

Keith B

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 98-03

In the Matter of Applications 29567, 29568, and 29569,
GREEN GULCH RANCH,
Applicant

SOURCES: Long Valley Creek, Balls Creek and Unnamed Tributaries, Purdy Creek and Unnamed Tributaries,
Both Tributary to Long Valley Creek Thence Honey Lake

COUNTY: Sierra

ORDER APPROVING PETITION FOR RECONSIDERATION

BY THE BOARD:

1.0 BACKGROUND

In September 1989 Green Gulch Ranch (Applicant) filed Applications 29567, 29568, and 29569 to divert 16,800 acre-feet per annum (afa) year round from the Long Valley Creek stream system for irrigation and stockwatering on 1,170 acres of land in Sierra County. Two months later, the Long Valley Creek stream system was included in Order WR 89-25 (Declaration) and declared to be a fully appropriated stream from March 1 to September 30.

Water Code section 1206(a) provides that following the adoption of a declaration that a stream system is fully appropriated, the State Water Resources Control Board (SWRCB) may cancel any pending application to appropriate water from a fully appropriated stream system. In paragraph 7 of Order WR 89-25, the SWRCB ordered the Chief of the Division of Water Rights to identify all such pending applications and to provide the applicants with notice of the respects in which the application is inconsistent with the Declaration (paragraph 7.0.1) and to specify a reasonable time within which the applicant may amend the application to make it consistent with the conditions of the Declaration (paragraph 7.0.3) or provide a statement, in the nature of an offer of proof, to show that hydrologic circumstances have changed within the stream system declared to

be fully appropriated, or that other circumstances exist which justify the continued processing of the application (paragraph 7.0.4). The statement provided to comply with paragraph 7.0.4 should be in sufficient detail to support a prima facie finding that unappropriated water is available to supply the applicant. In 1993 paragraph 7 was incorporated in Title 23, California Code of Regulations section 873.

In accordance with paragraph 7 of Order WR 89-25, on August 15, 1991, the Applicant was sent a letter explaining the options available with regard to continued processing of its applications. The letter requested that the Applicant notify the SWRCB within 30 days of how it wished to proceed and informed the Applicant that failure to respond within 30 days may result in cancellation of the applications. On October 15, 1991, the Applicant responded and provided information in an attempt to show that hydrologic circumstances have changed and there is unappropriated water available for appropriation.

By letter dated August 6, 1992, the Applicant was asked whether a procedure to process the applications proposed by the staff of the Division of Water Rights (Division) was acceptable and was provided a copy of the Division's staff analysis of the hydrologic information submitted by the Applicant. The staff analysis identified six "questions or concerns" regarding the hydrologic information. No response to the "questions or concerns" was asked for nor was a date specified for a response regarding the proposed procedure.

By letter dated October 5, 1992, the Division asked the Applicant for written confirmation of the preferred method of processing the applications within 60 days or the applications may be canceled without further notice. No mention was made of any response to the "questions or concerns" raised in the staff analysis being required to be submitted.

On November 20, 1992, the Applicant provided written confirmation that the Division's proposed method of processing the applications was acceptable and asked to be informed

regarding scheduling the Technical Review Sessions¹ so that it could offer dates on which it would be available. There was no contact between the Applicant and the Division for the next four years.

By letter dated December 17, 1996, the Division asked the Applicant for specified information to be provided within 45 days or the applications would be subject to cancellation without further notice. In the letter, the Division asked:

- "1. Are the Applicants still interested in pursuing the above referenced applications? If not, please provide us written notice of the applications that should be canceled.
- "2. If you are still interested in pursuing the applications, are there any modifications that need to be made to either the amounts, purposes, place of use, etc.?
- "3. Are you ready to address the concerns contained in the July 16, 1992, staff analysis? If so, a written response to these concerns should be submitted.
- "4. Have you identified all of the legal water diverters downstream of the proposed points of diversion? If so, have you conducted any technical review sessions with these individuals and what was their reaction? If such sessions have not been conducted, when do you anticipate conducting such sessions?
- "5. Have any diversions pursuant to the applications been initiated? Until such time as permits are obtained or some other valid basis of right can be formally established, diversion of surface water to groundwater storage should not be initiated.
- "6. Are any local permits or approvals required for your project? If so, will the local agency responsible for issuance of these permits act as lead agency pursuant to CEQA?"

The Applicant requested and was granted a 15 day extension of time to respond. On January 31, 1997, the Applicant provided a written response. By letter dated February 28, 1997, the Applicant provided an additional written response to the Division's letter dated

¹ The Applicant agreed to conduct Technical Review Sessions (possibly in the Long Valley area) where the Applicant and its consultants would present their arguments regarding the availability of unappropriated water to other water right holders or interested parties.

December 17, 1996. The Applicant responded that it was still interested in pursuing the applications and that it may be necessary to amend the purpose of use and place of use stated in the applications if a permit is obtained from the Long Valley Groundwater Management District to export water for domestic use in Washoe County, Nevada. The Applicant further responded that it had not identified all of the legal water users downstream of the proposed points of diversion and that no diversions pursuant to the applications have been initiated. The Applicant did not provide an answer regarding when Technical Review Sessions would be conducted, nor did it state whether a local agency would be the lead agency pursuant to CEQA. The Applicant stated that it was not ready to address the concerns contained in the July 16, 1992, staff analysis but that its engineers would be meeting with Division staff on March 6, 1997.

On March 6, 1997, Division staff met with the Applicants. According to a Memorandum to Files dated March 7, 1997, which summarized the meeting, the Division provided several "recommendations" to the Applicant; however, no deadline was specified for compliance with the recommendations nor was the Applicant told that failure to comply with the recommendations would result in cancellation of the applications without further notice. In the Petition for Reconsideration (Petition), the Applicant admits that the Division requested that the six areas of concern outlined in the July 16, 1992, staff analysis be addressed and confirmed that no deadline for receiving the response was imposed. (Petition at 4:19-22.)

On May 6 and 14, 1997, telephone conversations between the Applicant and Division staff occurred. Contact reports in the SWRCB's files show that the Applicant stated an intent to pursue the applications and that the Applicant was waiting for approval from the Washoe County Planning Commission regarding the Applicant's proposed groundwater export project. There is no indication in these contact reports that the Applicant was told to submit specified information by a specified date or risk cancellation of the applications.

On December 2, 1997, the Chief of the Division of Water Rights issued an Order Rejecting and Canceling Applications 29567, 29568, and 29569 (Order). In a letter dated December 2, 1997, the Chief of the Division of Water Rights explained that the applications were canceled because,

in accordance with Water Code section 1206(a), the applications were pending on the date that the Long Valley Creek stream system was declared to be fully appropriated and because of a "lack of diligence" on the part of the Applicants. In the December 2, 1997 letter, the Chief of the Division of Water Rights also stated that the Applicant should have submitted specified information to the Division; yet there is no record in the files of any previous request that the Applicant provide the information specified on page two of the December 2, 1997, letter by a specific deadline to avoid cancellation of the applications.

On December 31, 1997, the Applicant filed a Petition for Reconsideration of the Order. As explained in the Petition, the Applicant submitted the response to the concerns identified in the Division's July 16, 1992, staff analysis with the Petition.

2.0 THE LAW GOVERNING RECONSIDERATION

Water Code section 1122 provides for reconsideration of SWRCB decisions or orders upon the SWRCB's own motion or upon petition filed within 30 days by any interested person. Title 23, California Code of Regulations, section 768 provides that an interested person may petition for reconsideration upon any of the following causes:

- "a. Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
- "b. The decision or order is not supported by substantial evidence;
- "c. There is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;
- "d. Error in law."

Requirements for petitions for reconsideration are set forth in Title 23, California Code of Regulations, section 769. Actions which the SWRCB may take on reconsideration are set forth in Title 23, California Code of Regulations, section 770. The SWRCB may refuse to reconsider the decision, deny the petition, set aside or modify the decision, or take other appropriate action.

3.0 SUMMARY OF PETITION

The Petition requests reconsideration of the Division Chief's Order because the Applicant was unaware of a deadline for submitting information requested by the Division. The Applicant had been preparing its response to the request for information by the Division when the Order was issued. The Applicant contends that its data show that sufficient unappropriated water is available in the Long Valley Creek stream system to satisfy the proposed project. The Applicant requests that the Order be reversed and the applications reinstated.

4.0 DISCUSSION

Both the Applicant and the Division bear some responsibility for the delay in determining whether to proceed with processing the applications. A pattern of conduct has been established where the Applicant has, at times, been late in providing information or has not provided all of the information requested by the Division or has not taken action requested by the Division. By its inaction the Division has acquiesced or appeared to acquiesce in the delay or insufficiency of the Applicant's response. Further, the Division, at times, has not clearly stated what information should be submitted by the Applicant or whether there is a deadline for submittal. Moreover, the Division, at times, has not explicitly conditioned the Applicant's failure to comply with requests for specified information by a specified deadline or failure to take specified actions by a specified deadline with cancellation of the applications.

Under legislation that took effect this year, the SWRCB may request supplemental information from project applicants, including information needed to demonstrate that unappropriated water is available for appropriation. (Water Code section 1275.) The legislation further provides for cancellation of the application if the information is not provided. (*Id.* section 1276.) The new law is intended to avoid situations, as apparently occurred here, where the Division does not have the information it needs to properly review and process an application, despite requests of the applicant, while the applicant believes it is doing enough to prevent cancellation of the application for want of due diligence.

In this case, however, the cancellation took place before the new law took effect. The Division was not relying on the new law as the basis for cancellation and the Applicant was not given any notice that the requirements of the new law might be applied to the Division's requests for information. Even under the new law, a request for supplemental information must be specific enough about what information is being requested and when it is due for the applicant to know what is expected. Given the apparent misunderstandings between the Applicant and Division staff regarding what information should have been provided by the Applicant, when the information should have been provided, what actions should have been taken by the Applicant, and when specified actions should have been taken, the SWRCB finds that cancellation of the applications was inappropriate.

The SWRCB further concludes that the Division should make a request to the Applicant, pursuant to section 1275 of the Water Code, for information reasonably needed to supplement the original application. At a minimum, the Division should request information sufficient to demonstrate that circumstances justify continued processing of applications on a stream that has been declared to be fully appropriated, to the extent the Division determines that the Applicant has not already provided the necessary information. Additional requests for the kind of information previously requested by the Division, and for information concerning impacts on public trust resources, would also be appropriate. The Division need not necessarily make all requests for supplemental information as part of a single request. All requests should be reasonably specific about what information is requested, and set a specific, reasonable period for submitting the necessary information.

5.0 CONCLUSION

For the reasons discussed above, the SWRCB concludes that the Petition should be approved. Accordingly, the Order should be reversed and Applications 29567, 29568, and 29569 should be reinstated.

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ORDER

IT IS HEREBY ORDERED THAT the Petition for Reconsideration filed by Green Gulch Ranch is approved.

IT IS FURTHER ORDERED THAT the Order Rejecting and Canceling Applications 29567, 29568, and 29569 is reversed and Applications 29567, 29568, and 29569 are reinstated.

CERTIFICATION

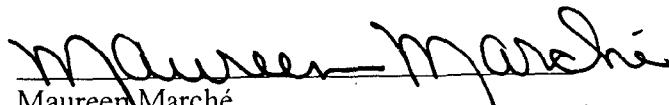
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on February 19, 1998.

AYE: John Caffrey
James Stubchaer
Marc Del Piero
Mary Jane Forster
John Brown

NO: None

ABSENT: None

ABSTAIN: None


Maureen Marché
Administrative Assistant to the Board