

STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

In the Matter of Permit 14329)	
(Application 20545) and)	ORDER: WR 92-01
Application 26726)	
)	SOURCE: Birch,
BAXTER RANCH,)	Tinemaha, and
)	Red Mountain
)	Creeks
Permittees and)	
Applicants)	COUNTY: Inyo
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ORDER REVOKING PERMIT AND
CANCELING APPLICATION

BY THE BOARD:

1.0 INTRODUCTION

The State Water Resources Control Board (State Water Board) having initiated statutory revocation proceedings concerning Permit 14329 and cancellation proceedings concerning Application 26726; the Baxters (permittee and applicant) having requested a hearing on the proposed revocation of the permit and cancellation of the application; notice of a hearing having been given; a hearing having been held on September 28, 1990 by the State Water Board; the Baxters and staff of the Division of Water Rights (Division) having appeared and presented testimony and exhibits at the hearing; the evidence having been duly considered; the State Water Board finds as follows:

2.0 SUBSTANCE OF PERMIT 14329 (APPLICATION 20545)

On January 2, 1962, Application 20545 was filed with the State Water Board for year round diversion of six cubic feet per second (cfs) from Birch Creek for hydroelectric power generation.

On April 29, 1964, Permit 14329 was issued pursuant to State Water Board Decision 1154. Permit 14329 specified that construction of the project be completed by December 1, 1966 and that water be put to full beneficial use by December 1, 1967. The issuance of the permit did not confer a right of access to the point of diversion.

Two Petitions for Extension of Time were subsequently approved. The most recent Order Approving a New Development Schedule was approved on March 29, 1972. It required that construction of the project be completed and the water be put to full beneficial use by December 1, 1973.

3.0 SUBSTANCE OF APPLICATION 26726

On February 24, 1981, Application 26726 was filed with the State Water Board for year round diversion of a total of six cfs from Birch, Tinemaha, and Red Mountain Creeks for hydroelectric power generation. The application was publicly noticed in 1982. The Division

accepted 19 protests to Application 26726. Eight of the protests have not been resolved.

4.0

HEARING ISSUES

On September 6, 1990, the following issues were noticed for a hearing to be held on September 28, 1990:

- "1. Should Permit 14329 (Application 20545) be revoked for failure to obtain required Federal permits, lack of diligence in pursuing development of the project, failure to complete construction and failure to put the water to beneficial use?
- "2. Should the permittee be granted an extension of time to complete construction and put the water to beneficial use under Permit 14329?
- "3. If an extension of time is granted, to what dates should the time be extended under Permit 14329?
- "4. If an extension of time is granted, should the priority of Permit 14329 be changed relative to the priorities of other applications, permits, and licenses which authorize the diversion of water from the same source of water and were filed or issued after January 2, 1962?
- "5. If an extension of time is granted, should further conditions be placed on Permit 14329 and what should such conditions be?
- "6. Should Application 26726 be canceled for failure to obtain the required Federal permits and lack of diligence?
- "7. Should the applicant be granted an extension of time to obtain the required federal permits for Application 26726?

- "8. If an extension of time is granted, to what dates should the time be extended to obtain the required permits for Application 26726?
- "9. If an extension of time is granted, should the priority of Application 26726 be changed relative to the priorities of other applications, permits, and licenses which authorize the diversion of water from the same source of water and were filed or issued after February 24, 1981?"

5.0

APPLICABLE LAW

Water Code Section 1410, et seq., applies to the revocation of permits. Section 1410(a) states:

"There shall be cause for revocation of a permit if the work is not commenced, prosecuted with due diligence, and completed or the water applied to beneficial use as contemplated in the permit and in accordance with this division and the rules and regulations of the Board."

Title 23, California Code of Regulations (CCR)

Section 840, et seq., applies to extensions of time.

Section 844 states:

"An extension of time within which to complete an application, to commence or complete construction work or apply water to full beneficial use will be granted only upon such conditions as the board determines to be in the public interest and upon a showing to the board's satisfaction that due diligence has been exercised, that failure to comply with previous time requirements has been occasioned by obstacles which could not reasonably be avoided, and that satisfactory progress will be made if an extension of time is

granted. Lack of finances, occupation with other work, physical disability, and other conditions incident to the person and not to the enterprise will not generally be accepted as good cause for delay. The board may, in its discretion, require a hearing upon notice to the permittee and such other parties as the board may prescribe."

Applications may be canceled for failure to submit required information, including information necessary to comply with the California Environmental Quality Act (CEQA, Public Resources Code Section 21000, et seq.) pursuant to 23 CCR 683. Section 683 states:

- "(a) Notwithstanding the provisions of Section 682 the board may, in the course of processing the application, request an applicant to clarify, amplify, correct, or otherwise supplement the information required in or by this Subchapter and to obtain information necessary to comply with the Public Resources Code Section 21000 et seq.
- "(b) Failure by an applicant to comply with a written request for information pursuant to subdivision (a) of this section within a reasonable time and in a responsive manner may be cause for the board to cancel or reject the application pursuant to Government Code Section 65965(c) or the State Administrative Manual Permit Guidelines Section 1099, adopted on January 31, 1978."

Water Code Section 106.7(e) applies to small hydroelectric projects.¹ It requires the applicant to "demonstrate that project revenues will exceed project costs, including the cost of mitigation measures over the life of the project".

Water Code Section 1350 states that the State Water Board may reject any application after hearing. Rejection of an application which was accepted by the State Water Board as complete is analogous to and has the same effect as cancellation of the application.

Title 23, CCR Section 776 applies to applications where public agency permission or approval is required.

Section 776 states:

"If the proposed project will require a permit, license, or approval from another public agency or officer and it becomes evident that regardless of the action taken by the board, such permit, license or approval could not be secured from the proper agency, the application will be rejected."

1 None of the small hydroelectric projects involved in this order have been approved by the Federal Energy Regulatory Commission (FERC), and FERC has made no finding that any of the projects are financially feasible. Hence, requiring submission of the information required by Water Code Section 106.7 does not conflict with any FERC determination, and the information could be used by the Board in making recommendations to FERC. (See California v. FERC, 100 S.Ct. 2024, 2034 (1990); state water right permit conditions which do not involve regulation of diversion for consumptive uses or protection of prior vested rights are preempted if they conflict with FERC license conditions or the balance embodied in FERC licensing determination.)

On September 17, 1974, the permittee filed a Petition for Extension of Time. The permittee requested an extension of time until December 1, 1976 to complete construction and put the water to beneficial use. The permittee claimed that a time extension was necessary because of delays in obtaining steel pipe, breakdown of equipment, and cold weather prevented construction activity. Six protests to the petition were received by the State Water Board. The protests were not resolved. No further action was taken on the petition because the permittee was in the process of modifying the project and filing a new application to appropriate water for another hydroelectric power project.

On July 16, 1980, the permittee filed another Petition for Extension of Time. The permittee claimed that weather conditions, breakdown of equipment, and the high cost of materials prevented timely completion of the project. The permittee requested an additional three years to complete construction and put the water to beneficial use.

On March 12, 1982, the permittee again filed a Petition for Extension of Time. The permittee claimed that difficult working conditions caused breakdown of equipment which prevented timely completion of the

project. The permittee requested an additional two years to complete construction and three years to put the water to beneficial use.

On March 12, 1982, the permittee also filed a Petition to Change the Place of Use. Access to the new place of use is controlled by the U.S. Forest Service (USFS). The USFS has not consented to providing access to the permittee.

On April 7, 1982, the permittee filed an Application for Exemption of Small Hydroelectric Power Project with the Federal Energy Regulatory Commission (FERC). FERC denied the exemption.

On April 22, 1982, BLM issued a Trespass Notice to the permittee. The Trespass Notice informed the permittee that the following acts were committed in violation of law:

1. "[u]nauthorized use of public lands for the purposes of constructing a portion of a hydroelectric power generating facility and an irrigation system;
2. "destruction of government property; and
3. "destruction of archaeological resources located on the public lands."

By letter dated May 11, 1982, BLM informed the permittee that no additional work can occur on public land until a grant of right-of-way is issued. On June 7, 1982, the permittee filed an Application for Right-of-Way with BLM to obtain access to the point of diversion.

On August 3, 1983, the permittee filed an application for a license for this hydroelectric power project with FERC. On December 12, 1984, the application was rejected by FERC for failure to correct specified deficiencies in the application.

By letter dated August 18, 1987, the Division gave the permittee until December 31, 1987 to provide information on the following:

1. whether the Birch Creek hydroelectric project was viable;
2. whether an application had been filed with FERC for this project; and
3. whether the permittee would file an application for a right-of-way with BLM by the end of 1987.

By letter dated December 23, 1987, the permittee responded to the Division's letter. The permittee stated that an application for a conduit exemption would be filed with FERC. The permittee did not

respond to the issues of viability of the project or obtaining a right-of-way from BLM.

By letter dated March 7, 1990, the Division informed the permittee that it appeared unlikely that the project could be completed. The Division stated that if the permittee submitted a new Petition for Extension of Time to complete the project then the petition must be accompanied by a showing of diligence, including plans, a development schedule, and a showing of economic feasibility and availability of financing.

On April 3, 1990, the permittee requested an extension of time to complete the project. The permittee did not submit the showing of diligence as described in the Division's letter dated March 7, 1990.

On May 14, 1990, the permittee again requested an extension of time and informed the Division that the project had been changed from hydroelectric to hydromechanical power generation. The change to hydromechanical power generation removes the project from FERC jurisdiction; accordingly, a license from FERC is not required to operate the project. The permittee did not submit the showing of diligence with

this request, either. Consequently, the Division did not accept the request for extension of time.

On June 8, 1990, the Division issued a Notice of Proposed Revocation of Permit 14329 in accordance with Water Code Section 1410, et seq. The grounds for the proposed revocation are:

1. failure of the permittee to obtain access to the point of diversion which is located on BLM land;
2. the permittee has had 26 years to obtain access to the point of diversion; and
3. failure to proceed with diligence to develop the project.

On June 12, 1990, the permittee requested a hearing to show cause why Permit 14329 should not be revoked.

On September 7, 1990, the permittee filed an application for right-of-way with BLM to obtain access to the point of diversion for the power project. On September 26, 1990, BLM rejected the application for failure to resolve the unauthorized use of public land as described in the Trespass Notice issued on April 22, 1982.

As of the close of the hearing record on September 28, 1990, the permittee had not obtained access to the

point of diversion, had not completed construction of the project, and had not put water to beneficial use under the terms of Permit 14329. Further, the permittee did not provide the required showing of diligence including plans, a development schedule, and a showing of economic feasibility and availability of financing. There is no evidence to show that satisfactory progress will be made if yet another time extension for this project is approved by the State Water Board.

7.0

LACK OF DILIGENCE IN OBTAINING REQUIRED FEDERAL PERMITS, PROVIDING ENVIRONMENTAL DOCUMENTATION, AND PROVIDING AN ECONOMIC FEASIBILITY ANALYSIS OF THE PROPOSED PROJECT DESCRIBED IN APPLICATION 26726

On February 24, 1981, Application 26726 was filed with the State Water Board for year round diversion of a total of six cfs from four points of diversion located on Birch, Tinemaha, and Red Mountain Creeks for hydroelectric power generation. On February 5, 1982, the notice of the application was published pursuant to Water Code Section 1310, et seq. Nineteen protests to the application were accepted. Eight protests remain to be resolved as of the close of the hearing record.

By letter dated March 29, 1982, the Division informed the applicant that the State Water Board, as a responsible agency, must consider an environmental document pursuant to CEQA. The County of Inyo is the

lead agency responsible for preparation of the environmental document. The Division's letter specified the issues that should be addressed in the environmental document. An environmental document had not been prepared as of the close of the hearing record. Applications may be canceled if the applicant fails to submit information necessary to comply with CEQA. 23 CCR 683(b).

On January 20, 1984, FERC informed the applicant that the application for license which was filed for the project proposed in Application 26726 was deficient. The applicant was given 90 days to correct the deficiencies in the application. On December 13, 1984, FERC rejected the application for license for failure to correct the deficiencies. The applicant did not appeal. The applicant had not obtained a FERC license as of the close of the hearing record. The State Water Board may reject applications where public agency approval is required and such approval is not secured from the proper agency. Water Code Section 1350, 23 CCR 776.

By letter dated December 29, 1989, the Division notified the applicant that the petitions for change which had been filed with the State Water Board would not be publicly noticed until the following information was received:

1. a development schedule which includes a timeline for obtaining a FERC license and a timeline for resolving the outstanding protests;
2. the economic analysis required by Water Code Section 106.7(e); and
3. a Petition for Extension of Time.

The applicant was given until February 12, 1990 to submit this information.

On January 29, 1990, the applicant requested an extension of time to submit the information requested in the Division's letter dated December 29, 1989. On February 6, 1990, the Division granted an extension of time until June 15, 1990 to submit the information.

The applicant was informed that if the information was not received by June 15, 1990, Application 26726 may be subject to cancellation. Lack of diligence in pursuing an application, absence of a feasible plan, and lack of the financial resources required to pursue the proposed project are grounds for denial of the application.

23 CCR 840. The information was not received by the State Water Board.

On August 20, 1990, the Division informed the applicant that Application 26726 was being processed for cancellation for failure to submit information

demonstrating that the project is being pursued with diligence. The applicant was informed that the cancellation issue would be combined with the revocation proceedings for Permit 14329.

As of the close of the hearing record on September 28, 1990, the applicant had not submitted the following information:

1. a development schedule which includes a timeline for obtaining a FERC license and a timeline for resolving the outstanding protests;
2. the economic analysis required by Water Code Section 106.7(e); and
3. a Petition for Extension of Time.

Further, no environmental documentation has been received to assess the impacts of the proposed project pursuant to the requirements of CEQA. The applicant has not provided the required showing of diligence in pursuing Application 26726. There is no evidence to show that satisfactory progress will be made if a time extension is approved by the State Water Board.

8.0

COMPLIANCE WITH CALIFORNIA ENVIRONMENTAL QUALITY ACT

An action to revoke a permit and cancel an application is exempt from CEQA because it is an enforcement

action. 14 CCR 15321. Therefore, no further action is required by the State Water Board to comply with CEQA.

9.0

CONCLUSION

The State Water Board finds that there is no cause for approving the Petition for Extension of Time to complete construction and apply water to full beneficial use under Permit 14329 and that the petition should be denied. The State Water Board also finds that there is no cause to grant an extension of time to obtain the required federal permits, to provide environmental documentation, and to provide an economic feasibility analysis of the proposed project for Application 26726 and that no extension of time should be granted.

The State Water Board finds that there is cause to revoke Permit 14329 for failure to obtain access to the point of diversion, to complete construction, and to apply the water to full beneficial use. Consequently, the permit should be revoked.

Further, the State Water Board finds that there is cause to cancel Application 26726 for failure to obtain required federal permits, to provide environmental documentation, and to provide an economic feasibility

analysis of the proposed project. Consequently, the application should be canceled.

ORDER

IT IS HEREBY ORDERED that the Petition for Extension of Time to complete construction and apply water to full beneficial use under Permit 14329 is denied.

IT IS FURTHER ORDERED that Permit 14329 is revoked and Application 26726 is canceled.

CERTIFICATION

The undersigned, Administrative Assistant to the State Water 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


MARCH 19 1992

AYE: W. Don Maughan
 Eliseo M. Samaniego
 John Caffrey
 Marc Del Piero
 James M. Stubchaer

NO: None

ABSENT: None

ABSTAIN: None


Maureen Marché
Administrative Assistant to
the Board

