for possible forfeiture and that the Division had an obligation to inform the Tribe about this issue. One witness even described the Tribe as a "bonafide purchaser." (RT at 216.) This argument fails for two reasons.

First, loss for nonuse is a long-held and well-accepted principle of water law.[3] A party cannot revive a right long lost based on a theory that the agency did not warn them that

[3] Water Code §§ 1240 & 1241 [reenacted from 1872 Civil Code section 1411 and Water Commission Act section 20 and 20(a)]; see also *Lindblom v. Round Valley Water Co.* (1918) 178 Cal. 450 at 455 [citing

there was a problem. Put simply, a right that is subject to forfeiture cannot be immunized from forfeiture, simply because title changed hands, and without regard to whether the purchaser was warned or was otherwise aware of the problem. Rights acquired by purchase cannot be any greater than what the seller had beforehand. *Nemo dat qui non habet*, a fundamental rule of law provides: "He who hath not cannot give." *Black's Law Dictionary* 1037 (6th ed.1990). There is no requirement for the Division to record with the county or by some other method provide notice to prospective purchasers that there could be a cloud on the title to a water right license. Water right files are publically available for review and relevant information regarding any risks and uncertainties is contained either in those files or maintained by the right holder.

Second, there is ample evidence that the Tribe knew, or should have known, about the nonuse and possibility of forfeiture associated with License 659. The Tribe's protest alone would indicate a problem with nonuse based on the claim that the property owner lacked access to the property. Following that, the Tribe was copied on a letter in 2000 to the prior owners that clearly demonstrated that the Division was considering revocation of License 659. (WR-35.)

In addition, subsequent communications between Great Springs and Division staff clearly demonstrate that a proposed revocation was being developed. The letter from Mr. Sapperstein in June states: "[Y]ou have agreed to suspend any further action on the potential forfeiture of this water right pending receipt of this information. Presumably, once the proper forms and information are filed, there will be no need to consider further the forfeiture issue." (WR-36.)

Civ. Code § 1411]; *Wright v. Best* (1942) 121 P.2d 702, 710; *Smith v. Hawkins* (1985) 110 Cal. 122, 126-27.)

Again in July, Mr. Saperstein's letter to the Division shows Great Springs' knowledge that the Division was investigating forfeiture of License 659. "With the filing of these forms, you will find that License 659 has continuously been put to a reasonable and beneficial use. I would expect that there is no need to consider any further action regarding Water Code sections 1241 and 1675." (WR-37 at 2.) Any "presumption" or "expectation" that the Amended Reports could cure the defect of actual nonuse was on the part of Great Springs, not the Division. Great Springs submitted the Amended Reports without the requested supporting documentation. The Amended Reports were not found to be satisfactory and the Notice of Proposed Revocation was issued based on all of the available evidence.

The Tribe subsequently acquired License 659 from Great Springs in 2002, even though Great Springs remained engaged with the Tribe, completing the construction of a water bottling facility which is operating southeast of Cabazon presumably pursuant to other water rights. (RT at 255.) The Tribe sent a notice of assignment in 2002, which was received by the Division's Licensing Unit that handles changes in ownership records. The Division's records of ownership for the license were not changed until June, 2003. (WR-43.) The Tribe suggests that the Division should have notified the Tribe of the pending enforcement action at that time of the notice. Considering the information already available to the Tribe, it was incumbent on the Tribe, not the Division, to review the file for License 659. Recording a change in ownership is ministerial and does not trigger a comprehensive file review. If it did, the Division would have time to do nothing else. The Petition Unit was unaware of the Tribe's notice of ownership change but nevertheless

provided the Tribe notice of the proposed revocation based on its status as a protestant to the earlier change petition.[4]

Tribal Status Does Not Alter the Cause to Revoke License 659.

The Prosecution Team supports the public policy favoring tribal self-reliance and self-determination. Nevertheless, the Tribe's acquisition of License 659 does not alter the underlying facts that show cause to revoke. Likewise, conversion of the fee title to trust does not put License 659 beyond the continuing regulatory authority of the State Water Board. License 659 is a creature of state law, administered by a state agency, and subject to an adjudication and decree of the Riverside County Superior Court. While adjudicated before the enactment of the McCarran Amendment, the rights under the Decree are subject to state administration even if later acquired by the Tribe. Under this amendment, the federal government must submit itself to state jurisdiction like any ordinary party. (43 U.S.C. § 666; see also *U.S. v. Or.* (1994) 44 F.3d 758, 767 [McCarran Amendment applies to both court and administrative proceedings].)

Conclusion

Facts and evidence show cause for forfeiture of License 659. The due diligence of a subsequent owner has no bearing on the facts establishing nonuse by a previous owner, even if due diligence had been exercised. Here the Tribe had access to sufficient information indicating the possibility that License 659 had been lost for lack of use. With no legal defense to forfeiture, the Board should adhere to important State law and public policy and revoke License 659.

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[4] The Tribe also argues that notice should have gone to the Bureau of Indian Affairs as trustee and/or the Tribe's land; however, the Ahadpour property was not transferred from fee to trust until 2006, long after the Notice of Proposed Revocation was issued. More importantly, the fee to trust process is for land, not water permits and licenses. (See 25 CFR Part 151; §151.10 ["Upon receipt of a written request to have lands taken into trust, the Secretary will notify the state and local governments having regulatroy jurisdiction over the land to be acquired"].)

PROOF OF SERVICE

I, Wanda Warriner, declare that I am over 18 years of age and not a party to the within action. I am employed in Sacramento County at 1001 I Street, 22nd Floor, Sacramento, California 95814. My mailing address is P.O. Box 100, Sacramento, CA 95812-0100. On this date, July 20, 2012 I served the within documents:

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	BY FACSIMILE: I caused a true and correct copy of the document to be transmitted by a facsimile machine compliant with rule 2003 of the California Rules of Court to the offices of the addresses at the telephone numbers shown on the service list.
	BY HAND DELIVERY: I caused a true and correct copy of the document(s) to be hand-delivered to the person(s) as shown.
	BY OVERNIGHT MAIL TO ALL PARTIES LISTED: I am readily familiar with my employer's practice for the collection and processing of overnight mail packages. Under that practice, packages would be deposited with an overnight mail carrier that same day, with overnight delivery charges thereon fully prepaid, in the ordinary course of business.
x	**BY FIRST CLASS MAIL TO ALL PARTIES LISTED:** I am readily familiar with my employer's practice for the collection and processing of mail. Under that practice, envelopes would be deposited with the U.S. Postal Service that same day, with first class postage thereon fully prepaid, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing shown in this proof of service.

By placing a true copy thereof in separate, sealed envelopes addressed to:

State Water Resources Control Board Attention: Kathleen Groody P.O. Box 2000 Sacramento, CA 95812-2000	MORONGO BAND OF MISSION INDIANS c/o Stuart L. Somach Somach, Simmons & Dunn 500 Capitol Mall, Suite 1000 Sacramento, CA 95814	

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document was executed on July 20, 2012 at Sacramento, California.

Wanda Warriner

Wanda Warriner
Legal Secretary