

STATE WATER RESOURCES CONTROL BOARD  
RESOLUTION NO. 92-17

AUTHORIZATION OF THE CHIEF, DIVISION OF WATER RIGHTS,  
TO ISSUE A WATER RIGHT PERMIT TO NUGGET HYDROELECTRIC, L.P.  
PURSUANT TO APPLICATION 29837

WHEREAS:

1. On September 15, 1983, Nugget Hydroelectric, L.P., (Nugget) filed Application 27869 to appropriate water by direct diversion of 30 cubic feet per second from Deadwood Creek and Owl Gulch in Yuba County for hydroelectric power generation at its Deadwood Creek Project. This application was protested. A hearing was convened on the protested application on December 7, 1989. The hearing was continued; subsequently, Nugget withdrew the application and the application was thereafter canceled.
2. Nugget is a licensee of the Federal Energy Regulatory Commission for operation of the Deadwood Creek Project. On February 15, 1990, Nugget filed suit in the United States District Court, Eastern District of California, to obtain an order requiring the State Water Resources Control Board (State Water Board) to issue a water right permit to Nugget, based upon the decision of the United States Supreme Court in State of California v. Federal Energy Regulatory Commission, 495 U.S. 490, 109 L.Ed.2d 474, 110 S.Ct. 2024 (1990).
3. On October 11, 1990, Nugget filed a new application for its Deadwood Creek Project, Application 29837. Because Nugget failed to submit the Instream Beneficial Use Assessment required by Water Code Section 1250.5, Nugget's application has not been noticed and thus no opportunity has been afforded to protest the application.
4. On September 6, 1991, the United States District Court ordered the State Water Board to issue a water right permit to Nugget.
5. The State Water Board, believing that the order and judgement of the District Court incorrectly applies the decision of the United States Supreme Court in State of California v. Federal Energy Regulatory Commission (supra), is pursuing an appeal of that order and judgement in the United States Ninth Circuit Court of Appeals.
6. The State Water Board also supports amendment of federal law to expand the scope of state water right authority over federally-licensed hydroelectric projects.

NOW THEREFORE BE IT RESOLVED:

1. The Chief, Division of Water Rights, is authorized to issue a permit to Nugget Hydroelectric, L.P., on Application 29837, in accordance with the order and judgement of the United States District Court.
2. The permit issued to Nugget shall contain the following special term:

"This permit is issued in compliance with the order and judgement of the United States District Court, Eastern District of California, in Nugget Hydroelectric, L.P. v. State Water Resources Control Board (U.S.D.C., E.D. Cal., CIV. NO. S-90-203 EJG). The State Water Resources Control Board has appealed from that order. The State Water Resources Control Board reserves jurisdiction, in the public interest, to revoke or amend this permit following final appellate court review or any relevant change in applicable federal law.

In issuing this permit, the State Water Resources Control Board expressly declines to waive any rights, claims, defenses, or demands of any kind that it may hold against Nugget Hydroelectric, L.P., or its principals, agents, or representatives, resulting from or related to the pending appeal from the order and judgement in the above federal court action."

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the State Water Resources Control Board held on February 20, 1992.

  
Maureen Marché  
Administrative Assistant to the Board

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STATE WATER RESOURCES CONTROL BOARD MEETING  
SACRAMENTO, CALIFORNIA  
FEBRUARY 20, 1992

ITEM: 11

SUBJECT: RESOLUTION AUTHORIZING THE CHIEF, DIVISION OF WATER RIGHTS, TO ISSUE A WATER RIGHT PERMIT FOR APPLICATION 29837 OF NUGGET HYDROELECTRIC, L.P.

DISCUSSION: Nugget Hydroelectric, L.P. (Nugget) filed Application 29837 on October 11, 1990 for a permit to appropriate water by direct diversion of 30 cubic feet per second for hydroelectric power generation at its Deadwood Creek Project in Yuba county. This was the second conventional application filed by Nugget for its Deadwood Creek Project. Nugget's first application, Application 27869, was protested and a hearing was commenced on December 7, 1989. Before the hearing could be concluded, Nugget withdrew the earlier application. Thereafter, on February 15, 1990, Nugget filed suit in the United States District Court to compel the State Water Resources Control Board (State Water Board) to issue a water right permit. Thus, Nugget's current application, Application 29837, was filed about 7 months after Nugget commenced its United States District Court suit.

On May 21, 1990, while Nugget's District Court suit was pending, the United States Supreme Court announced its decision in State of California v. Federal Energy Regulatory Commission, 495 U.S. 490, 109, L. Ed. 2d 474, 110 S. Ct. 2024 (1990). Relying on the federal preemption analysis in that decision, Nugget took the position that it was not required to submit an Instream Beneficial Use Assessment (IBUA) in support of Application 29837, pursuant to Water Code Section 1250.5, because of its status as a licensee of the Federal Energy Regulatory Commission. Because Nugget did not submit an IBUA, the State Water Board did not issue a public notice of Application 27869. Therefore interested persons were not afforded opportunity to protest the application.

Nugget moved for summary judgement in its United States District Court suit, also on the basis of the decision in State of California v. Federal Energy Regulatory Commission, *supra*. On September 6, 1991, the United States District Court ordered the State Water Board to issue the permit. Project construction has been completed.

The State Water Board has taken an appeal from the order of the United States District Court. Depending on the outcome of federal appellate court review of the District Court's order, it is possible that the water right permit will have to be revoked or amended.

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There is also a possibility that, at some time in the future, the Federal Power Act may be amended to restore state water right authority. Accordingly, it is proposed to include a term in the permit reserving jurisdiction to revoke or amend the permit.

POLICY

ISSUE: Should the State Water Board authorize the Chief, Division of Water Rights, to issue a water right permit to Nugget Hydroelectric, L.P. on Application 29837, with a term reserving jurisdiction to revoke or amend the permit in accordance with the outcome of the federal appellate court review or changes in federal law?

FISCAL

IMPACT: This item is budgeted within existing resources. No additional fiscal impact will occur.

REGIONAL  
BOARD

IMPACT: None.

STAFF

RECOMMEN-

DATION: Adopt the proposed resolution.

Legal Review AKS

Policy Review AKS

Fiscal Review AKS RW for BB