CALIFORNIA
Water Boards

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State Water Resources Control Board

DEC 07 2012

To: Enclosed Mailing List

PROPOSED REVOCATION OF LICENSE 659 (APPLICATION 553) OF THE MORONGO BAND OF MISSION INDIANS

This letter addresses in part the Morongo Band of Mission Indians' (Morongo Band) May 10, 2012 Motion to Dismiss or, in the Alternative, To Decline To Revoke License 659 (Motion to Dismiss). In the motion, the Morongo Band informed the State Water Resources Control Board (State Water Board) for the first time that on June 29, 2005, the Morongo Band conveyed legal title to License 659 to the Bureau of Indian Affairs (BIA) to be held in trust for the benefit of the Morongo Band. Based on the BIA's ownership interest in the license, the Morongo Band asserts that the BIA is an indispensable party to this proceeding, and therefore this proceeding must be dismissed because the BIA cannot be joined due to its sovereign immunity.

The Morongo Band's motion to dismiss this proceeding on indispensable party grounds is denied. As discussed in more detail below, the statutes requiring dismissal of a proceeding if an indispensable party cannot be joined do not apply to administrative proceedings. Moreover, the United States has waived sovereign immunity with respect to the administration of License 659 under the McCarran Amendment (43 U.S.C. § 666).

I will reopen the hearing, however, to the extent necessary to allow the BIA to participate in order to ensure compliance with Water Code section 1675, which requires the State Water Board to provide the licensee with notice and an opportunity for a hearing before revoking a license.

In its Motion to Dismiss, the Morongo Band also argues that the doctrine of laches bars revocation, that this proceeding should be dismissed on due process grounds, and that License 659 should not be revoked as a matter of public policy. This letter does not address these arguments, which will be addressed in the State Water Board's final decision in this proceeding.

Factual and Procedural Background

As set forth in the hearing notice for this proceeding, the State Water Board's predecessor issued License 659 to Southern Pacific Land Company on January 31, 1928. The license authorizes the direct diversion of 0.16 cubic foot per second from springs arising in Millard Canyon year-round for purposes of Irrigation.

Beginning in 1922, the State Water Board's predecessor and the Riverside County Superior Court conducted a comprehensive adjudication of all the claimed rights to appropriate water from the Whitewater River and its tributaries, including Millard Creek. The adjudication culminated with the issuance of a court decree in 1938, which confirmed Southern Pacific Land Company's right to divert as authorized under License 659. (Enforcement Team Exhibit 7 [abstract of claims]; Enforcement Team Exhibit 50, p. 61 [decree].)

Ownership of License 659 changed hands several times before the Morongo Band acquired both the license and the land authorized to be served by the license from Great Spring Waters of America, Inc. (Great Spring Waters) in 2001. (Morongo Band Exhibit 15.) By letter dated November 1, 2002, the Morongo Band informed the Division of Water Rights (Division) that it had acquired License 659. (Morongo Band Exhibit 16.) The Division issued a Notice of Proposed Revocation of License 659 on April 28, 2003, and the Morongo Band requested a hearing. (The Notice of Proposed Revocation was addressed erroneously to Great Spring Waters, but the Morongo Band was on the mailing list and received a copy of the notice.)

The hearing in this proceeding has been subject to extensive delays. The hearing was originally scheduled for October 14, 2003. The Morongo Band requested a continuance, and the hearing was rescheduled for April 30, 2004. The hearing was delayed again pending resolution of litigation initiated by the Morongo Band concerning whether the Morongo Band would be deprived of a fair hearing in light of the fact that members of the Enforcement Team provide advice to the State Water Board on unrelated matters. Ultimately, the litigation was resolved by the California Supreme Court, which issued a decision upholding the State Water Board's hearing procedures in February 2009. (*Morongo Band of Mission Indians v. State Water Resources Control Board* (2009) 45 Cal.4th 731.)

Conveyance to the BIA

While the litigation was pending, the Morongo Band conveyed the land authorized to be served by License 659 to the BIA to be held in trust for the benefit of the Morongo Band. (Motion to Dismiss, Exhibit C [grant deed describing property conveyed]; Enforcement Team Exhibit 16 [copy of license describing authorized place of use].) The original deed, which was dated June 29, 2005, was lost and replaced by a deed dated December 19, 2007. (Motion to Dismiss, Exhibit C.) The United States accepted the first conveyance on June 29, 2005, and accepted the second conveyance on February 17, 2008. (*Ibid.*) Although the property description contained in the deed does not mention water rights, the Morongo Band contends that License 659 is appurtenant to the land, and therefore legal title to the license was transferred to the BIA along with the land.

When a license is transferred to a new owner, the State Water Board's regulations require the license holder to notify the State Water Board immediately. Section 831 of the Board's regulations provides: "When rights under an application, permit, or license are transferred, a statement to that effect, signed by the previous owner, shall be filed immediately with the board, referring to the number of the application and stating the name and address of the new owner. Thereafter, notices and correspondence concerning the application, permit, or license will be sent to the new owner . . . ." (Cal. Code Regs., tit. 23, § 831.) Notwithstanding this regulation, the Morongo Band did not notify the State Water Board that legal title to License 659 had been transferred to the BIA until the Morongo Band filed its Motion to Dismiss in May of this year.

Notice of Hearing and Related Proceedings

On October 12, 2011, the Division sent the parties a courtesy notice that the hearing would be scheduled in early 2012. On November 14, 2011, and January 6, 2012, the Morongo Band submitted letters making several procedural requests. The Chief of the Hearing Unit responded to these requests by email dated January 10, 2012. The Morongo Band renewed one of its requests by letter dated January 24, 2012.

On January 26, 2012, the State Water Board issued a formal notice that the hearing had been rescheduled for April 25, 2012. The hearing was rescheduled again for May 21, 2012 to accommodate one of the Morongo Band's witnesses. The deadline to submit notices of intent to appear was March 14, 2012, and the deadline to submit written direct testimony and exhibits was April 30, 2012.

In March of 2012, the Morongo Band filed two motions, raising a number of procedural objections to the hearing notice and the Notice of Proposed Revocation. The Morongo Band's letter and motions were addressed in a ruling dated April 26, 2012. None of the Morongo Band's letters or motions mentioned the BIA's interest in License 659 or raised the indispensable party issue.

Motion to Dismiss for Failure to Join Indispensable Party and Hearing

The Morongo Band did not file its Motion to Dismiss until May 10, 2012, after the parties had submitted notices of intent to appear and their written testimony and exhibits, and just eleven days before the hearing. The motion was not filed in time to be fully considered before the hearing. Rather than delay the hearing in order to consider the motion, the State Water Board elected to proceed with the hearing on May 21, 2012, as scheduled. The Morongo Band participated in the hearing. The only other party that participated in the evidentiary portion of the hearing was the Enforcement Team.

A representative from the BIA attended the hearing and presented a policy statement. In the policy statement, the BIA confirmed that it now holds title to the land served by License 659, and any appurtenant water rights. The BIA also asserted that there is a "serious legal issue" concerning whether the license could be revoked without appropriate notice to the BIA. The hearing record does not indicate whether the BIA was informed of the pending revocation proceeding in time to participate in the hearing. In the Morongo Band's Notice of Intent to Appear, which was filed on March 14, 2012, the Morongo Band indicated that it intended to "sponsor" an individual from the BIA, who would provide a policy statement at the hearing, but it is possible that the Morongo Band had not yet communicated with the BIA about the hearing and the possibility of presenting a policy statement.

Title to License 659 Probably Was Transferred to the BIA

As a threshold issue, the Morongo Band's argument that title to License 659 was transferred to the BIA to be held in trust for the benefit of the Morongo Band has merit. Federal law authorizes the BIA to accept both land and water rights in trust for Indian tribes. (25 U.S.C. § 465 ["The Secretary of Interior is authorized to acquire . . . any interest in lands, water rights, or surface rights to lands, within or without existing reservations . . . for the purpose of providing land for Indians"]; 25 U.S.C. § 2202 [Section 465 applies to all tribes].)

As stated above, the deed that conveyed title to the land served by License 659 from the Morongo Band to the BIA does not mention water rights, but, absent any evidence to the contrary, title to the

license transferred to the BIA as an appurtenance to the land. Unlike riparian rights, appropriative rights are severable from the land. As a general rule, however, appropriative rights are considered appurtenances to the land on which they are used, and they are conveyed with the land by operation of law unless expressly reserved in the grant deed or there is other evidence of contrary intent. (*Stanislaus Water Company v. Bachman* (1908) 152 Cal. 716, 724; *Nicoll v. Rudnick* (2008) 160 Cal.App.4th 550, 557-561; *Witherill v. Brehm* (1925) 74 Cal.App. 286, 295; see also Cal. Code of Regs., tit. 23, § 833 ["When an application, permit, or license stands upon the records of the board in the name of the owner of the place of use the right will be considered appurtenant to the land unless there is evidence to the contrary. It will generally be presumed that the water right passes with a transfer of the land unless expressly excepted."].)

The Indispensable Party Statutes Are Not Applicable to Administrative Hearings

Based on the BIA's ownership interest in the license, the Morongo Band argues that the BIA is an indispensable party in this proceeding, and therefore this proceeding must be dismissed because the BIA cannot be joined due to its sovereign immunity. In support of this argument, the Morongo Band cites to several federal cases that held that the United States was an indispensable party under Rule 19(b) of the Federal Rules of Civil Procedure in a suit that could affect land held by the United States in trust for an Indian tribe. Under Rule 19(b), a party is considered indispensable if the party cannot be joined in an action, and the court determines that dismissing the case is preferable to proceeding in the party's absence. (*Salt River Project Agricultural Improvement and Power District v. Lee* (9th Cir. 2012) 672 F.3d 1176, 1179.)

With limited exceptions not applicable here, Rule 19(b) applies to civil actions in federal district courts. (Fed. Rules Civ. Proc., rules 1, 81 (28 U.S.C.).) Similarly, the California state law counterpart to Rule 19(b), section 389 of the California Code of Civil Procedure, applies to civil actions in state courts. (See Code Civ. Proc., § 22 [defining "action" as a proceeding in a court of justice].) Rule 19(b) and section 389 do not apply to administrative proceedings before the State Water Board, and the laws that do apply to proceedings before the Board do not include a comparable provision requiring joinder of indispensable parties. (See generally Cal. Code Regs., tit. 23, § 648; Gov. Code, § 11400 et seq.) Accordingly, the Morongo Band's Motion to Dismiss on indispensable party grounds is denied.

Sovereign Immunity Is Not a Bar to the BIA's Participation due to the McCarran Amendment

The Morongo Band's indispensable party argument separately fails because the BIA cannot assert sovereign immunity as a defense to the State Water Board's exercise of its regulatory authority over License 659. The United States has waived sovereign immunity under the McCarran Amendment (43 U.S.C. § 666(a).) with respect to the administration of License 659.

The McCarran Amendment provides in relevant part: "Consent is given to join the United States in any suit: (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit." (43 U.S.C. § 666(a).)

Pursuant to the McCarran Amendment, the United States can be joined as a party in any comprehensive state adjudication of the rights to a stream system if the United States claims a

right to use water from the stream. In addition, once a water right has been adjudicated within the meaning of section 666(a)(1), then under section 666(a)(2) sovereign immunity is waived with respect to any subsequent proceeding to administer the right. (See *U.S. v. Hennen* (1968) 300 F.Supp. 256, 261, 263-264 [water right acquired by United States in 1963 had been adjudicated as part of comprehensive stream adjudication conducted between 1917 and 1929, and therefore United States had waived sovereign immunity from suit in Nevada state court to amend decree to authorize additional diversions]; see also *Federal Youth Center v. District Court in and for County of Jefferson* (1978) 195 Colo. 55, 59-62, 575 P. 395, 398-400 [once a right has been adjudicated within the scope of section 666(a)(1), sovereign immunity is waived with respect to any suit to administer the right pursuant to the water law administration procedures of the state, including procedures derived from statutes, judicial decisions, and administrative regulations].)

State jurisdiction under the McCarran Amendment extends to water rights held by Indian tribes, and to water rights held by the United States in trust for Indian tribes. (*Arizona v. San Carlos Apache Tribe of Arizona* (1983) 463 U.S. 545, 565-570 [rights held by Indian tribes]; *Colorado River Water Conservation District v. United States* (1976) 424 U.S. 800, 809-813 [Indian reserved rights held by United States in trust for tribes].)

In this case, License 659 was adjudicated as part of a comprehensive adjudication of the appropriative rights to the Whitewater River Stream System. Therefore, the United States has waived sovereign immunity under the McCarran Amendment with respect to the instant proceeding to determine whether the right has been forfeited for non-use.

The BIA Should Be Afforded the Opportunity to Participate in the Hearing

Although the Morongo Band's indispensable party argument lacks merit, the BIA should be afforded the opportunity to participate in the hearing in order to ensure compliance with Water Code section 1675. Section 1675, subdivision (b) provides that the State Water Board "may revoke a license after due notice to the licensee and after a hearing, when a hearing is requested by the licensee . . . ." Section 1675, subdivision (c) defines a licensee to include the "heirs, successors, or assigns of the licensee."

Since 2005, the BIA likely has been the holder of title to License 659, but the State Water Board did not provide notice of the proposed revocation or notice of the hearing to the BIA. Of course, the State Water Board could not have provided notice to the BIA because neither the Morongo Band nor the BIA provided timely notice to the Board that title to the license had been transferred to the BIA in 2005. Nonetheless, to ensure compliance with section 1675, the BIA will be permitted to request that the hearing be reopened to the extent necessary to allow the BIA to participate.

It bears emphasis that the BIA's participation is optional. The BIA may decide that its participation is not necessary in light of the fact that the BIA's interest in the license is aligned with the Morongo Band's interest, and the Morongo Band vigorously represented its interest in the hearing.

Hearing Logistics

In the interest of efficiency and fairness to the parties, including the Morongo Band, the existing hearing record will be preserved. If the BIA would like to participate in this hearing, the BIA should carefully review the existing hearing record, including: (1) the hearing notice and enclosure entitled "Information Concerning Appearance at Water Right Hearings," (2) the exhibits that have been submitted by the parties, and (3) the hearing transcript. These documents are available on the

Board's website at the following address:
http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/morongo_mission_indians/
If after reviewing the existing record the BIA would like the hearing to be reopened to allow the BIA to present additional evidence, the BIA must submit a Notice of Intent to Appear by 12:00 noon on February 20, 2013. A copy of the Notice of Intent to Appear form is available at the following address:
http://www.waterboards.ca.gov/waterrights/publications_forms/forms/docs/noi_exhibit_list.pdf.

The BIA will be permitted to present direct testimony and exhibits, to conduct non-duplicative cross-examination of any of the witnesses who have already testified, to present rebuttal testimony or exhibits, and to submit a closing brief. If the BIA submits a Notice of Intent to Appear, the BIA should indicate the manner in which the BIA intends to participate. In the event that the BIA would like to cross-examine any of the witnesses who have already testified, the BIA should identify the witnesses and provide a brief summary of the proposed line of questioning.

If the hearing is reopened at the BIA's request, the parties will be notified of the supplemental hearing date and any deadlines for exhibits or other materials that must be submitted in advance of the hearing.

Official Notice of Documents Pertaining to Water Availability

Another outstanding procedural issue that needs to be addressed is the Enforcement Team's request for the hearing officer to take official notice of reports of licensee for the period 1988 through 1999 for License 660 (Application 554), which authorizes the diversion and use of water from the same source as License 659. (R.T. pp. 264-265.)

As the hearing officer, I will take official notice of the fact that the holder of License 660 reported diversion and use of water under License 660 for the period of 1988 through 1999 as shown on the reports of licensee that were submitted to the State Water Board for that period. Official notice will be taken pursuant to California Code of Regulations, title 23, section 648.2 (authorizing the Board to take official notice of matters that may be judicially noticed and any generally accepted technical or scientific matter within the Board's field of expertise) and Evidence Code section 452, subdivision (h) (authorizing judicial notice of facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy). Copies of the reports of licensee are enclosed for the parties' information.

If you have any questions about this letter, you may contact Kathleen Groody, Environmental Scientist, at (916) 341-5354 or kgroody@waterboards.ca.gov, or you may contact Dana Heinrich, Staff Attorney IV, at (916) 341-5188 or dheinrich@waterboards.ca.gov.

Sincerely,

Charles R. Hoppin
Chairman

Enclosure

Mailing List

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