

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Application 27253,)
DALE C. WAGNER and DIANE ROSS,)
Applicant,)
LOWER TULE RIVER IRRIGATION)
DISTRICT, ET AL.,)
Protestants.)

ORDER: WR 86-1
SOURCE: Rancheria Creek
Tributary to Bear
Creek Thence
North Fork Tule River
COUNTY: Tulare

ORDER DENYING PETITION FOR RECONSIDERATION
AND AFFIRMING DECISION 1607

BY BOARD MEMBER RUIZ:

1.0 INTRODUCTION

On October 17, 1985 the State Water Resources Control Board (Board) adopted Decision 1607 denying Application 27253 by Dale C. Wagner and Diane Ross for the appropriation of water on the ground that unappropriated water was not available. Pursuant to Water Code Section 1357 a petition for reconsideration was filed on November 18, 1985 by Dale C. Wagner and Diane Ross (petitioner).

2.0 BACKGROUND INFORMATION

2.1 Application

Application 27253 is for a permit to appropriate 5040 gallons of water per day by direct diversion from May 1 through October 31 from Rancheria Creek tributary to Bear Creek thence North Fork Tule River.

The water is sought for the beneficial uses of irrigation, stock-watering and fire protection. The maximum annual diversion would not exceed 2.8 acre-feet. The project would be located in Tulare County about 7 miles northeast of Springville, California, within the NE1/4 of NE1/4, Section 6, T20S, R30E, MDB&M.

2.2 Protestants

The application was protested by the Lower Tule River Irrigation District, the Vandalia Irrigation District, the Campbell Moreland Ditch Company and Tulare County who claim prior rights to the use of the water in Tule River. The California Department of Fish and Game seeks bypass flows to protect instream beneficial uses, in the event the project is approved.

2.3 Prior Board Decision

Decision 1018 was adopted on June 30, 1961 by the State Water Rights Board, predecessor to the State Water Resources Control Board.

Finding that unappropriated water was not available, 21 applications to appropriate water from streams in the upper watershed of the Tule River were denied. The decision included an extensive analysis of the availability of unappropriated water and concluded that "evidence shows that waters of the Tule River have been completely used during all but infrequent flood years such as 1943 and 1952 under claim of prior rights in the Tule River Delta and Tulare Lake area" and "that

the water which could be appropriated in flood years occurs too irregularly and infrequently to be of any value to the applicants."

2.4 Field Investigation / Analysis / Hearing and Decision

Application 27253 is a minor application (Water Code Section 1348). The field investigation was conducted on August 11, 1983 in accordance with procedures for minor protested applications (Water Code Section 1345 et seq.). The staff analysis, forwarded to the parties, concluded that unappropriated water was not available and recommended denial of the application. A hearing was requested by the petitioner pursuant to Water Code Section 1347 and the hearing was held on March 19, 1985. The hearing resulted in Decision 1607, the subject of this petition. Decision 1607 concluded that the applicant had failed to show that unappropriated water is available and denied the application for unappropriated water.

3.0 APPLICABLE LAW

In order to issue a permit, the Board must find that unappropriated water is available (Water Code Section 1375). Unappropriated water includes water that has not been previously appropriated and water not diverted by riparian users (Water Code Section 1202). Applicants have the burden of proving that unappropriated water is available (Martin v. Alcoholic Beverage Control Appeals Board (1959) 341 P.2d 291, 52 Cal.2d 259).

Water Code Section 1357 provides that any person affected by certain decisions of the Board may seek reconsideration by filing a petition

no later than 30 days after adoption of such decision. Our regulations provide that reconsideration may be sought for 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 at the hearing;
- "(d) Error of law." (23 Cal.Adm.Code §737.1.)

If a request for reconsideration is sought to introduce new evidence ("(c)" above), an affidavit must accompany the petition explaining why such information could not have been produced in the exercise of reasonable diligence at the hearing. (23 Cal.Adm.Code §737.2(b).)

4.0 PETITION FOR RECONSIDERATION

4.1 Location of Illegal Diverters

The principal focus of the petition for reconsideration is upon paragraph 9.3 of Decision 1607, which follows:

"9.3 Illegal Diverters

The applicant contends that there are at least 12 illegal diverters in the Tule River watershed and that the protestants' failure to enjoin such use makes the water available for appropriation (Applicant 1, p. 4, item 4). Water Code Section 1202(c), he argues, provides that water is available for appropriation if it is not being put

to the beneficial use for which it was appropriated by protestants (T,25:20-26:23). No evidence of probative value was introduced to demonstrate the existence of illegal diverters. Further, none of the alleged illegal diverters are upstream from the applicant's proposed project such that more water would be physically available to the applicant if the diversions were halted (T,24:16-20). In any event, all that terminating illegal diversions would do would be to restore to protestants their rights."¹

The petitioner contends, apparently, that as a matter of law it is irrelevant whether illegal diverters are upstream from his proposed diversion (Petition, p. 1); however, he also requests that the Board conduct a field examination to verify that there are illegal diverters above the proposed point of diversion (Id., p. 2).

4.2 The Location of Alleged Illegal Diverters Is of Little Importance Because Other Essential Evidence Was Not Presented

As previously indicated, the applicant has the burden of demonstrating that unappropriated water is available. Among the reasons stated for requesting the hearing was that unappropriated water was available by reason of illegal diverters (letter requesting hearing, dated August 29, 1984, pp. 1 and 4(d)). During the hearing, however, the applicant did not produce any evidence identifying:

¹ The applicant's reference at the hearing, and the Board's reference to Section 1202(c) in Decision 1607 should have been directed to Section 1202(b). Subsection (b) addresses pre-1914 appropriative water rights and subsection (c) addresses post-1914 appropriative water rights. The appropriative rights questioned by the applicant are pre-1914 appropriative water rights. Neither the applicant's argument nor our responses are affected by this correction.

- o the locations of the points of diversions,
- o the quantities of water being diverted, nor
- o the reason why such diversions were believed to be illegal.

In the absence of such information, it is of little use to become preoccupied with whether such diverters are upstream from the petitioner's proposed point of diversion. Without such information we have no basis for concluding that any quantity of water may be available by reason of illegal diverters. Further, our finding that none of the illegal diverters were upstream from the proposed project was based on the petitioner's own testimony:

"QUESTION: 'As a piece of background information, Mr. Wagner, are any of these illegal diversions upstream from your proposed point of diversion on Rancheria Creek.'"

"RESPONSE: MR. WAGNER: 'No, none that I am aware of.'"
(T,24:17-20)

4.3 Unappropriated Water Is Not Available

Whether unappropriated water is available was also examined from a broader point of view by Decision 1607. We stated:

"11.1 Unappropriated Water is Not Available

In general, unappropriated water is determined by (1) quantifying the water physically available in a watershed and (2) subtracting the needs of riparian users and the claims of the holders of prior rights. The quantity of water surplus to the needs of riparian users and the claims of the holders of prior rights is available for appropriation. The protestants' claims are exercised by diversions below Success Reservoir. Other tributaries join the Tule River (1) below the applicant's proposed diversion point and

(2) above Success Reservoir. Because the protestants' claims may be satisfied from any and all tributaries to the Tule River, quantification of available water should be in relation to the water available to the protestants.

The Board, in Decision 1018, concluded that the water of the Tule River was fully appropriated except during infrequent flood years (Decision 1018, p. 14). The protestants contend, absent changed circumstances, that the Board should be bound by the decision. The applicant was not a party to the decision and is not bound by the doctrine of res judicata; however, because the applicant made no criticism of the findings in Decision 1018 nor offered any evidence as to the quantity of water available in the watershed, encompassing sufficient years for meaningful analysis, we will use the findings in the decision to aid in our analysis.

Tables II and III in Decision 1018, when combined, show inflow to Success Reservoir and represent very nearly total flow of the Tule River available to the protestants (Decision 1018, pp. 5-18). The following table is extracted from Tables II and III and shows the flows available to the protestants during the months in which the applicant seeks to divert water at an upstream location.

AVERAGE MONTHLY
INFLOW TO SUCCESS RESERVOIR
May 1949 - October 1958

	MAY	JUNE	JULY	AUGUST	SEPTEMBER	OCTOBER
Acre-Feet	24030	9922	2450	710	452	716
Cubic-Feet per Second	404	167	41	12	8	12

Judicial decisions are cited by the protestants as recognition of their rights to divert water (Glover v. Mitchell (1910), Woods Central Irrigation District Company v. Power Slough Ditch Company (1911), Poplar Irrigation Company v. Howard (1916), LaMarsna v. Woods Central

Irrigation District Company (1928) and Jones v. Pleasant Valley Canal Company (1931), Tulare County Superior Court Cases Nos. 5840, 5353, 7004, 16899 and 18018, respectively). Because the five decrees may include determinations of the same rights, only Decree No. 5840 for Glover v. Mitchell (1910) was used to compute the prior rights claimed by the protestants and others. Standing alone the decree sets forth rights to water totaling approximately 940 cfs in year-round diversions, a quantity which is more than double the quantity of water available in the river to the protestants on an average monthly basis during the months of May through October. While there is significant variance in monthly flows from one water year to another, flows exceeding 940 cfs are very infrequent. For example, during the 10-year periods analyzed by Decision 1018, flows exceeding 940 cfs would have occurred only during May of 1952.

The weight that should be given to the rights recognized by Glover v. Mitchell may be questioned. First, the diversion rights recognized by the decree for summer months are so much higher than actual flows in the Tule River it is unlikely such rights could actually have been perfected. Second, the diversion rights recognized by the decree may be more a product of stipulated agreements than of a full contest of claims. Finally, the case was brought by owners of riparian lands along the Tule River west of Porterville against upstream diverters and the portion of the decree respecting their concerns, the heart of the controversy, is a prohibition of diversion under upstream allocations totalling about 790 cfs from March 19 to April 10 unless 400 cfs is flowing in the river at the Oettle Bridge about 12 miles downstream from Success Dam. Nevertheless, these allocations indicate that available water has been fully used under various claims of right for many years and that no unappropriated water is available for appropriation." (Decision 1607, paragraph 11.1)

This analysis indicates that the holders of prior rights have claims for the use of water which exceed the quantity of water normally

available in the watershed. In view of the magnitude of the claims in comparison to the available water supply, the question of whether some quantity of water may become available due to illegal diverters is largely meaningless.

4.4 Request for Field Investigation

The petitioner's request that the Board conduct a field investigation to identify illegal diverters upstream from his proposed point of diversion is basically a request to produce new evidence. The petitioner was advised that he would have to produce information supporting his contentions five months before the hearing.² No information concerning illegal diverters having probative value was produced at the hearing. The petitioner testified that he was unaware of any upstream diverters. Furthermore, the request to produce new information is not accompanied by the affidavit required by our regulations (23 Cal. Adm. Code §737.2(b)). Under these circumstances we are not inclined to accede to this request.

² "Before scheduling a hearing, I wish to emphasize two points for your consideration. First, any hearing will be limited to the issues of availability of unappropriated water and the need for a minimum bypass flow to protect instream uses. Secondly, in view of the requirement that unappropriated water must be available as a prerequisite to the issuance of a permit (per Water Code Section 1375), and that Decision D-1018 found no unappropriated water available in the watershed in question, the burden will be on you to submit evidence establishing that water is available for appropriation." (Letter dated 10/17/84 to Mr. Wagner.)

4.5 The Effect of Water Code Section 1202(b) is Speculative³

The petitioner contends that Water Code Section 1202(b) provides that unappropriated water is available for appropriation if it is not being put to the beneficial use for which it was appropriated. More specifically, he argues that if the protestants allow others to illegally divert water for which they have water rights, then such water becomes available for appropriation pursuant to Section 1202(b). He demands that the Board rule, unequivocally, whether that is the case. The possibilities are numerous how such an issue might be resolved under California water law, e.g., prescription, injunctive relief for the right holder, or the petitioner's approach. Resolution could vary with each alleged illegal diverter depending upon specific facts not in the record for this matter. In the absence of a record demonstrating the existence of illegal diverters and other pertinent information, we decline to speculate as to the applicability of Section 1202(b).

4.6 Allegation Concerning Perjury is Unsupported

The petitioner also alleged that Decision 1607 was improper or that the proceedings were irregular due to:

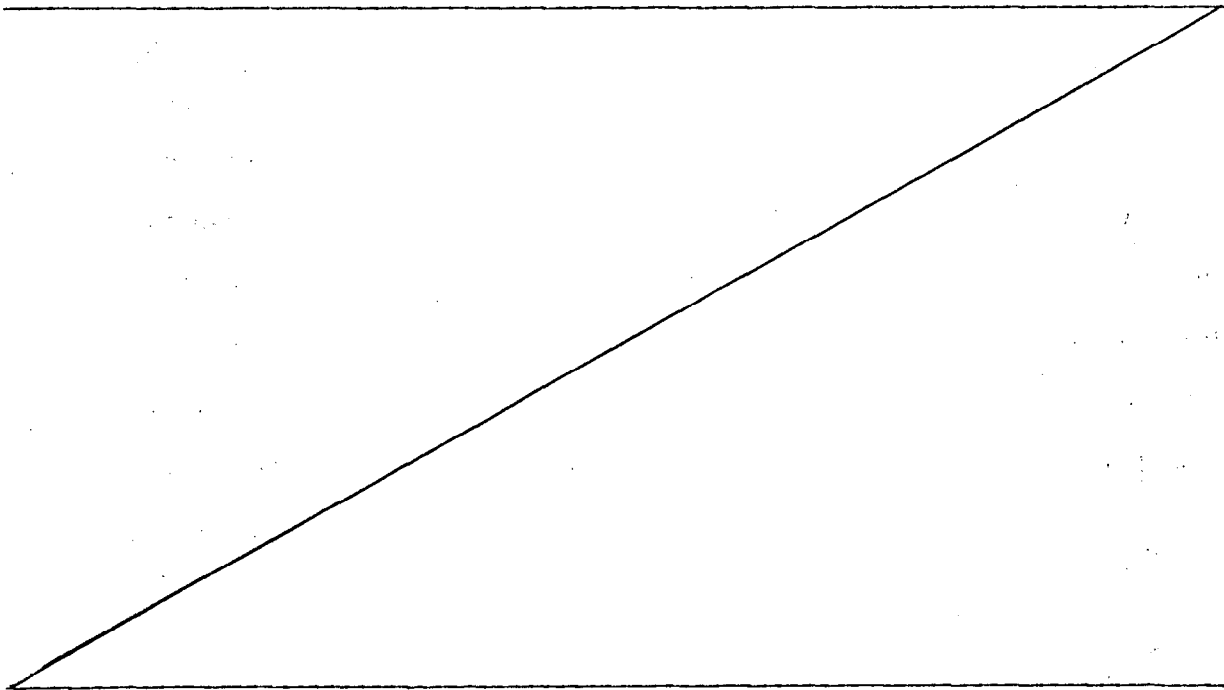
"Possible perjury by the protestants witness relative to knowledge of illegal water appropriation in the Tule River watershed. Evidence supporting this contention exists within WRCB records."

³ See Footnote 1, p. 5.

This allegation is too vague to enable the Board to evaluate the allegation.

5.0 CONCLUSIONS

Decision 1607 found that the petitioner failed to show that unappropriated water is available and denied Application 27253. For the reasons set forth herein, the arguments put forward to reconsider Decision 1607 are without merit. The request to present new evidence is denied because the petitioner did not submit an affidavit why such evidence could not have been presented at the hearing in the exercise of reasonable diligence. Indeed, the petitioner would have to present a great deal of additional evidence, beyond that requested, to demonstrate that unappropriated water is available. Accordingly, we find that the petition for reconsideration should be denied.



6.0 ORDER

The petition for reconsideration of Decision 1607 by Dale C. Wagner and Diane Ross is denied and the decision is affirmed as adopted on October 17, 1985.

CERTIFICATION


The undersigned, Executive Director of the State Water Resources Control 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 January 8, 1986.

AYE: Raymond V. Stone
Darlene E. Ruiz
E. F. Finster
Eliseo Samaniego
Danny Walsh

NO: None

ABSENT: None

ABSTAIN: None



Raymond Walsh
Interim Executive Director