

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

**ORDER WR 2006-0013-EXEC**

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In the Matter of the Petition for Reconsideration of  
**Lower Rock Creek Mutual Water Company and John Hooper**  
(Permit 15341 pursuant to Application 22579)  
Regarding Order Denying Petition for Extension of Time

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SOURCE: Rock Creek tributary to Owens River  
COUNTY: Mono

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**ORDER DENYING RECONSIDERATION**

**BY THE EXECUTIVE DIRECTOR:**

**1.0 INTRODUCTION**

Lower Rock Creek Mutual Water Company and John Hooper (collectively referred to as the Petitioners) petition the State Water Resources Control Board (State Water Board or Board) for reconsideration of the Division of Water Rights' (Division) order denying an extension of time for water right Permit 15341 (Application 22579). The Petitioners request the State Water Board to approve an extension of time for Permit 15341. The State Water Board finds that the Division Chief's order denying the time extension was appropriate and proper and denies the Petitioners' petition for reconsideration.

**2.0 GROUND FOR RECONSIDERATION**

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

- (a) [i]rregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
- (b) [t]he decision or order is not supported by substantial evidence;
- (c) [t]here is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;

(d) [e]rror in law. (Cal. Code Regs., tit. 23, § 768.)<sup>1</sup>

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.<sup>2</sup> 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. (Board Order 96-1, at p. 17, fn. 11.)

### **3.0 FACTUAL BACKGROUND**

On April 6, 1967, the State Water Board's predecessor issued Permit 15341 to Wilkes Paradise, Incorporated, and Sierra-Paradise Corporation for the direct diversion of 0.33 cubic feet per second (cfs) of water year round from Rock Creek, tributary to the Owens River, in Mono County for domestic use and fire protection. The place of use is the Sierra-Paradise subdivision, which is also referred to as the Paradise Estates subdivision. In addition, Permit 15341 serves the Paradise Lodge and camp facilities. By order dated June 14, 1974, the Division amended Permit 15341 to impose a total annual diversion limit of 138 acre-feet (af).

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<sup>1</sup> 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.

<sup>2</sup> This delegation is not affected by *Central Delta Water Agency v. State Water Resources Control Board* (2004) 124 Cal.App.4th 245 [20 Cal.Rptr.3d 898]. In that case, the court held that the State Water Board, after a hearing, could not defer making findings that were prerequisite to issuing water right permits by delegating the remaining findings to its staff for subsequent determinations by the staff.

Permit 15341 has changed owners several times since it was issued. The Lower Rock Creek Mutual Water Company (Water Company) has owned a portion of the water right since 1977, and Mr. John Hooper was assigned a portion of the permit in 2005. By letter dated April 9, 2006, the Water Company informed the Division that the Water Company owns 67 percent of the water right and Mr. Hooper owns 33 percent.<sup>3</sup>

The State Water Board and its predecessor have granted five extensions of time since Permit 15341 was issued in 1967. The State Water Board last granted a time extension on December 17, 1990, requiring the completion of construction by December 31, 1997, and the complete application of water to beneficial use by December 31, 1999.

In 1993 the Permittee<sup>4</sup> informed the State Water Board that it had installed a well to serve as the source of water supply for the subdivision, but that it wanted to maintain its appropriative water right as a backup supply or “standby source” for emergencies and fire protection. To maintain its water right since then, the Permittee has relied on Water Code section 1011.5, which provides that if certain conditions are met, an appropriative water right will not be subject to forfeiture for nonuse if groundwater is used as a substitute supply.<sup>5</sup>

On July 8, 2002, the Permittee requested a sixth extension of time.<sup>6</sup> The Permittee sought a ten-year extension, although it estimated that construction and beneficial use of water would not be completed until approximately 2020. The Division did not receive any protests against

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<sup>3</sup> According to the petition for reconsideration, the Water Company’s service area encompasses approximately 78 acres and 132 subdivided lots and the Paradise Fishing Camp. The camp has 20 cabins and 19 recreational vehicle hook-ups, which are used on a seasonal basis.

<sup>4</sup> For ease of reference, this order will simply refer to the actions of the “Permittee” instead of the individual owners of the water right.

<sup>5</sup> Water Code section 1011.5, subdivision (b) states: “When any holder of an appropriative right fails to use all or any part of the water as a result of conjunctive use of surface water and groundwater involving the substitution of an alternate supply for the unused portion of the surface water, any cessation of, or reduction in, the use of the appropriated water shall be deemed equivalent to a reasonable and beneficial use of water to the extent of the cessation of, or reduction in, use, and to the same extent as the appropriated water was put to reasonable and beneficial use by that person. No forfeiture of the appropriative right to the water for which an alternate supply is substituted shall occur . . . .” This order does not make any finding as to whether the Permittee has preserved any portion of its appropriative water right under section 1011.5.

<sup>6</sup> Petitioners state that the Permittee filed the time extension petition on September 19, 2002. Any discrepancy in the filing date, however, is immaterial to the issues decided in this order.

approval of the time extension. By letter dated May 13, 2005, the Division informed the Permittee that it must enter into a Memorandum of Understanding (MOU) for preparation of environmental documents under the California Environmental Quality Act (CEQA) and submit other information within 180 days before the Division could process the time extension petition. On June 6, 2005, the Permittee responded that although the requirement posed a financial hardship for the community, it would retain the appropriate engineering and environmental consultants to prepare the necessary documents. As of the date of the petition for reconsideration, the Permittee had not entered into an MOU.

By letter dated June 27, 2005, the Division requested the Permittee to show cause for an extension of time. On July 29, 2005, the Permittee responded that while development had been slow, it anticipated that the remaining approximately fifty undeveloped lots could be developed in the next ten years if recent growth trends continued. According to the Permittee, if the amount of its water right was reduced, then the Permittee would have to halt future development until it considered the water sources available for the community's existing and future needs. In its letter, the Permittee requested a twenty-year extension of time in case "build out" was not complete within ten years.

By order dated June 2, 2006, the Division Chief denied the Permittee's petition for extension of time, citing the Permittee's failure to show that: (1) due diligence has been exercised, (2) its failure to comply with previous time requirements has been occasioned by obstacles that could not reasonably be avoided, and (3) satisfactory progress will be made if an extension of time is granted.<sup>7</sup> The Petitioners timely submitted their petition for reconsideration to the State Water Board.

#### **4.0            DISCUSSION**

The Petitioners request the State Water Board to reconsider the Division's denial of the time extension petition on the grounds that (1) the petition was supported by substantial evidence

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<sup>7</sup> The State Water Board has authorized the Division Chief to act on requests for extension of time. (Board Res. No. 2002-0106, attachment, par. 2.6.11.) The Division Chief may grant a time extension if certain conditions are met and only if "the extension is for ten years or less and the period of the extension in combination with all extensions previously granted under delegated authority does not exceed fifteen years." (*Id.*, § 2.6.11(c)(1).) Only the State Water Board, and not the Division Chief, may approve a time extension exceeding this 15-year period.

and (2) relevant new evidence has become available since the petition was filed that was not presented prior to the denial of the petition.

#### **4.1 Applicable Law**

Water Code section 1396 requires a permittee to prosecute project construction and beneficial use of water with due diligence, in accordance with the Water Code, the State Water Board's regulations, and the terms specified in the permit. (See also Wat. Code, §§ 1395, 1397 [requiring a water right permit to identify periods of time to begin construction, to complete construction, and to apply water to beneficial use].) The State Water Board may approve a request for an extension of time if the State Water Board finds that there is good cause for the extension. (*Id.*, § 1398, subd. (a).) The State Water Board's regulations allow an extension of time to be granted only on such conditions as the State Water Board determines to be in the public interest, and on a showing to the State Water Board's satisfaction that (1) due diligence has been exercised, (2) failure to comply with previous time requirements has been occasioned by obstacles that could not reasonably be avoided, and (3) satisfactory progress will be made if an extension of time is granted. (Cal. Code Regs., tit. 23, § 844.) The State Water Board generally will not accept conditions incident to the person and not to the enterprise as good cause for delay. (*Ibid.*)

#### **4.2 Due Diligence**

"Diligence is the essence of a right to appropriate water." (Board Order WR 82-5, at p. 7, quoting Decision 884 (1958), at p. 71.) In determining whether there is good cause to approve the Permittee's request for an extension of time to complete the beneficial use of water, the State Water Board must consider whether the Permittee has exercised diligence in the past in putting water to beneficial use. Due diligence requires a demonstrable effort to put water to beneficial use within the time period specified in the permits. (But see 25 Ops.Cal.Atty.Gen. 32, 40 (1955) [noting that due diligence may require something more than simply complying with time limits in permits].)

Although Permit 15341 authorizes a total annual diversion of 138 af per annum (afa), the Permittee's use has been far less. According to the Division's 1989 Report of Inspection, the Permittee's total annual use was 23 af. In 1993, the year in which the Permittee began using its groundwater well, the Permittee used approximately 17.7 af. Recognizing that the actual total annual use during the last time extension period (which expired in 1999) may differ slightly, it

nonetheless appears that the Permittee has used less than 20 percent of its authorized total annual diversion in the past 39 years, despite receiving five extensions of time. Moreover, the Permittee has failed to diligently pursue processing the time extension petition currently under consideration by not timely complying with the Division's request for an MOU for preparation of CEQA documents. Accordingly, the Permittee has not exercised diligence in putting the full amount of water authorized under its permit to beneficial use.

Petitioner responds that it has acted reasonably and with due diligence in developing its water right, but that it has no control over the pace of future development. Petitioner notes that the Permittee has installed a water system that allows it to divert the full amount of water authorized by the permit, and that from 1967 to 1993 (when the groundwater well was installed), the Rock Creek diversion was the Permittee's sole source of water supply. It further notes that the Permittee has only diverted the amount of water necessary to meet the needs of the existing homes and other uses, and that it has attempted to conserve water through installation of water meters.<sup>8</sup> Moreover, according to the Petitioner, the amount of water that can be put to beneficial use is dependent on the construction of homes in the area. Because all 132 lots were sold by the original subdivider and are privately owned, the Permittee has no control over the pace of development; each lot owner decides when to construct a home. Thus, according to Petitioner, it has not been able to put water to full beneficial use even though it has exercised due diligence.

The mere fact, however, that a permittee has the facilities necessary to divert additional quantities of water, and would put that water to beneficial use as demands increase, is insufficient to justify an extension of time. The principle is well established that due diligence is not established simply because beneficial use may increase as demands increase. (*California Trout, Inc. v. State Water Resources Control Board (California Trout)* (1989) 207 Cal.App.3d 585 [255 Cal.Rptr. 184]; see, e.g., Board Orders WR 73-14, WR 82-5.) In *California Trout*, the Court of Appeal observed that the statutory requirement of diligence does not allow the State Water Board "to countenance a scheme placing water rights in 'cold storage' for future use." (*California Trout, supra*, at p. 619.) The permittee in that case was a large and growing municipality, and there was no serious question about the potential for increased municipal

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<sup>8</sup> Permittee has not claimed credit in its annual progress reports for beneficial use of water not used due to conservation efforts. (Wat. Code, § 1011.)

demand adequate to make use of the diversions authorized in the permit. Nonetheless, the Court concluded that the State Water Board had acted improperly when it granted an extension of time because the permittee did not have any immediate plan to proceed promptly to put the water to full beneficial use.<sup>9</sup> (*Id.* at pp. 618-619.) In particular, the Court held that a claim that beneficial use would be achieved “[w]hen required by municipal needs” was inconsistent with the due diligence requirement.<sup>10</sup> (*Id.* at p. 619.) Thus, “a water right permit is not a proper instrument to reserve water for development at some future time.” (Board Order WR 82-5, at p. 7; see also Board Decision D 1083 (1963), at p. 5. [noting that every water right applicant bears the burden of providing information that the State Water Board can rely on when setting the time periods for completion of construction and application of water to beneficial use in the water right permit].)

The Petitioners also suggest that the doctrine of gradual or progressive development supports a finding that the Permittee has acted diligently. Under the gradual or progressive development doctrine, an appropriator under a pre-1914 right may increase the amount of water diverted up to the amount of the originally contemplated appropriation if the development is diligently made within a reasonable time. (*Haight v. Costanich* (1920) 184 Cal. 426, 431-432 [194 P. 26]; see also Board Orders WR 95-10, at pp. 15-16, and WR 95-17, at pp. 25-26.) The Permittee, however, does not claim a pre-1914 right and, thus, the doctrine is inapplicable. Instead, the Permittee’s diversion is subject to the requirements prescribed by California statutory law, which require that work on a project and the application of water to beneficial use be completed within the period specified in the permit. (Wat. Code, § 1397.)

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<sup>9</sup> The discussion of extensions in *California Trout* was part of a retroactivity analysis, and the court did not invalidate the extensions. Nevertheless, the Court of Appeal’s discussion reinforces the conclusion that the State Water Board is required to implement the due diligence requirements of its regulations, and that the potential or even probability of increasing water use due to growth and development is insufficient to establish due diligence.

<sup>10</sup> Accordingly, the State Water Board has since determined that although a municipality is to be afforded some latitude in putting water to beneficial use, it still must diligently apply water to beneficial use. (See, e.g., Board Order WR 2000-13, at p. 14 [finding the question of diligence by a municipality to be a “close one”].) The Permittee does not argue that it qualifies as a municipality. A municipality is a public agency that supplies water for domestic or municipal use. (Decision D 858 (1956), at pp. 63-68; but see Board Order WR 2006-0001.)

#### **4.3 Failure to Comply With Previous Time Requirements**

The State Water Board must also consider whether the Permittee's failure to comply with previous time requirements has been occasioned by obstacles that could not reasonably be avoided. Lack of finances and other conditions incident to the person and not the enterprise will not generally be accepted as good cause for delay. (§ 844.)

The Petitioners acknowledge that financial hardship is generally not accepted as a good cause for delay, but contend that in this case, the financial hardship is caused by circumstances incident to the enterprise and not to a person. They note that the Water Company's revenues are primarily dependent on the amount of water use and that funds have been limited with less than full development of the project. The slow pace of development and attendant financial hardship, however, do not support a finding that the Permittee's failure to comply with previous time requirements has been occasioned by obstacles that could not reasonably be avoided. (See, e.g., In the Matter of Permit 5684 (May 6, 1971) 1971 WL 15184 [State Water Board order denying time extension where a permittee had difficulty completing a subdivision largely due to depressed economic conditions in the area].)

To the contrary, the record indicates that the Permittee chose not to further develop its water use under Permit 15341, other than as a standby supply, when it installed the groundwater well in 1993. While Water Code section 1011.5 allows a water right holder to maintain its surface water right while substituting a groundwater supply, the quantity of water preserved under the surface water right is limited to the quantity of water already beneficially used under that right. Increased groundwater use cannot be counted as increased beneficial use of surface water under an appropriative water right. A permittee still has the responsibility to diligently apply the full amount of water to beneficial use if it has not already perfected the water right.

According to the petition for reconsideration, there were 86 houses in the subdivision at the time the petition was prepared. Despite the increase from 45 houses in 1989 to 86 houses in 2006, the Permittee's annual progress reports do not indicate a corresponding increase in the beneficial use of water. In other words, although the demand for water has increased, the Permittee's diversion and use under its appropriative right has not. Instead, the Permittee has relied on the groundwater well installed in 1993 for its primary water supply and on water diverted under Permit 15341 for a standby supply. The Permittee's decision to rely on a



different water supply does not support a finding that the delay was occasioned by obstacles that could not reasonably be avoided.

#### **4.4 Satisfactory Progress**

The Petitioners contend that the Permittee will make progress if an extension of time is granted and that the public interest will be served by granting the Permittee Water Company additional time to determine how the Water Company can “best and most economically meet the future demand on its system.” (Petition for Reconsideration, p. 7.) The Water Company seeks funding, in part, to assess whether a second well is hydrologically feasible, and if so, whether two wells are adequate to serve the water system’s needs at full build-out. According to the Petitioners, if construction of a second well is infeasible, then the only source of water supply to meet the needs of existing and future homeowners is the diversion of surface water from Rock Creek. The Petitioners also note that they are willing to retain consultants and enter into a CEQA MOU within 90 days of the State Water Board’s approval of the petition for reconsideration.

The Petitioners further explain that in February 2006 Mr. Hooper purchased the camp and that a primary consideration in his purchase was the availability of permitted water for landscape irrigation purposes and, if necessary, domestic purposes. He proposes a development plan involving subdividing the camp into ten lots for private homes and preserving several of the existing cabins and the existing lodge complex. The Petitioners estimate that water use on the former camp property will more than double past uses on the property.

This information, however, does not provide cause for reconsideration. Instead, it demonstrates that the Permittee has no immediate plans to develop full beneficial use of water under Permit 15341. In fact, the Permittee’s first priority is to assess the feasibility of additional groundwater supply for its development. The Permittee plans to devote its efforts and resources toward developing a second well, and only if that second well proves infeasible will the Permittee attempt to further develop its Rock Creek surface diversion. Moreover, although Petitioners state that the Permittee is pursuing funding for the water system improvements, they do not identify any specific construction plans or financing that is in place. Thus, any improvements are merely speculative at this point. The Permittee’s efforts to secure funding and to assess the feasibility of a second well to meet its future demands do not support a finding that the Permittee will make satisfactory progress in making full beneficial use of water under

Permit 15341. (See Board Order 73-14 [denying time extension where a permittee had not decided whether to proceed with project and there was no evidence that a water supply project would be constructed within a reasonable time in the future].) To the contrary, the Permittee's future plans to appropriate water under Permit 15341 are highly indefinite and uncertain. It appears that Petitioner's primary interest in maintaining the water right is limited to using it as a secondary or standby supply.

Additionally, the potential for an increase in demand sufficient to make full beneficial use of the 138 afa authorized under Permit 15341 is uncertain at best, providing even less of a basis for concluding that satisfactory progress will be made if an extension is granted. There is no information in the file supporting a conclusion that Permittee will use the full total annual amount of 138 afa even if the project is fully developed. In 1989, when 45 homes were built, the Division's inspection report indicated that Permittee used 23 af. The report stated that one third of the project was developed. Assuming the same rate of water use, it appears that the Permittee's use would be far less than 138 afa even if all 132 homes are built. Even assuming, *arguendo*, that Mr. Hooper's development of the camp area will more than double the past use of surface water on that property, this information does not support a conclusion that the Permittee will make satisfactory progress in putting the full amount of water to beneficial use.

#### **4.5 Future Action by the Division**

It merits noting that the Board's decision to deny an extension of time will not necessarily result in the revocation of all water use under Permit 15341. A water right permit is "not revoked merely because an extension of time to complete beneficial use under the permit has not yet been granted." (Board Decision 1629 (1994), at p. 36.) Once issued, a permit remains in force until revoked in the manner prescribed by section 1410 of the Water Code or a license is issued. (*Eaton v. State Water Rights Board* (1959) 171 Cal.App.2d 409, 415-416 [340 P.2d 722]; see In the Matter of Permit 5684, *supra* [Board order denying extension of time and ordering that a license be issued]). The Water Code further provides that, as part of licensing, the State Water Board shall determine if the water has been applied to beneficial use "in conformity with the permit." (*Id.*, § 1605.) Accordingly, licensing may be based on the amount of water put to beneficial use before the period specified in the permit expired. (Board Order WR 74-21). Thus, in future actions on the permitted right, the Division may determine whether Permittee has beneficially used water in accordance with its permit and whether Permittee may be afforded any credit for groundwater use under Water Code section 1011.5.

**5.0**            **CONCLUSION**

For the reasons discussed above, the State Water Board finds that the Division's order denying an extension of time was appropriate and proper and that the petition for reconsideration fails to raise substantial issues related to the causes for reconsideration. To the extent that this order does not address all of the issues raised in the petition for reconsideration, the State Water Board finds that these issues are insubstantial. The petition for reconsideration is denied.

**ORDER**

**IT IS HEREBY ORDERED THAT** the petition for reconsideration is denied.

Dated: August 28, 2006

*ORIGINAL SIGNED BY*  
Celeste Cantú  
Executive Director