Dec. 1588

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Decision 1588, Approving in Part Application 26001,		
KINGS RIVER CONSERVATION DISTRICT,	ORDER:	WR 83- 2
Permittee,	SOURCES:	Deer, Bear, Laurel and Dinkey Creeks
SIERRA ASSOCIATION FOR ENVIRONMENT,		
Petitioner.	COUNTY:	Fresno

ORDER DENYING PETITION FOR RECONSIDERATION
OF WATER RIGHT DECISION 1588

BY THE BOARD:

Petitioner Sierra Association for Environment, which protested Application 26001, has petitioned the Board to reconsider Decision 1588 and prepare a supplemental EIR for the project. Petitioner makes several points in its combined petition and memorandum of points and authorities. These points are set forth below with the Board's findings in response to them.

1. ISSUE: *The Board's decision does not make the findings required by 14 Cal.Admin.Code Sections 15085.5(h) and 15088(a) (State CEQA Guidelines).*

Response: Section 15085.5(h) of the State CEQA Guidelines requires a responsible agency to make the findings required by Section 15088 for each significant effect of the project and to make the findings in Section 15089 if necessary. For this project, the Board is a responsible agency. Under

Section 15088, if an environmental impact report has been completed and identifies one or more significant impacts for a project, a public agency shall not approve the project unless the public agency makes one or more of the written findings set forth in Section 15088(a) for each identified significant effect, accompanied by a statement of the facts supporting each finding. Under Section 15088(a)(1) the Board may find that changes or alterations have been required in, or incorporated into, the project which mitigate or avoid the significant environmental effects of the project as identified in the final EIR. The Board made this finding for all of the significant environmental effects of the Dinkey Creek Hydroelectric Project. See Finding 78 and other findings in Decision 1588. As stated in Finding 78, the Board additionally considered the environmental impacts presented to it during the water right hearing which were not set forth in the final EIR. Statements of fact for each significant environmental effect are set forth in the findings discussing the various issues raised by the project.

Changes or alterations have been required in the project. These changes or alterations mitigate the significant environmental effects of the project as identified in the final EIR and as identified during the water right hearing. The requirements of Section 15088 have been followed in accordance with subsections (a)(1) and (a)(2) thereof.

No findings need to be made under Section 15089. Section 15089 requires a statement of overriding considerations

when a decision of a public agency allows the occurrence of unmitigated environmental effects which are identified in the final EIR. For the Dinkey Creek Hydroelectric Project all environmental effects identified in the final EIR are avoided or mitigated.

2. ISSUE: *The findings on recreation are not supported by substantial evidence, and thus violate Section 15088(b) of the State CEQA Guidelines. This is because the testimony of James L. Howard on recreation is incompetent.*

Response: The petitioner here asserts that the testimony of James L. Howard on recreation was incompetent, and then reasons that because his testimony was incompetent, it does not constitute substantial evidence. Based on the premise that Howard's testimony is not substantial evidence, the petitioner contends that the findings on recreation mitigation are unsupported by substantial evidence.

Essentially, petitioner is attempting to raise an objection to Howard's testimony after the testimony has been given and the hearing closed. Petitioner had an opportunity during the hearing to make such an objection, and did not do so. It is now too late to object.

Even if petitioner had objected, Mr. Howard's testimony is relevant evidence admissible under the rules of evidence applicable to water right hearings. (See 23 Cal.Admin.Code Sections 733(d) and 648.4(a).)

Mr. Howard in his testimony stated facts he had observed and explained decisions he had made regarding recreation mitigation. His testimony was understandable and did not foreclose the Board's drawing different conclusions. To the extent that he gave his opinion, it was admissible under the Board's rules of evidence. Since it was rationally based on his observations and was helpful to a clear understanding of his testimony, it would likely also be admissible under California Evidence Code Section 800 as permissible opinion testimony by a lay witness.

We conclude that Mr. Howard's testimony was competent and constitutes substantial evidence, and that the findings on recreation mitigation are supported by substantial evidence.

3. ISSUE: *"In its development of project plans, KRCD suppressed alternatives. This was not revealed in the EIS/EIR. While the Muley Hole site is more expensive, it should have been considered. Section 15142(d) [sic] CEQA Guidelines.*

"Energy conservation is clearly a preferred alternative under the Energy Commission preferences."

Response: Petitioner's complaint regarding the content of the EIS/EIR is untimely and inappropriate in the context of a protest to the water right decision. Petitioner could have properly raised this point under Public Resources Code Section 21167(c) within 30 days after the District filed its Notice of Determination approving the project, by filing an action in court. Prior to that date, petitioner could have raised this point during the District's administrative process of preparing and finalizing its EIR. Petitioner is too late to challenge the contents of the EIS/EIR. Additionally, as set forth

in greater detail below, the Board cannot require a supplemental EIR to cover these points.

Although the District included alternatives, it did not describe any alternative project sites or variations in its proposed project in its EIS/EIR. However, the District did consider two alternative project sites in its planning process, and did not suppress these alternatives when asked to describe them during the hearing. The Muley Hole site was not an appropriate alternative under CEQA. Because of the projected cost of electricity generated at the Muley Hole site, use of the site would not be feasible for attaining the project's basic objectives. Section 15143(d) of the State CEQA Guidelines does not require a description of infeasible alternatives.

Energy conservation was discussed in the alternatives section of the EIS/EIR, including a discussion of the effect of energy conservation on demand. Consequently, petitioner's implication that the District failed to discuss this alternative in the EIR is incorrect.

Notwithstanding that the EIS/EIR did not describe alternative project sites or variations in the proposed project, the Board considered alternatives in the water right hearing and in formulating its decision. The Board's consideration of the alternatives satisfies its statutory obligation.

4. ISSUE: *"It is clear that significant and cumulative unmitigated impacts will occur to the longest free-flowing stream remaining in the Sierra National Forest. Yet the Board concludes that economic*

justification is marginal. (findings 32-36 [sic]). It delegates its responsibility to make over-riding considerations findings [sic] to Southern California Edison (Condition 4)."

Response: It is untrue that the project will cause significant and cumulative unmitigated impacts to Dinkey Creek. As stated above, all significant environmental effects of the project have been mitigated.

The petitioner next implies that in some way the project's claimed environmental effects contrast with the project's marginal economic viability. Petitioner's point in this regard is unclear.

Finally, petitioner asserts that the Board has in Condition 4 delegated to Southern California Edison its responsibility to make findings of overriding considerations. Condition 4 contains no such delegation, either explicitly or implicitly. Further, since the project will have no unmitigated significant environmental effects, the Board has no responsibility to make a statement of overriding considerations. (See Public Resources Code Section 21081 and Section 15089 of the State EIR Guidelines.)

5. ISSUE: *The Board should prepare a supplemental EIR for the project.*

Under this issue petitioner mentions transmission lines and road access to them, effect on the Mono Indians, archeological sites on private land, minimum pool elevation, the "glade", plant populations, and law enforcement.

Response: First, petitioner asserts the potential impacts on wildlife of transmission lines and road access to them and then states that the Board abandoned the transmission line question to future permitting. As stated in Finding 61, the transmission lines will not be a part of the District's project. They will be owned by a separate entity. Consequently, mitigation of effects of the transmission lines cannot be addressed in Decision 1588.

Next, petitioner points out that Mono interest in Dinkey Creek was unknown to the District when the EIS/EIR was prepared. Based on this lack of knowledge, protestant argues that a supplemental EIR should be prepared to cover this information, under Section 15067(a)(3)(B)(1) of the State CEQA Guidelines. Protestant is incorrect. Under Public Resources Code Section 21166 and under Section 15067(a)(3)(A), no subsequent or supplemental EIR shall be required unless one of three circumstances listed in Section 21166 exists. Clearly, neither subsection (a) nor subsection (b) applies. Subsection (c) requires a supplement if "[n]ew information, which was not known and could not have been known at the time the environmental impact report was certified as completed becomes available." While the Mono interest was unknown to the District when the EIS/EIR was prepared, it was clearly not something which "could not have been known at the time the environmental impact report was certified as complete." Nor was petitioner offered or pointed to any evidence in the record to show that the Mono interest could not have been known at the time of the EIR. Thus, no supplement can be required.

Petitioner poses some further "environmental" questions regarding the Monos. The relevance of these questions to the Board's decision is unclear. They are:

> "[W]ould Mono hunting on their land be subject to California season and sex game laws?"
>
> "Can the Board require the Forest Service to allow gathering?"

Regarding the former question, petitioner has offered no statutory citations and we are consequently unaware of the subject to which petitioner refers or of its effect on the Board's decision. Referring to the second question, no provision in Decision 1588 requires the Forest Service to allow gathering. The decision and the permit issued pursuant to it apply to the District.

Next, petitioner states that neither SHPO (State Historic Preservation Officer) nor the Forest Service has jurisdiction by law over the archeological sites on private land, and cites Section 15088(a)(2) of the State CEQA Guidelines. It is unclear what petitioner means to say about Section 15088(a)(2). Section 15088(a)(2) refers to a written finding for a significant effect when changes in a project are within the responsibility and jurisdiction of another public agency.

Some archeological sites are now on private land. However, they will be on public land as soon as the District acquires them and has an opportunity to disturb them. Further, SHPO and the Forest Service presently have jurisdiction over the sites because the project is a federally licensed project (it has received a license from the Federal Energy Regulatory

Commission). In accordance with the jurisdiction of SHPO and the Forest Service, the District is directed in Decision 1588 at Term 17.g., to protect cultural resources on both private and public lands. Consequently, all the archeological sites affected by the project can be protected. Section 15088(a)(2) is not violated by the Board's finding that federal law will provide for mitigation of project effects on the sites.

Next, petitioner says that Condition 23 does not cover the pros and cons of minimum pool elevation. It appears that petitioner means to refer to Condition 22. The minimum pool elevation is discussed in Finding 47. The contents of findings are not repeated in the conditions.

Finally, petitioner asserts that the permit conditions to protect the "glade" (Term 20), plant populations (Term 19), and law enforcement (Term 26) require a supplemental EIR.

Petitioner bases its contention that a supplemental EIR should be prepared on Sutter Sensible Planning, Inc. v. Board of Supervisors et al., 122 Cal.App.3d 813, 176 Cal.Rptr. 342 (1981), and on 60 Ops.Cal.Atty.Gen. 335, 339-341 (1977).

As stated in Decision 1588 at Finding 72, the Sutter Sensible Planning, Inc., case is not applicable to the present fact situation. Under Public Resources Code Section 21166, no subsequent or supplemental EIR shall be required unless one of three circumstances exists. Neither subsection (a) or (b) of Section 21166 applies to the present facts. Subsection (c) provides for a supplement if "[n]ew information, which was not known and could not have been known at the time the environmental

impact report was certified as complete, becomes available". The "new" information mentioned by petitioner includes transmission lines and road access to them, Mono interest in Dinkey Creek, archeological sites, minimum pool elevation (really a mitigation measure, not an impact), the "glade", plant populations, and law enforcement. All of these items, to the extent that they constitute environmental effects of the project, were known by the District or could readily have been known by the District when it prepared the EIS/EIR and certified it as complete. The information was not new information for which a supplemental or subsequent EIR is appropriate. Thus, the provisions of Public Resources Code Section 21166 do not apply to this case.

Petitioner's citation of 60 Ops.Cal.Atty.Gen. 335, 339-341 (1977) likewise does not advance petitioner's position. The cited opinion was issued in 1977, before subsection (c) was added to Public Resources Code Section 21166. Along with Section 21166(c), the Legislature added and amended several sections of CEQA. The opinion addressed a situation in which the lead agency had not yet filed a notice of determination and had gotten new information. The opinion assumed that the EIR was inadequate. Adequacy of an EIR can be challenged before 30 days has passed after filing of a notice of determination. The opinion concluded that the lead agency should reopen the CEQA process if the EIR is demonstrated to be inadequate. The present case does not present the situation addressed in the opinion. The lead agency has long since filed a notice of determination, and the 30-day period for challenging its adequacy has passed.

Petitioner's demand for a supplemental or subsequent EIR is inappropriate. Petitioner could have challenged the adequacy of the EIS/EIR when the District approved the project.

The Board has fully considered all known significant environmental effects of the project, regardless whether they are listed in the EIS/EIR, and the approval of the project has been conditioned to mitigate these effects. For the Board to now require a supplemental EIR would be to place form over substance, unreasonably delay the project, and disregard Public Resources Code Section 21166.

ORDER

1. The petition is denied.
2. Decision 1588 is affirmed.

Dated: February 17, 1983

Carole A. Onorato, Chairwoman

F. K. Aljibury, Member

Warren D. Noteware, Member

Kenneth W. Willis, Member