

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Alleged Waste,)
Unreasonable Use, Method of Use,)
or Method of Diversion of Water)
by)
MISSION VIEJO COMPANY)

Decision 1463

DECISION DIRECTING PREVENTION OF
WASTE AND UNREASONABLE USE OF WATER

BY THE BOARD

On February 23, 1977, the State Water Resources Control Board held a public hearing pursuant to Sections 736.1 and 764.10 of Title 23, California Administrative Code. This hearing was held to receive evidence on whether the proposed filling and operation of an artificial lake covering 125 acres principally for private use in Orange County results in waste or unreasonable use of water during the present drought. The Mission Viejo Company and other interested parties having appeared and presented evidence; the evidence received at the hearing and thereafter having been duly considered; the Board finds as follows:

Substance of the Project

1. The Mission Viejo Company (hereinafter the respondent) is presently filling an artificial lake called Lake Mission Viejo as part of a real estate development in Orange County. Water for the lake is supplied by member agencies of the Metropolitan Water District of Southern California.

2. Lake Mission Viejo presently has in storage about 1,500 acre-feet of water and over 2,000 acre-feet is needed to fill the lake.

3. Lake Mission Viejo has been designed to provide aesthetic enjoyment and recreation such as swimming, boating, fishing and other water contact sports. The Lake is also planned to serve as an emergency water source for the domestic use of about 115,000 persons.

Findings as to Waste, Unreasonable Use, Unreasonable Method of Use and Unreasonable Method of Diversion

4. The State of California is experiencing its second year of severe drought.

5. Mandatory water rationing is now in effect in Monterey County, Marin County, El Dorado County and a number of other areas of the State. Mandatory water rationing is possible for other areas before the drought ends.

6. Agriculture, including food production in the San Joaquin Valley, could be severely affected by the present drought, resulting in substantial economic losses to growers and probable increases in food prices.

7. The Metropolitan Water District of Southern California (MWD) obtains water from two sources: the Colorado River and the State Water Project (SWP). The Department of Water Resources has curtailed deliveries of SWP water to the MWD and has reduced deliveries to other SWP contractors.

8. Evidence indicates that MWD has been and intends to continue its diversion of Colorado River water to the maximum capacity of its diversion and conveyance works. Thus, any curtailment of nonessential use in the MWD service areas must necessarily result in stretching the capability of Colorado River water to meet the

needs of the service area and concomitantly reducing the future demand for SWP water from the North to be delivered to Southern California.

9. Prudent water management planning requires taking all reasonable steps now to minimize adverse impacts should the present drought extend into next year or beyond.

10. The respondent asserts that filling and operation of the lake is reasonable because of a series of performance bonds and agreements between the respondent and the Lake Mission Viejo homeowners' association. However, it is found that while there is a legal requirement to fill the lake, the performance of this obligation is not guaranteed by any performance bond and that while the subsidy agreement and accompanying performance bond does require the expenditure of a sum certain every month on water to maintain the level of this lake, this does not make the maintenance of the level of the lake reasonable under the circumstances of this case. It is a fundamental principle of law that the want of performance of an obligation, in whole or in part, or any delay therein, is excused by operation of law. (See Civil Code Sec. 1511(1).)

11. The respondent asserts that a major benefit of Lake Mission Viejo is that the lake will provide an emergency water supply for the domestic use of about 115,000 residents. A representative from the Orange County Municipal Water District testified that an emergency water supply reservoir is needed because of the lack of groundwater basin from which water could be pumped during an emergency. Notwithstanding this assertion and this testimony, it is found that the reasonableness of the use of the water in Lake Mission Viejo must be judged on its use as a recreational facility for the following reasons.

First, the water districts which could use this water as an emergency water supply have not developed the institutional arrangements with the respondent to so use the water.

Second, domestic use of the water is within the jurisdiction of the State Department of Health and local health officials, and one of these persons must approve this use of water. Respondent introduced no evidence that this approval had been obtained.

Third, all recreational lakes have, to some degree, the capability of providing an emergency water supply as an incidental use. For such a use to be determinative under the existing drought circumstances, a greater demonstration by the developer of the need for, and the extent of the need for, the water supply is required than was provided here.

Conclusion

The Board finds that the proposed filling of Lake Mission Viejo under the current circumstances constitutes both a waste and an unreasonable use of water in violation of Section 2, Article X, of the California Constitution.

ORDER

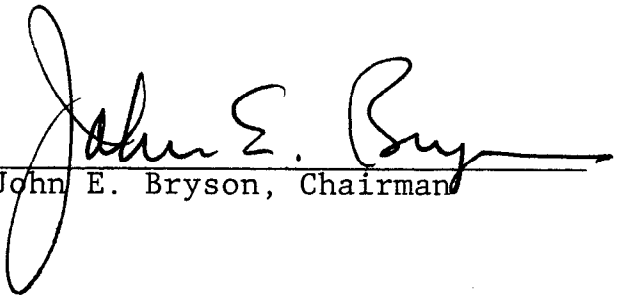
IT IS HEREBY ORDERED that:

1. The respondent shall cease filling Lake Mission Viejo forthwith.
2. The respondent shall not resume filling Lake Mission Viejo until a determination by this Board, upon petition by respondent or upon the Board's own motion, that in the foreseeable future it will be unlikely that the California Department of Water Resources will require water service contractors to take deficiencies in entitlements pursuant to Article 18 of DWR Standard

Provisions for Water Supply Contracts or that other circumstances exist which would operate to eliminate the adverse impact or potential adverse impact of filling the Lake.

3. The Executive Officer of the State Water Resources Control Board is authorized to refer this matter to the Attorney General of the State of California at any time for appropriate legal action should the respondent fail to comply with this order.

DATED: March 2, 1977


John E. Bryson, Chairman

"no"
W. Don Maughan, Vice Chairman


W. W. Adams, Member*


Roy E. Dodson, Member


Jean Auer, Member

*See attached Differing Opinion

DIFFERING OPINION TO DECISION 1463
IN THE MATTER OF ALLEGED WASTE, UNREASONABLE USE, METHOD
OF USE, OR METHOD OF DIVERSION OF WATER BY MISSION VIEJO COMPANY

The issue before the Board is whether 3,650 acre-feet of water to fill a recreational lake at a time of severe water shortages is a reasonable use of water.

I think there is a larger issue here. Should water to fill and maintain a single-purpose recreational lake or reservoir be considered a beneficial use of water at any time? I think not.

In California water is a limited resource at all times, not just in time of drought. It is also the one natural resource that is the most essential to the social and economic well being of the state.

Whether this lake is filled or not filled will have no effect on the drought that the northern half of the state is enduring. I cannot point to Mission Viejo and say that if this lake is not filled there will be one additional acre of food crops planted or harvested.

In previous cases before this Board, the issue of reasonableness or unreasonableness of use of water for a single-purpose recreational lake for a limited number of people was present. In one such case, the Boyd Trucking Company, a majority of the Board voted to deny the application to appropriate water for this purpose on the basis that it was an unreasonable use of water. While the present situation does not involve an application to appropriate water, the decision in the Boyd Trucking case none-the-less presented the same issue about the reasonableness or unreasonableness of use of water for such recreational lakes and controls my decision in this matter. In that case I voted with the majority.

There is no doubt in my mind that Lake Mission Viejo is a well planned project; that the builders are reasonable and responsible people; that they built the project with careful consideration of water quality and water conservation. They did seek and obtain all necessary permits and did comply with the California Environmental Quality Act. Counsel for Mission Viejo made the point in his closing argument that if the Board should decide that filling the lake is an unreasonable use of water, then that decision should apply even-handed to all other similar lakes in California. I agree with Counsel on this point.

There are currently many examples of waste and unreasonable use of water in this state. Certainly, unmetered water served to urban users is one.

My conclusion that the use of water in such a large recreational reservoir is unreasonable is further supported by analogy to our regulations relating to appropriation of water for such uses. Section 657.1 of Title 23 of the California Administrative Code states in part:

"(a) A water storage reservoir for recreational use in connection with subdivisions shall be limited in surface area to the smallest reasonable size. If the reservoir will be used principally by the residents of the subdivision without substantial use by the public, and will be in the San Joaquin Valley, southern California, the coastal watersheds south of San Francisco Bay, or the Lahontan area south of Lake Tahoe, the surface area at maximum water level shall not exceed 50 acres, and in other areas of the state shall not exceed 100 acres, provided a larger reservoir may be allowed upon a showing that it is needed for the intended uses and will not result in waste or unreasonable use of water."
(Emphasis added.)

The size of Lake Mission Viejo is about two and one-half times the size of a recreational reservoir normally allowed in Southern California when a person appropriates water for such use and therefore such use is unreasonable.

Dated: March 2, 1977



W. W. Adams, Member