

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2010-0021-EXEC

In the Matter of the Petition for Reconsideration of Decision to not
Accept the Protest of Michael J. Barkley filed against
Petition for Extension of Time on

United States Bureau of Reclamation

Permit 13776 (Application 18115)

SOURCE: Stony Creek

COUNTY: Colusa

ORDER GRANTING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR:

1.0 INTRODUCTION

Michael J. Barkley (Barkley) petitions the State Water Resources Control Board (State Water Board or Board) for reconsideration of the Division of Water Rights (Division) decision to deny his protest of the United States Bureau of Reclamation's (Reclamation) petition to extend the development period for Permit 13776. The State Water Board Executive Director finds that the petition raises substantial issues related to the causes for reconsideration set out in California Code of Regulations, title 23, section 768. Barkley's petition for reconsideration of the Division's decision to not accept the protest on environmental grounds is granted. Barkley's petition for reconsideration concerning all other protest issues is denied. To the extent Barkley raises issues that are not addressed in this order, the Executive Director determines that those issues do not merit further review.

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: (1) irregularity in the proceedings or abuse of discretion; (2) the decision or order is not supported by substantial evidence; (3) there is relevant evidence, which in the exercise of reasonable diligence, could not have been produced; or (4) an error in law. (Cal. Code Regs., tit. 23, § 768.)¹

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. (*Id.*, § 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 2007-0057 delegates to the Executive Director the authority to supervise the activities of the State Water Board. The Executive Director's consideration of a petition for reconsideration falls within the scope of authority delegated under Resolution 2007-0057. Accordingly, the Executive Director has the authority to refuse to reconsider a petition for reconsideration, deny the petition, set aside or modify the order, or take other appropriate action.

3.0 FACTUAL BACKGROUND

On June 29, 2009, the Division received a petition for extension of time from Reclamation for Permit 13776 and additional permits associated with the Central Valley Project (CVP). Permit 13776 was approved by the Board in 1962 and relates to storage and diversions for Black Butte Dam on Stony Creek. Reclamation requested an extension until 2030 to develop water use under the permit.

¹ The Water Code directs the State Water Board to act on a petition for reconsideration within 90 days from the date on which the State Water Board adopts the decision or order that is the subject of the petition. (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 to act upon a petition simply because the State Water Board failed to complete its review of the petition on time. (State Water Board Order WR 2009-0061 at p. 2, fn 1; see *California Correctional Peace Officers Ass'n. v. State Personnel Bd.* (1995) 10 Cal. 4th 1133, 1147-48, 1150-51; State Water Board Order WQ 98-05-UST at pp. 3-4.)

The State Water Board publicly noticed the time extension petition on September 3, 2009. On October 1, 2009, Barkley filed a timely protest to the petition alleging the Board did not have jurisdiction over the change, it would not best serve the public interest, would be contrary to law, and approval would have an adverse environmental impact. Barkley alleged that Reclamation's diversions in the Stony Creek watershed adversely affect parcels he owns on the North Fork of Stony Creek. Barkley also alleged public trust and environmental impacts due to the "vast cumulative project culminating in Ap. 18115 [Permit 13376]." To support his protest on environmental grounds, Barkley referenced effects on anadromous fish species and public trust resources and claimed that time constraints on filing the protest did not allow him the opportunity to provide further information to support his allegations. Barkley's protest also extensively referenced the Angle Decree (Decree), an adjudication of water rights in the Stony Creek Basin that included the United States and Barkley's predecessor in interest.²

On December 14, 2009, the Division determined that the following protest issues would not be accepted:

- 1) that the project was inconsistent with watershed protection principles, county of origin and area of origin statutes;
- 2) that the project involves waste occurring before 1946; and
- 3) arguments related to the Angle Decree.

The Division determined that Barkley had also provided inadequate information to support his protest based on fishery/public trust impacts. Accordingly, the Division did not accept the protest, but allowed Barkley 30 days to supplement the protest to support the environmental allegations. (See Cal.Code Regs., tit. 23, § 749 [the board will allow a protestant a reasonable opportunity to correct a protest].)

On January 14, 2010, Barkley submitted a timely petition for reconsideration of the Division's decision not to accept the protest. In the petition, Barkley asserts that the Division arbitrarily dismissed his protest, that substantial evidence did not support the dismissal and that the dismissal constituted an error in law. Barkley submitted three supplements to his petition for reconsideration—on February 11, 2010, March 14, 2010 and April 8, 2010. On April 12, 2010,

² The United States District Court, Northern Division, issued the Angle Decree in 1930.

Barkley filed a writ of mandate in Sacramento Superior Court challenging the Board's decision to dismiss his protest. Barkley served the Board with the writ of mandate on April 19, 2010.³

4.0 DISCUSSION

4.1 The Environmental Protest should not have been Dismissed

The Water Code does not contain specific provisions that address protests to time extension petitions. The only reference to protests of time extensions is found in California Code of Regulations, title 23, Section 843 subdivision (c) (1). That section requires that a protestant state the reason for the objection to the time extension petition and any condition on which the objection could be satisfied. Section 843 subdivision (c) (1) also provides that the Board may make a determination on the protest with or without a hearing.

Water Code sections 1330-1335 address protests to applications and do not specifically apply to petitions for extension of time.⁴ However, because time extension petitions are petitions to request further time to develop water use under a water rights application, it is reasonable to rely on sections 1330-1335 for guidance on how to process protests of time extension petitions to the extent that applying these sections would be consistent with applicable statutes and regulations.⁵

Section 1335 governs the circumstances under which the Board may dismiss a protest to an application. After requesting that the protestant submit specific information in support of the protest, the Board may dismiss the protest if specified conditions are met. Section 1335, subdivision (d) (2) states that a protest based on public interest, public trust or environmental issues may be canceled if the Board determines that: 1) the public review period for the applicable environmental document has expired; and 2) in the absence of any additional information there is no substantial evidence to support the allegation in light of the whole record.

³ Barkley dismissed the complaint without prejudice on June 10, 2010 pursuant to a settlement agreement reached with the State Water Board. The settlement provides that the State Water Board's December 14, 2009 dismissal of his protest was not a final Board action and that the Board would consider his petition for reconsideration and issue an order on reconsideration.

⁴ Likewise, Water Code section 1703 et seq. addresses protests of petitions to change a point of diversion, place of use or purpose of use and does not mention protests to time extension petitions.

⁵ Unlike protested water rights applications, the regulations that cover protests to time extension petitions specifically state that the Board is not required to hold a hearing on a protested time extension petition.

Reclamation has not submitted environmental documentation for the project, nor does it appear that the project will be exempt from environmental review. In a supplement to its time extension petition, Reclamation acknowledges that the State Water Board is the lead agency under the California Environmental Quality Act (CEQA) and that Reclamation will be responsible for producing environmental documentation for the petitions under the State Water Board's direction.⁶ At this time, it is unnecessary to determine whether Barkley's submissions constitute substantial evidence to support allegations of adverse impacts to fishery resources and other public trust resources. Under section 1335 (d) (2), until the public review period for environmental review has passed, dismissal of Barkley's protest is premature insofar as the protest involves issues other than injury to a legal user of water.

Barkley has cited numerous studies and references to support his claim of an adverse impact to public trust resources. While no determination on the issue is necessary at this point, it is important to note that any evidence submitted by Barkley must address environmental concerns incidental to the time extension petition, not concerns related to the current operation of the project. The project is currently operated in accordance with 2002 and 2008 National Marine Fisheries Service Biological Opinions and with terms adopted in a 1996 Board Order that required improvements to fish habitat. Evidence submitted to support adverse environmental impacts must account for the current environmental baseline for the project and focus on those impacts that will occur if the time extension petition is granted—not on impacts that are the result of current operations or other activities that will occur independent of the State Water Board's action on Reclamation's petition.⁷

⁶ It is unclear which type of environmental document Reclamation will ultimately produce. Reclamation refers the Board to information that will be presented in the Environmental Impact Report/Environmental Impact Statement being prepared for the Bay Delta Conservation Plan (BDCP). The Department of Water Resources is the lead agency responsible for developing the BDCP, with the State Water Board serving as an advisory agency. Reclamation asserts that the environmental document produced for the BDCP will inform the preparation of the necessary environmental document for the time extension petitions. It is unnecessary at this point to speculate on the contents of an environmental document produced for the time extension petition other than to state that any document will have to comply with CEQA.

⁷ State Water Board Order WR 2001-0002 discusses criteria that should be considered when evaluating time extension petitions. The Board stated, "a petition for extension of time does not necessarily entail reevaluation of the underlying water right. Rather, in reviewing a petition for extension of time, only those changes that will take place if the petition is granted should be considered."

4.2 Consideration of the Proposed Change is within the State Water Board's Jurisdiction

Barkley alleges that the State Water Board has no jurisdiction to grant Reclamation an extension of time for water development. Barkley alleges that under the Angle Decree, the Board has no jurisdiction over lands that were allocated surface flow in the watershed. This assertion is incorrect. The State Water Board is the primary agency responsible for administering water rights in California. (Wat. Code § 174.) The Angle Decree in no way divests the State Water Board of its authority to administer water rights in the Stony Creek watershed.

Further, the Decree does not expressly or impliedly limit future appropriations in the watershed. The Decree did not declare the stream system fully appropriated; this determination was not made until the Board did so in 1991. (See Order WR 91-07.)

The Decree applies only to the parties and diversions that were before the Court, and the State Water Board was not a party. (See *Pasadena v. Alhambra* (1949) 33 Cal. 2d 908, 920 [only persons made party to the judgment can be bound by it].) The Angle Decree states, "except as herein specifically provided no diversion of water from the natural flow of the stream into any ditch or canal for direct conveyance to the lands shall be permitted as against any of the parties herein except in such amount as shall be actually and reasonably necessary for the beneficial use for which the right of diversion is determined and established by this decree..." In other words, the Decree was a snapshot of water rights existing as of the Court's determination in 1930, and the Decree binds only the parties to the Decree to the amounts specified in the Decree. In a discussion of private decrees in *Environmental Defense Fund, Inc. v. East Bay Municipal Utility Dist.* (1980) 26 Cal. 3d 183, 199 the court stated, "private judicial litigation involves piecemeal adjudication determining only the relative rights of the parties before the court..." Barkley is correct in stating that the Angle Decree bound his predecessor's rights relative to the United States; however, the Decree did not divest the Board of the jurisdiction to grant appropriative rights to future applicants.

Subsequent to the Angle Decree, Reclamation and a number of additional parties submitted applications for appropriative water rights in the Stony Creek stream system. Granting Reclamation and others appropriative permits subsequent to the issuance of the Decree has no effect on water rights determined by the court. Barkley and Reclamation maintain whatever

rights were adjudicated in the Angle Decree. (See *United States v. State Water Resources Control Board* (1986) 182 Cal. App 3d. 82, 102, citing *Duckworth v. Watsonville Water Co.* (1915) 170 Cal. 425, 431 [the rights of riparians and senior appropriators remain unaffected by the issuance of an appropriation permit].)

Contrary to Barkley's assertion that only the court can determine water rights in the Stony Creek watershed, since 1914 the Board has had exclusive jurisdiction over the granting and administration of appropriative water rights. (*Environmental Defense Fund, Inc. v. East Bay Municipal Utility Dist.* (1980) 26 Cal. 3d.183, 194; see also Wat. Code, § 2800 et seq. [State Water Board retains permitting and licensing authority where a decree has been issued in a statutory stream system adjudication].) The Board had the exclusive authorization to grant Reclamation an appropriative permit and to authorize an extension to Reclamation's development schedule. Accordingly, the Division properly rejected Barkley's argument that the Board lacked jurisdiction over Reclamation's permit.

4.3 Barkley has provided No Support for Allegation of Interference with Prior Rights

Barkley alleges that Reclamation's diversions interfere with his prior upstream water rights and that California Code of Regulations, title 23, section 749 should not apply in this case.⁸ Section 749 states that because an upstream user can take water before it reaches a downstream user, protests based on a prior right of an upstream user normally will not be accepted. Barkley offers no further factual support to support his claim that Reclamation has interfered with his upstream right or that approval of the petition will result in any interference with his alleged upstream right. His only statement to support the claim is that Reclamation has violated the Angle Decree and that its excess diversions "interfere with upstream uses..." This is not substantial evidence, however, showing that Barkley's prior decreed rights will be adversely affected if the Reclamation's petition for extension of time is granted. Without supporting facts and evidence, Barkley has not shown that granting the time extension petition will interfere with his prior rights.

⁸ Barkley claims that the Angle Decree awards him 88 acre-feet of water. Any water granted to him in the Angle Decree would be senior to Permit 13776.

4.4 Barkley has provided No Support for Assertion that the Proposed Time Extension is not in the Public Interest

The California Constitution requires the Board to act to prevent waste or unreasonable use of water. (Cal. Const. art. X, § 2.) Barkley alleges that Watermaster reports submitted until 1946 indicate spillage and waste of water under Reclamation's Angle Decree right. The time extension petition, however, pertains to Permit 13776 granted to Reclamation in 1962. Any water use by Reclamation that occurred before 1962 is outside the scope of Reclamation's current petition. If waste occurs in relation to a water right covered by the Angle Decree, the recourse is to file a complaint challenging the waste under Reclamation's decreed right, not to challenge a time extension petition to a later appropriative right. Moreover, even if it were appropriate for the Board to consider water use under the Angle Decree in conjunction with the time extension petition, Barkley has provided no evidence to support his allegations of waste or unreasonable use.

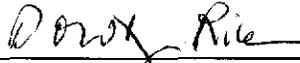
5.0 CONCLUSION

Barkley protested a time extension petition for Permit 13776 claiming the petition was not within the State Water Board's jurisdiction, that the time extension would not best serve the public interest, would be contrary to law, and would have an adverse environmental impact. Based on a review of Barkley's protest, petition for reconsideration and evidence in the record, there is no evidentiary basis to support Barkley's allegations. However, Reclamation has not submitted an environmental document for the time extension petition, and until the public review period has expired for any such document, it is premature to dismiss the protest. Accordingly, Barkley's protest on environmental grounds is reinstated.

ORDER

IT IS HEREBY ORDERED that Barkley's petition for reconsideration of the Division's denial of the protest of Permit 13776 on environmental grounds is granted.

Dated: 7-01-10



Dorothy Rice
Executive Director