

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2009-0014-EXEC

In the Matter of the Petition for Reconsideration of

IRISH BEACH WATER DISTRICT
Permit 15580 (Application 21902)

Regarding Order Denying Extension of Time

SOURCE: Irish Gulch tributary to Pacific Ocean

COUNTY: Mendocino

ORDER DENYING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR:

1.0 INTRODUCTION

Irish Beach Water District (Petitioner) petitions the State Water Resources Control Board (State Water Board or Board) for reconsideration of the Division of Water Rights' (Division) order denying a petition for extension of time to put water to beneficial use under Permit 15580 (Application 21902). The Executive Director finds that denial of the extension was appropriate and proper, and thus denies the petition for reconsideration. (Cal. Code Regs., tit. 23, § 770.)¹

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 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 that 90-day period, a petitioner may seek judicial review, but the State Water Board is not divested of jurisdiction to act upon the petition simply because the State Water Board failed to complete its review of the petition on time. (See *California Correctional Peace Officers Ass'n. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1147-1148, 1150-1151 [43 Cal.Rptr.2d 681]; State Water Board Order WQ 98-05-UST at pp.3-4.)

- (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.)

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 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 2002-0104. 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. (State Water Board Order WR 96-1, at p. 17, fn. 11.)

3.0 FACTUAL BACKGROUND

The Division issued Permit 15580 to Gertrude J. Moores, Jesse E. Nichols, and the Estate of Williams M. Moores on February 15, 1968, pursuant to Application 21902. On March 20, 1969, the permit was amended to list Irish Beach Water District as an additional Permittee. The permit was subsequently assigned solely to the Irish Beach Water District on March 21, 1973. The permit authorizes direct diversion of 1.31 cubic feet per second (cfs) for municipal,

domestic, and irrigation purposes. The Permit required completion of construction work by December 1, 1970 and full beneficial use of water by December 1, 1971.

At the request of Petitioner, on July 27, 1973, the Division extended the time to complete construction to December 1, 1975 and the time to put water to full beneficial use until December 1, 1976. The same order also established a maximum annual diversion limit of 545 acre-feet per annum (afa). The Division granted a second time extension at the request of Petitioner, extending the time to complete construction to December 1, 1978 and the time to put water to full beneficial use to 1987. At the same time, the Division added a second point of diversion to the permit. On October 17, 1988, the Division inspected the project and found that Petitioner was using 0.05 cfs, with a maximum use of 23 afa. The Division granted Petitioner a third time extension in 1989. Construction was to be completed by December 31, 1995; water was to be put to full beneficial use by December 31, 1997.

Following expiration of the 1997 deadline for putting water to full beneficial use, the Division conducted a licensing inspection on May 25, 1999. The inspection found that 167 of the 450 homes planned for the development had been built. Progress reports indicated maximum use to be 0.05 cfs, and the maximum diversion to be 24.1 afa. On July 28, 2000, two and one-half years after time expired under the permit, Petitioner requested a fourth extension of time. The petition indicated that it was unknown when water would be fully used, but requested a ten-year extension (i.e., until December 31, 2007).

On March 15, 2007, less than a year before the requested ten-year extension period was to expire, and following numerous requests from the Division to complete documentation under the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.), Petitioner issued a Notice of Determination (NOD) for the time extension environmental document.

On July 22, 2008, the Division denied Petitioner's request for extension of time. The denial was based on a number of factors, the first of which was that the Division could not make a finding of due diligence. At the time the last extension ran out, 28 years had elapsed since issuance of the original permit. At the time of the denial, over 39 years had elapsed. As of 2007, when the extension would have expired, all water had not been put to beneficial use. The Division also noted the long delay, despite prodding by the Division, in completion of CEQA documentation

for the extension. The Division also found that the delay was not occasioned by obstacles that could not be reasonably avoided. The reason given by Petitioner was that only 5 houses per year were being developed. The Division further found that the Mitigated Negative Declaration showed insufficient summer flow to complete the project. The Mitigated Negative Declaration also identified threatened and endangered species and their habitat that could be affected by the project. The extension denial order expressed concern over the State Water Board's public trust duty to protect these species, including the California Red-Legged Frog, the Point Arena Mountain Beaver, Steelhead, and Coho Salmon.

Finally, the Division found that satisfactory progress was not likely to be made if an extension were granted. Petitioner had stated that the project would not be completed during the requested extension. In fact, the contemplated extension period had nearly expired before Petitioner finished CEQA documentation necessary for consideration of the extension. In addition, the Petitioner had made little progress towards reaching full beneficial use. The denial noted that environmental documentation estimated that full beneficial use would not occur until sometime between 2038 and 2067.

On August 19, 2008, the State Water Board received a petition for reconsideration and a request that the extension be extended further, to 2018. Petitioner also requested that the State Water Board hold a hearing on evidence relating to impacts on threatened and endangered species and delays with the development due to financial trouble associated with litigation concerning another water right.

4.0 DISCUSSION²

4.1 Requirements for Obtaining an Extension

The State Water Board may extend the deadlines specified in a permit for beginning construction, completing construction, and completing application of water to beneficial use upon a showing of good cause. (Wat. Code, § 1398.) The State Water Board will grant a petition for an extension of time only upon such conditions as the Board determines to be in the public interest, and only upon a showing that (1) due diligence has been exercised, (2) failure to comply with previous time requirements was caused by obstacles which could not reasonably

² To the extent Petitioner raises issues not discussed in this order, those issues are dismissed as not substantial or appropriate for review. (Cal. Code Regs., tit. 23, § 770, subd. (b)(1).)

be avoided, and (3) satisfactory progress will be made if an extension is granted. (Cal. Code Regs., tit. 23, § 844.) "Lack of finances, occupation with other work, physical disability, and other conditions incident to the person and not the enterprise will not generally be accepted as good cause for delay." (*Ibid*; State Water Board Order WRO 2003-0003 [lack of time and money were not valid excuses for failure to diligently pursue a project].) Approval of a petition for an extension of time is a discretionary act that is subject to the requirements of CEQA. (State Water Board Order WR 2008-0045 at p. 4.)

4.2 Due Diligence

The due diligence requirement is an important aspect of water right administration. As a recent State Water Board order explains:

The Water Code and the State Water Board's regulations require appropriative water rights to be developed with due diligence. The purpose of the due diligence requirement is to ensure that appropriators do not hold water rights in "cold storage," thereby preventing water resources from being put to beneficial use. (See *California Trout Inc. v. State Water Resources Control Board* (1989) 207 Cal.App.3d 585, 619 [discussing Water Rights Board's regulations and the fact that "the statutory requirement of diligence does not allow the Water Board to countenance a scheme placing water rights in 'cold storage' for future use"]; see also State Conservation Commission, Report of the Conservation Commission of the State of California to the Governor and Legislature of California (1913) pp. 20-21, 39-40 [not sound public policy to allow cold storage of a valuable natural resource such as water]; and see *Nevada County and Sacramento Canal Company v. G. W. Kidd* (1869) 37 Cal. 282, 314 ["The doctrine is that no man shall act upon the principle of the dog in the manger, by claiming water by certain preliminary acts, and from that moment prevent others from enjoying that which he is himself unable or unwilling to enjoy, and thereby prevent the development of the resources of the country by others"].) (State Water Board Order WR 2008-0045 at p. 2.)

Petitioner argues that it has exercised due diligence because all construction has been completed and full beneficial use of water is nearly complete. But Petitioner goes on to state that only 195 of 502 homes have been built. (Petition, p. 6-7.) This represents only a 39% build-out. Petitioner further notes as evidence of diligence that the lots have been subdivided and fully permitted for development. (Petition, p. 7.) Demonstrating that the lots are ready for homes does not necessarily show diligence, however, especially considering that over a nearly 40 year period the homes have not been built and the water has not been put to beneficial use. Petitioner asserts that "future growth is not merely a gleam in the developer's eye – rather, it is just a matter of time before all approved lots are built." (Petition, p. 7.) However, considering

that the permit was issued in 1968 and that according to the Mitigated Negative Declaration an additional thirty to sixty years may be required to put the water to full beneficial use, the amount of time is not consistent with the requirement for due diligence.

Petitioner also challenges the finding that due diligence was not exercised because Petitioner was slow to complete CEQA documentation. This challenge is based on the assertion that Petitioner's slow completion of CEQA was because of Petitioner's "misunderstanding as to how to proceed with the CEQA documentation and the fact that small public agencies are not always capable of responding quickly due to a variety of factors." (Petition, p. 11.) While this may be true, State Water Board regulations make clear that "conditions incident to the person and not to the enterprise will not generally be accepted as good cause for delay." Petitioner's multi-year delay argues against an assertion that satisfactory progress will be made or that due diligence has been exercised. Thus by the terms of the State Water Board's regulations, it would be improper to consider Petitioner's failure to retain a CEQA consultant as a valid excuse for delay.

4.3 Failure to Comply with Past Time Requirements

Petitioner asserts that the reasons previous timelines were not met was the slow rate of development along the Mendocino coast and the onerous regulatory process and hurdles to developing large residential subdivisions in the area. In the words of the Petitioner, development of a subdivision on the Mendocino coast, "even back in the 1980's – is a very complex, expensive, and time consuming undertaking." (Petition, p. 7.) Petitioner fails to note, however, that 1980 was nearly 30 years ago. Even in the relatively slow-moving worlds of coastal development and water regulation, three decades is a substantial amount of time. Petitioner also does not elaborate on how regulatory processes delayed the construction of homes in this particular subdivision or appropriation of water under this particular permit.

Petitioner also argues that past failure to comply with time requirements was caused by litigation over a different water right held by Petitioner. Petitioner does not explain how lack of access to water under another right caused it to delay development under this permit. If anything, one would expect that lack of access to water under another right would speed development under this permit. Further, a lack of finances caused by separate litigation, as claimed by Petitioner, does not supply a valid reason for delay, even if such lack of finances caused a slowdown in development. (Cal. Code Regs., tit. 23, § 844.)

4.4 Likelihood of Satisfactory Progress if an Extension is Granted

Although first noting that it is hard to project future growth within a subdivision, Petitioner claims in its reconsideration request that all the water will be put to beneficial use within ten years. This is based on an expected growth of five new homes per year, which is in line with past and current development rates. Petitioner suggests in the petition for reconsideration that it only intends to service 53 more homes from this permit.

While home development may be progressing at the rate of five homes per year, it appears that appropriation under this permit has lagged behind that trend. From issuance of the permit in 1968 until 2005, Petitioner was increasing diversion rates under the permit by an average of 0.0018 cfs per year. By comparison, in the past ten years (1995 to 2005), diversions were increasing by only an average of 0.0017 cfs per year. According to Petitioner, appropriation will be capped at 58 gallons per minute, or 0.1292 cfs. (Petition, p. 12.) If historical rates of development continue, as Petitioner suggests they will, this rate of diversion will not be reached until at least 2039, well past the date of the requested extension, or even the extended date of 2018 that Petitioner requests in the petition for reconsideration. This date is in line with the estimates in the Mitigated Negative Declaration. (Mitigated Negative Declaration, pp. 5, 17.) A mere showing that some increase in water use will occur over a long period of time does not amount to a satisfactory showing that the water will be put to beneficial use in accordance with the permit.

The evidence presented by the Petitioner, including arguments made in the petition for reconsideration, do not convince the State Water Board that satisfactory progress will be made if an extension of time is granted. This finding is only underscored by the fact that we are now well past the 2007 date when the extension would have expired, and even Petitioner estimates that the project is still more than ten years from full beneficial use of the water.

Thus, Petitioner has not made any part of the showing necessary to support an extension of time. Petitioner has not demonstrated that due diligence has been exercised, has not demonstrated that failure to comply with previous time requirements was caused by obstacles

that could not reasonably be avoided, and has not shown that satisfactory progress will be made if an extension is granted.³ The Division's action was appropriate and proper.

5.0 REQUEST FOR HEARING

Petitioner offers new evidence that Petitioner claims could not, in the exercise of reasonable diligence, have been produced earlier. Petitioner offers this evidence as part of a challenge to paragraph 21 of the denial order, regarding threatened and endangered species. This new evidence suggests that some concerns over certain species may not be as significant as previously thought.

The Division may condition or deny a petition for extension of time based on environmental or public trust impacts, including impacts on threatened and endangered species. (See Wat. Code, § 1398 [the State Water Board "may" grant an extension for good cause]; Cal. Code Regs., tit. 23, § 844 [An extension will be granted only on those conditions that the State Water Board determines to be in the public interest.]) But the absence of any impacts on threatened and endangered species, or evidence that those impacts will not be as serious as anticipated by the Division, cannot support the issuance of an extension if other requirements for approving an extension have not been satisfied. Because the Petitioner has not made the showing necessary to support issuance of an extension, as discussed in Section 4 of this order, there is no reason to hold a hearing to hear evidence concerning impacts on threatened and endangered species.

A hearing was also requested to present new evidence on how litigation related to the development project, but related to a different water permit, impacted Petitioner financially and slowed development. As discussed above, lack of finances, including lack of finances resulting from litigation, does not constitute a valid excuse for delay. As such, there is not a reason to hold a hearing to hear evidence concerning this matter, as such evidence could not affect the outcome of this reconsideration.

³ The Division denied the Petitioner's request for a ten-year extension. The Petitioner's petition for reconsideration requests an additional ten-year extension, for a total of twenty years. Because this order concludes that the requirements for issuing an extension have not been satisfied for either period, it is unnecessary to address the issue whether the State Water Board could grant an extension for more than ten years without first providing notice and an opportunity to protest the longer extension. (See Cal. Code Regs., tit. 23, § 843.)

6.0 CONCLUSION

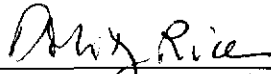
Upon review of the record, the State Water Board finds that the Division's order canceling the application was appropriate and proper.

ORDER

IT IS HEREBY ORDERED that the Irish Beach Water District petition for reconsideration is denied.

MAR 04 2009

Dated: _____



Dorothy Rice
Executive Director