

STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

In the Matter of)	ORDER: WR 90-4
Application 28888)	
BELLA VISTA WATER DISTRICT,)	SOURCE: Sacramento River
Applicant,)	COUNTY: Shasta
U. S. BUREAU OF RECLAMATION,)	
ET AL.,)	
Protestants.)	

ORDER CANCELLING APPLICATION

BY THE BOARD:

1.0 INTRODUCTION

Bella Vista Water District having filed Application 28888 on September 8, 1986; public notice of the application having been given on December 4, 1987; protests having been received based upon alleged adverse environmental effects, injury to prior rights, and the lack of access to the U. S. Bureau of Reclamation (Bureau) diversion facilities identified in the application; the applicant having been advised on October 25, 1988 of the need to resolve the access issue before Application 28888 could be processed further; the applicant having been granted an extension of time to demonstrate the necessary right of access to the diversion facilities; the Bureau having advised the

Board that negotiations with the applicant were not successful and having requested that Application 28888 be cancelled; and the issues raised having been duly considered; the Board finds as follows:

2.0

SUBSTANCE OF APPLICATION

Application 28888 was filed to initiate a right for direct diversion of 60 cubic feet per second (cfs) from the Sacramento River at the existing U. S. Bureau of Reclamation (Bureau) Wintu Pumping Plant in Shasta County. The application proposes to use 59.6 cfs for irrigation purposes from May 1 to September 30 and 0.4 cfs for domestic and stockwatering purposes on a year-round basis. The applicant currently receives water from the Sacramento River via the Bureau's Wintu Pumping Plant and Bella Vista Conduit pursuant to contract with the Bureau which holds appropriate water rights for the Central Valley Project. In a written response to the Bureau's protest to Application 28888, the applicant advised the Board that the application was filed to establish an independent state water right to be utilized: (a) at such time, by act of Congress, that the facilities may be purchased or otherwise conveyed to the applicant or to the State of California; or (b) at such time as the District is able

to develop additional, or substitute points of diversion.

3.0

PROTESTS

Application 28888 was publicly noticed on December 4, 1987. Protests were received from four parties as summarized below:

<u>Protestant</u>	<u>Basis of Protest</u>
California Department of Fish and Game	adverse effects on the environment and public trust resources
California Sportfishing Protection Alliance	adverse effects on the environment and public trust resources
Maxwell Irrigation District	injury to prior rights
U. S. Bureau of Reclamation	lack of access or approval to use proposed diversion and water conveyance facilities owned by U. S. Bureau of Reclamation for the purposes of Application 28888

4.0

ANALYSIS OF ISSUES

4.1

Effects of Proposed Project on Environmental and Public Trust Resources

The protests of the Department of Fish and Game and the California Sportfishing Protection Alliance allege that the proposed project could have adverse effects on fish and wildlife. As a local governmental agency, the applicant is the lead agency for purposes of preparing

an environmental document in accordance with the requirements of the California Environmental Quality Act (CEQA) (Public Resources Code, Section 21000 et seq.). The applicant has delayed preparation of an environmental document pending resolution of the dispute over the applicant's right to use Bureau water diversion and conveyance facilities for delivery of water diverted under the independent right which the applicant seeks. In view of our disposition of Application 28888 on other grounds as discussed in Section 4.3 below, however, the Board finds it unnecessary to address the environmental issues raised by the Department of Fish and Game and the California Sportfishing Protection Alliance protests at this time.

4.2

Effect of Proposed Project on Prior Rights

By letter dated October 25, 1988, the Chief of the Division of Water Rights advised the applicant of the limitations established on the season of diversion from the Sacramento River by Board Decision 1594. If a new appropriation of water at or near the proposed point of diversion were to be approved, the Board would determine an appropriate season of diversion based upon the availability of water after accounting for prior rights and other factors. In view of our disposition of Application 28888 on other grounds as discussed in

Section 4.3 below, however, the Board finds it unnecessary to address the issue of the potential injury to holders of prior water rights in this order.

4.3

Lack of Long-Term Access or Approval for Use of Proposed Water Diversion and Conveyance Facilities Owned by U. S. Bureau of Reclamation

The subject of access to property or diversion facilities needed to consummate a proposed appropriation of water is addressed in Sections 775 through 777 of Title 23 of the California Code of Regulations. Section 775 provides that where the owner of property will not consent to use of the property by a water right applicant, the Board may require evidence of the applicant's ability to secure access through condemnation proceedings or otherwise. Section 775 authorizes the Board to allow the applicant a reasonable time to negotiate for a right of access with the owner.

Section 777 of Title 23 provides that the Board ordinarily will not undertake to determine the right to occupy or use land or other property, but may temporarily defer action on an application pending judicial resolution of an applicant's right of access. Thus, the general policy reflected in the regulations

is that the Board will leave the subject of disputed rights of access to resolution by negotiation or judicial determination.

In instances where a project will require the approval of another governmental agency or officer, however, the Board's action is subject to the following provision as set forth in Section 776 of the Title 23:

"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."

In the present case, the applicant has acknowledged that it needs authorization from the Bureau to use the Wintu Pumping Plant and Bella Vista Conduit. It contends, however, that it already has such permission pursuant to a contract with the Bureau which provides for delivery of Central Valley Project water to the Bella Vista Water District. (Contract No. 14-06-200-851A.) The Bureau acknowledges the provisions of the contract allowing the applicant to utilize Bureau facilities, but argues that the contractual authorization applies only to use of the facilities for diversion and delivery of water purchased under the contract -- not for diversion and delivery of water

diverted under an independent water right as proposed in Application 28888.

The Bureau's position is supported by the following language in Article 16(c) of the contract:

"If at any time the [United States'] Contracting Officer determines that the District has not cared for, operated, maintained or delivered water from the transferred works as required pursuant to the terms of this contract or has failed to comply with the payment or other provisions hereof, the United States upon notice to the District ... may take back and operate and maintain said works or any part thereof...."
(Emphasis added.)

In our opinion, the above language establishes that the District's right to utilize Bureau facilities under the contract is contingent upon those facilities being used to deliver Bureau water pursuant to the terms of the contract. There is nothing in the contract to support the contention that the contract grants a right to utilize Bureau facilities to deliver water otherwise available to the District rather than delivering water purchased from the Bureau pursuant to the contract.

By letter dated October 25, 1988 the Chief of the Division of Water Rights advised the applicant that it had six months to either negotiate an agreement with the Bureau regarding access to the Bureau facilities or

to obtain a judicial determination that it already had the necessary right of access under terms of the existing contract with the Bureau. On March 29, 1989 the Division of Water Rights granted the applicant's request for an extension of time to October 15, 1989 to attempt to negotiate an agreement with the Bureau. On October 26, 1989, the Division of Water Rights granted the applicant's request for a further extension of time until January 16, 1990. On November 17, 1989, the Bureau informed the Division of Water Rights that it had met with the District regarding the access issue and resolution of the Bureau's protest is unlikely. In a letter dated December 22, 1989, the Bureau requested that Application 28888 be cancelled.

In accordance with the policy reflected in Sections 775 and 777 of Title 23 of the California Code of Regulations, the Board has allowed a reasonable period of time for the applicant to resolve the issue of entitlement to access to federal water diversion and delivery facilities through negotiation with the Bureau or through judicial determination. In the 17 months following the letter from the Chief of the Division of Water Rights, however, there has been no indication

that the applicant has taken any action to obtain a judicial determination upholding its interpretation of the contract.

In addition, it has become evident that the applicant cannot secure the Bureau's agreement to the applicant's use of the water diversion and delivery facilities for diversion of water under the permit requested by Application 28888. Even if the applicant's interpretation of its rights under the existing contract with the Bureau were correct, the District's rights to utilize the Bureau facilities under the contract would terminate on December 31, 1994, the end of the current contract period.

Due to the fact that water is not available for the entire irrigation season under a new appropriative right, it is likely that the applicant will attempt to renew its water supply contract with the Bureau, whether or not Application 28888 is approved.

Article II of the contract provides that any renewal of the contract shall be on terms and conditions mutually agreeable to the parties. In view of the November 17, 1989 and December 22, 1989 letters from the Bureau, it is apparent that the Bureau would not agree to renewal

of the contract with the applicant on terms authorizing use of Bureau facilities for diversion of water under an independent water right held by the District.

The project proposed by Application 28888 is viable only if the applicant secures the Bureau's approval and the Bureau has made it clear that it will not grant such approval. Thus, the present situation falls squarely within the description of Section 776 of Title 23 which calls for rejection of an application when a proposed project will require approval of another public agency and it becomes evident that such approval could not be secured. Therefore, in accordance with the provisions of Section 776, the Board concludes that Application 28888 should be denied.

4.4 Duplicative Rights For the Same Diversion of Water

The applicant's answer to the Bureau's protest states that the purpose of the application is to establish

"a concurrent state water right to draw the same water which is now being taken exclusively under contract with the Bureau of Reclamation."

In essence, the water which the applicant seeks to appropriate has already been appropriated by the Bureau

and currently is being provided to the applicant for the same uses proposed in Application 28888. The applicant does not intend to forego diversions under the contract with the Bureau and rely upon its own right. Rather, it seeks to establish a "concurrent" right to divert the same water.

The practical problems posed by issuance of duplicative permits for the same water would include uncertainty as to what terms and conditions govern the project and the fact that the same water use cannot be accounted for twice under separate permits. The general rule that water which presently is being diverted under existing appropriative or riparian rights is not available for appropriation is set forth in Water Code Section 1201. More specifically, Section 695 of Title 23 of the California Code of Regulations provides:

"A permit can be issued only for unappropriated water. Unappropriated water does not include water being used pursuant to an existing right, whether the right is owned by the applicant, or by another person. (For the relationship between new applications and existing rights, see Section 731.)"

The only exceptions to the rule that one cannot appropriate presently appropriated water involve either: (1) instances where an applicant claims a pre-

existing right but there is uncertainty regarding the existence or extent of the alleged right;¹ or (2) instances where an applicant relies upon the statutory preference granted to in-basin or county-of-origin uses as against rights for use of water outside of the basin or county of origin.² The first exception is inapplicable in this instance because the only existing right claimed by the applicant is a well-defined contractual right to a portion of the water appropriated by the Bureau under its water right permits for the Central Valley Project. The applicant's contractual right to receive water has not been questioned. Similarly, the second exception is inapplicable to the present case since there has been no allegation that water is unavailable to the applicant due to prior rights for use of the water outside the watershed or county of origin. To the contrary, the Bureau presently provides water to the applicant at the very location and for the very purposes proposed in Application 28888.

In summary, Application 28888 represents an attempt to acquire a duplicative water right to cover the same

¹ See 23 Cal. Code of Regs. § 731.

² See Water Code §§ 11128, 11460-11463, and Water Code §§ 10505 and 10505.5.

water which the applicant is already receiving pursuant to its contract with the Bureau. The Board does not issue this type of duplicative water right permit for the practical and legal reasons discussed above.

4.5

Due Diligence Requirement

The applicant's response to the Bureau's protest raises an issue regarding the speculative nature of Application 28888. According to the applicant, the requested right would be utilized:

"(a) at such time, by Act of Congress, that the [Bureau] facilities may be purchased or otherwise conveyed to the applicant or to the State of California; or (b) at such time as the District is able to develop additional or substitute points of diversion."

The applicants' apparent intention to acquire a water right permit now to be utilized at some indefinite future time is contrary to the fundamental requirement of California water law that appropriative water rights be perfected with due diligence. One cannot acquire a water right permit to be placed on a shelf in "cold storage" and utilized at some future unspecified time. (California Trout, Inc. v. State Water Resources Control Board (1989) 207 Cal.App.3d 585, 255 Cal.Rptr. 184, 204.)

4.6

Season of Diversion

In the event the applicant considers refiling an application for a project which avoids the deficiencies discussed above, the applicant should be aware of the limitations on the season of diversion for new appropriative water rights in the Sacramento-San Joaquin Delta watershed. Board Decision 1594 established that, in most years, water is unavailable for diversion by new appropriators for a significant portion of the irrigation season. Therefore, even if a permit were granted, the District would need a supplemental supply of water to cover those periods when water would not be available under a new permit.

5.0

CONCLUSION

Based on the findings above, the Board concludes that Application should be denied and cancelled without prejudice to the applicant refiling an application for the same or similar project in the event that the deficiencies addressed in this order can be remedied.

ORDER

IT IS HEREBY ORDERED that:

1. Application 28888 is denied and said application shall be cancelled by the Division of Water Rights.

2. This action is taken without prejudice to any future application for appropriation of water which the Bella Vista Water District may file.

CERTIFICATION

The undersigned, Administrative Assistant to the 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 April 19, 1990.

AYE: W. Don Maughan
 Darlene E. Ruiz
 Edwin H. Finster
 Eliseo M. Samaniego
 John Caffrey

NO: None

ABSENT: None

ABSTAIN: None


Maureen Marché
Administrative Assistant to
the Board

