

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2008-0005-EXEC

In the Matter of Permit 19895 pursuant to Application 28473

CHINO BASIN WATERMASTER

Petition for Reconsideration of
Order Denying Petition for Extension of Time

SOURCES: Day Creek and East Etiwanda Creek, tributary to the Santa Ana River

COUNTIES: San Bernardino and Riverside

ORDER REMANDING ORDER DENYING PETITION FOR TIME EXTENSION

BY THE EXECUTIVE DIRECTOR:

1.0 INTRODUCTION

The Chino Basin Watermaster (Watermaster) petitions the State Water Resources Control Board (State Water Board or Board) for reconsideration of the Division of Water Rights' (Division) Order WR 2007-0034-DWR (Order) denying an extension of time for water right Permit 19895 (Application 28473). The Watermaster requests the Board to approve its petition for extension of time for the permit. The State Water Board finds that the Order denying the time extension of time was inappropriate and remands the order to the Division for further consideration consistent with this order¹.

2.0 RECONSIDERATION OF A DECISION OR ORDER

Any interested person may petition the State Water Board for reconsideration of a decision or order on any of the following grounds:

- (a) Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;

¹ 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 the 90-day period, a petitioner may seek judicial review, but the State Water Board is not divested of jurisdiction 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]; State Water Board Order WQ 98-05-UST at pp. 3-4.)

- (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. (Cal. Code Regs., tit. 23, § 768.)²

The State Water Board may refuse to reconsider a decision or order if the petition for reconsideration fails to raise substantial issues related to the causes for reconsideration set forth in section 768 of the State Water Board's regulations. (§ 770, subd. (a)(1).) Alternatively, after review of the record, the State Water Board also 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).)

State Water Board Resolution No. 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 No. 2002-0104. Accordingly, the Executive Director has the authority to refuse to reconsider a petition for reconsideration, deny the petition, set aside or modify the decision or order, or take other appropriate action. The State Water Board has not designated decisions by the Executive Director as precedent decisions pursuant to the Administrative Procedures Act. (SWRCB Order WR 96-1, p. 17, fn. 11.)

3.0 FACTUAL BACKGROUND

On October 3, 1986, the State Water Board issued Permit 19895 for Application 28473 to the Chino Basin Watermaster.³ The permit authorizes the diversion of up to 15,000 acre-feet of water per annum to underground storage for irrigation, industrial and municipal uses, from November 1 of each year to April 30 of the succeeding year. The water may be diverted from Day Creek and East Etiwanda Creek into four spreading basins. Both creeks are tributary to the Santa Ana River.

² All further regulatory references are to the State Water Board's regulations located in Title 23 of the California Code of Regulations unless otherwise indicated.

³ Originally, the County of San Bernardino was a co-permittee. The County has ceded its interest in the permit to the Watermaster.

Pertinent permit conditions include the following requirements:

- Commence construction by October 3, 1988, complete construction by December 1, 1989 and put water to beneficial use by December 1, 1990. (Terms 7-9.)
- Install and maintain devices to measure the quantities of water placed in underground storage and the quantities of water subsequently recovered for beneficial use. (Term 15.)
- File progress reports upon request. (Term 10.)

The Permittee made slow but fairly steady progress toward project construction between 1987 and 1991. (1987, 1988, 1989, 1990, 1991 Progress Reports.) In 1993, construction was reported as being complete. (1993 Progress Report.)

There has been insufficient runoff to pond water in some years. (1989, 1990 Progress Reports.) Some water was impounded in other years. (1991, 1992, 1993 Progress Reports.) The quantity of water actually placed in groundwater storage and subsequently recovered for beneficial use is unknown because Permittee did not install monitoring devices as required by its permit. (June 30, 2003 Report of Inspection report by Scott McFarland.)

On August 10, 1994, Permit 20753 (Application 28996) was issued to the Watermaster and the County of San Bernardino. Permit 20753 authorizes the Watermaster⁴ to divert water to four basins on East Etiwanda Creek and six basins on San Sevaine Creek. The Watermaster's petition for extension is for Permit 19895, not Permit 20753.

Starting in 1997, Permittee began filing Progress Reports indicating that construction has not started for Permit 19895. (Progress Reports for 1996, 1997 and 1998.) The 2001 Progress Report stated that construction had commenced but had not been completed. Significantly, the progress report for this permit (Permit 19895) refers the reader to the progress report for Permit 20753.

The June 30, 2003 inspection report by Scott McFarland indicates that all five points of diversion are as specified by the permit and four basins are in place (although two basins are not percolating water). The inspection report also indicates that the original project was completed years ago and that the Permittee has plans for expansion.

⁴ The County of San Bernardino has ceded its interests in Permit 20753 to the Watermaster.

On April 20, 2006 Permittee stated that measuring devices had been installed on basins A and B. (April 20, 2006 Contact Report.)

Permittee has repeatedly made statements to the effect that it does not have storage rights in the groundwater basin and that it is not entitled to use water from the groundwater basin. (1987-1993, 2002 Progress Reports.)

4.0 BASIS FOR ORDER DENYING PETITION FOR TIME EXTENSION

The order denying the petition for time extension contains about 31 recitals forming the basis for the order; many of the recitals are factually contradictory. The following appears to be the basis for the order denying the time extension:

- The project has not been constructed or not timely completed. (Whereas: 3.h, j, l and n; and 6.)
- Funds are not available for project construction. (Whereas: 6.)
- Permittee has not installed measuring devices or maintained records of water diversion and use. Permittee has not made beneficial use of water. (Whereas: 4, 5, 9, 10, and 12.)
- Watermaster has neither the right to store water in the Chino Groundwater Basin nor the right to withdraw water from the basin for beneficial use. (Whereas: 3.f, 10 and 12.)

5.0 DISCUSSION

Permittee's inconsistent reporting of the construction of the project authorized by Permit 19895, failure to install measuring devices and maintain records of use, and repeated statements that it is not entitled to store or use the water it seeks to appropriate were significant contributing causes to the order denying petitioner's request for a time extension. Nevertheless, the Division did not adequately review the record in denying the time extension petition.

5.1 Inconsistent Reporting of the Construction of the Project

When the record is examined more closely, it is clear that the project had been constructed, although construction was not completed until after the period specified in the permit. Thus, the Division should have considered whether to grant an extension of time to put water to full beneficial use, rather than denied an extension based on the assumption that construction was never completed.

It further appears that the Permittee's statements that it lacked the finances to commence construction were in reference to another project (the project for Permit 20753), or it may be that the Permittee statements were with regard to an intention to reconstruct one or more of the basins for Permit 19895. Nevertheless, intended reconstruction does not place the Permittee in violation of the permit terms requiring that construction be commenced and completed within the time set forth in the permit (Terms 7 and 8). The absence of funds to construct a different project or for project reconstruction is not, standing alone from other circumstances, a sufficient basis for denying a petition for a time extension.

5.2 Failure to Install Measuring Devices and to Maintain Records of Use

Some small amount of water has probably been placed in groundwater storage. The actual amount of water that has been placed in storage and subsequently put to beneficial use is unknown because Permittee failed to timely install required measuring devices—a permit violation that may have serious consequences.

An appropriation of water must be for a useful or beneficial purpose: when an appropriator ceases to use water for a useful or beneficial purpose, the right ceases. (Water Code § 1240.) Groundwater storage is a beneficial use of water only if the water so stored is thereafter applied to the beneficial purposes for which the storage is made. (Wat. Code, § 1242.) The State Water Board may only issue a license confirming the right to appropriate water for such amounts as have been determined to have been applied to beneficial uses within the terms and conditions of a permit. (Wat. Code, §§ 1610, 1611.) Thus, unless measuring devices are installed and records maintained of the quantity of water that is diverted to groundwater storage and thereafter put to beneficial use, a permittee will never be able to obtain a license for the appropriation of water.

Indeed, a permittee's failure to install such devices and to maintain records accounting for the amount of water that is recharged and subsequently beneficially used may be grounds for revocation. (Wat. Code, §§ 1611, 1410.) The fact that Permittee has belatedly installed some of the required measuring devices cannot make up for the absence of many years of records that could have documented the amount of water placed in the groundwater basin and subsequently put to beneficial use.

5.3 Repeated Statements regarding the Right to Store Water in or Withdraw Water from the Chino Groundwater Basin

The Watermaster's statements that it has neither the right to store water nor the right to withdraw water appear to be correct when viewed from the context of the Chino Basin Watermaster Judgment, Case No. RCV 51010 (Judgment). However, the Watermaster's statements are misleading within the context of the appropriative water laws administered by the State Water Board. And it is within the context of state appropriative water laws that the Watermaster files annual Progress Reports.

Part of the confusion between the State Water Board and the Watermaster are their differing views as to what constitutes groundwater storage. The State Water Board views groundwater storage as water physically diverted from a surface or subsurface stream and put into a groundwater basin for subsequent recovery. (Wat. Code, § 1242; Cal. Code Regs, tit. 23, § 658.) This includes the water being diverted under Permit 19895 from two streams overlying the Chino Groundwater Basin. The State Water Board views groundwater basins as natural reservoirs.

The Watermaster appears to view stored groundwater as only being made up of water imported from outside the Chino Basin Watershed and reclaimed water. (Judgment, 4. Definitions, (aa) Stored Water, (bb) Supplemental Water, ¶ 49. Sources of Supplemental Water.) Only those persons who have imported supplemental water pursuant to an agreement with the Watermaster have storage rights. (Judgment ¶ 28. Ground Water Storage Agreements.)

Finally, the Watermaster appears to view the diversion and spreading of groundwater into spreading basins for percolation to groundwater as replenishment or maintenance of the basic groundwater pool, and not storage. (Judgment, ¶ 50 Methods of Replenishment, (a) Spreading.)

The Judgment determined the various rights to extract and put Chino Basin groundwater to beneficial use. (Judgment, II. Declaration of Rights.) In accord with the judgment, the Watermaster has the duty and power:

- (1) to determine an operating safe yield for the basin (Judgment, ¶ 1.(l));
- (2) to oversee the extraction of water from the Chino Basin Groundwater (Judgment, V. B. Powers and Duties);
- (3) to develop and implement a physical solution for maximizing the reasonable beneficial uses of groundwater, including the importation of additional water and developing local water projects to augment the amount of water placed in the groundwater basin (Judgment, VI. Physical Solution); and
- (4) to assess users for amounts sufficient to replenish water to replace groundwater extraction exceeding the basin's safe yield. (Judgment, ¶¶ 22 and 45.)

Given such broad powers, the Watermaster has the authority to store groundwater and to regulate its extraction for subsequent beneficial use within the meaning of state appropriative water law administered by the State Water Board.⁵

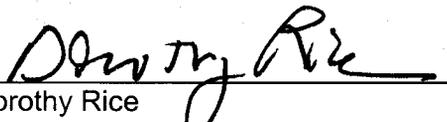
6.0 THE PETITION FOR RECONSIDERATION BY CHINO BASIN WATERMASTER SHOULD BE ACCEPTED.

For the reasons discussed above, the petition for reconsideration by the Chino Basin Watermaster of Order WR 2007-0034-DWR denying its petition for extension of time should be accepted. Further, the order should be remanded to the Division for further consideration in light of the findings and discussion contained in this order.

ORDER

IT IS HEREBY ORDERED THAT the petition for reconsideration by the Chino Basin Watermaster of Order WR 2007-0034-DWR is accepted. The order is remanded to the Division for further consideration consistent with this order.

Dated: 1.11.08


Dorothy Rice
Executive Director

⁵ Of course, the Watermaster may only appropriate water subject to the State Water Board's permitting and licensing authority to the extent authorized by its permits. An extension of time is necessary if the Watermaster intends to divert or use more water than was actually diverted or used within the period specified in the permit.