



State Water Resources Control Board



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STATE WATER RESOURCES CONTROL BOARD
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DIV. OF WATER RIGHTS
SACRAMENTO

CLOSING BRIEF OF DIVISION OF WATER RIGHTS PROSECUTION TEAM IN THE MATTER OF HEARING ON ALLEGED WASTE AND UNREASONABLE USE OF WATER BY HIDDEN LAKES ESTATES HOMEOWNERS ASSOCIATION

I. INTRODUCTION

This matter comes before the State Water Resources Control Board (State Water Board or Board) based on the Notice of Public Hearing regarding the Alleged Waste and Unreasonable Use of Water by the Hidden Lakes Estates Homeowners Association (Homeowners Association), pursuant to Article X, section 2 of the California Constitution and Water Code sections 100 and 275.

The Division of Water Rights (Division) Prosecution Team (Prosecution Team) presented evidence at the hearing on February 1, 2010. The evidence showed that the Homeowners Association owns and controls two lakes, and that northern lake is leaking water continuously onto the properties below, causing damage to those properties. The evidence further showed that the Homeowners Association has known of this problem for some time and has failed to correct it. Finally, the evidence showed that the leaking water serves no beneficial purpose.

Based on this clear and uncontroverted evidence, viewed in light of past court decisions and decisions of the Board, a misuse of water is occurring and the Board should require the Homeowners Association to correct that misuse, both as a matter of law and of sound policy. Although the misuse of water in this case is small, it would be a mistake for the Board to focus on the amount of water being wasted. Using size as major factor would make it extremely

difficult to deal with the cumulative impacts of individual instances of misuse of water or the varying needs of water-short areas. Where enough evidence is present showing that water is being misused, size should be relevant only to aid the Board in determining the reasonableness of a particular course of correction. Here, a number of factors previously considered by the Board to be reflective of the waste and unreasonable use of water are present, and the cost of the available correction measures are reasonable, as they would be spread out among many homeowners and could be spread over time as well. Therefore, the Board should require the Homeowners Association to correct its misuse of water.

II. APPLICABLE LAW

The State's policy on prevention of waste and unreasonable use of water is clearly expressed in Article X, Section 2 of the California Constitution, which provides:

It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or watercourse in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.... This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained.

Essentially the same limitation is found in Section 100 of the Water Code. Section 275 of the Water Code further charges the Department of Water Resources and the State Water Board to "take all appropriate proceedings or actions before executive, legislative, or judicial agencies to

prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this State." The Board's regulations specifically include all of the above within the definition of "misuse of water." (Cal. Code Regs., tit. 23, § 855.)

As the Board has stated in a previous proceeding, the "reasonableness" of the diversion and use of water cannot be determined in the abstract or by some inflexible standard. (State Water Board Decision D-1600 (D-1600) (1984)). As cited in D-1600, the California Supreme Court has stated:

What is a beneficial use, of course, depends upon the facts and circumstances of each case. What may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great scarcity and great need. What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time.

(*Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.* (1935) 3 Cal.2d 489 [45 P.2d 972, 1007].) The Board also considered a more recent decision where the Court elaborated further on the reasonable use standard.

Although, as we have said, what is a reasonable use of water depends on the circumstances of each case, such an inquiry cannot be resolved in vacuo isolated from state-wide considerations of transcendent importance. Paramount among these we see the ever increasing need for the conservation of water in this state, an inescapable reality of life quite apart from its express recognition in the 1928 amendment [now Article X, Section 2 of the California Constitution].

(D-1600 at p. 23, quoting *Joslin v. Marin Municipal Water District* (1967) 67 Cal.2d, 132 [429 P.2d 889], cited with approval in *Environmental Defense Fund, Inc. v. East Bay Municipal Utility District* (1980) 26 Cal.3d 183 [161 Cal.Rptr. 466].) Therefore, when the Board is determining the "reasonableness" of water usage, the law requires the Board examine the facts available to it and, particularly, to evaluate those facts in view of the increasing need for water conservation within California. (*Ibid.*) "Although each case must be evaluated on its

own merits, prior court decisions, prior decisions of the Board, and several statutes provide guidance in evaluating water usage....” (*Ibid.*) The Board went on to describe several factors that should be considered in an evaluation of waste and unreasonable use of water, as described below.

III. ANALYSIS AND ARGUMENT

The purpose of the hearing, as described in the hearing notice, was to determine whether a misuse of water exists at the Hidden Lakes Estates Homeowners Association’s northern lake and what the Board should require the Homeowners Association to do to prevent the continued misuse of water.

There is no disagreement over whether the north lake is leaking. The lake is leaking onto the properties immediately below it, and the Homeowners Association has known the lake is leaking for a long time. What remains to be determined is what the Board should require the Homeowners Association to do to rectify this problem.

Factors to be Considered in Evaluating Alleged Waste and Unreasonable Use

One of the most important factors to be considered in evaluating the reasonableness of use of water is identification of other beneficial uses to be made of water that could be conserved. (D-1600 at p. 24, citing *Joslin v. Marin Municipal Water District Id., supra*, 67 Cal.2d, 132) Similarly, the Board has looked at whether the availability of excess water for other beneficial purposes may serve to mitigate what might otherwise be an unreasonable situation. (D-1600.) For example, where irrigation tailwater reenters the source stream and is

available for downstream use, if the diversion has no adverse effect on instream uses, it may not be unreasonable to allow large quantities of tailwater. Likewise there may be no misuse of water where a water user's canal seepage contributes to the recharge of a groundwater basin, since underground storage of water for future use is recognized as a beneficial use. (Water Code Section 1242.) A third scenario would be where irrigation return flow (or seepage) returns directly to the source stream and provides enhancement of fish and wildlife resources, which is recognized as a beneficial use of water under Water Code Section 1243.

Charles Rich testified that the Homeowners Association purchases the water it uses to fill and refill its two lakes from the American River watershed via Folsom Lake through a contract with the San Juan Water District. Mr. Rich also testified that the leakage from the north lake flows into the Linda Creek watershed, bypassing the Lower American River and its wild and scenic and public trust beneficial uses, including the anadromous fish species, Central Valley steelhead that are listed as threatened under the federal Endangered Species Act (71 Fed.Reg. 860 (Jan. 5, 2006) and fall-run chinook salmon that are listed as a species of concern pursuant to the federal Endangered Species Act (69 Fed.Reg. 19977 (Apr. 15, 2004)). Finally, Mr. Rich testified that the Linda Creek watershed does not benefit from the additional water leaking from the north lake.

The leakage in this case does not fit into any of the above categories. Here, the water is imported from a chronically water-short watershed, and the leakage flows into a watershed where it provides no additional benefit to any listed beneficial uses.

Although consideration of the alternative uses for the allegedly misused water is a factor in a reasonableness inquiry, "a finding of unreasonable use or method of use does not require

that there be a dispute between competing users." (D-1600.) Excessive diversion or an unreasonable method of diversion of water to the detriment of instream fish and wildlife uses may be considered wasteful even if there are no objections from competing consumptive users. (*Environmental Defense Fund v. East Bay Municipal Utility District*, supra, 200 Cal.3d at 200.) But "if other parties demonstrate an intention to utilize water that could be conserved through reasonable conservation measures, the failure to undertake such conservation may be found to be unreasonable." (*Ibid.*)

Here, there is ample evidence that the source watershed has great need for additional water, both for instream beneficial uses and for other appropriative right holders. Even though the amount of water is small, even that small amount is needed. Conversely, the Linda Creek watershed has no need for the additional water. The listed beneficial uses for this watershed are already being met with the existing water without the need for imported water. Therefore, the leaking water is serving no use at all, and the Board should find the failure to prevent the leakage unreasonable.

Another factor in determining whether there is a misuse of water was highlighted by the State Water Board in Decision 1463 (D-1463), where the Board concluded that filling a recreational lake during a drought was an unreasonable use of water since the same water could otherwise be used to reduce the need for water imports from areas experiencing water shortages.

Here the Homeowners Association operates its two lakes for recreational and aesthetic purposes. The evidence in the record shows that the Homeowners Association's north lake loses approximately 85% of its capacity every year, likely primarily due to the leakage that the

Homeowners Association admits is occurring. That means that every year the Homeowners Association has to refill the lake by approximately 85% of its capacity so that the lake remains full.

Because there is ample evidence that the American River watershed has been in a drought for the past several years, and the Governor even declared a drought emergency for the region, the Homeowners Association's repeated refilling of the north lake falls squarely within the scenario considered by the State Water Board to be an unreasonable use of water in D-1463. To be clear, it is not the Prosecution Team's view that the lake is an unreasonable use of water; merely that the constant refilling of the lake to replace the leakage is unreasonable.

Costs of Correction

"The fact that water conservation may require the water user to incur additional expense provides no justification to continue wasteful or unreasonable practices." (D-1600.) In *People ex rel. State Water Resources Control Board v. Forni* ((1976) 54 Cal.App.3d 743 [126 Cal.Rptr. 851]), the court ruled that water users may properly be required to "endure some inconvenience or to incur reasonable expenses" in order to comply with the constitutional standard of putting the water resources of the state to maximum beneficial use. The decision in the Forni case indicates that the Board may require a water user to build reservoirs or make other physical improvements if that is the only feasible method of achieving the constitutional mandate of reasonableness. (54 Cal.App.3d at 751-752.)

There are several corrective measures that may alleviate or eliminate the misuse of water occurring here. The determination of whether the cost of a particular conservation measure is reasonable must be made with respect to the resources available for financing water conservation efforts as well as the value of the water which would be conserved. Here the party responsible for the misuse, the Homeowners Association, represents the owners of approximately 200 homes. By financing the costs of whatever corrective action is required, the cost to each homeowner to correct this misuse would be but a small sum added to the regular Homeowners Association dues each month or year, the purpose of which is to maintain the Homeowners Association's facilities.

Other Issues Raised By Participants

As was brought up by at the hearing, the Homeowners Association and the two owners of the parcels immediately below the north lake entered into a settlement agreement at some point regarding some of the damages suffered by those property owners. There were likely numerous legal issues involved in the lawsuits that led to the settlement agreement. These issues may have included any improvements made in or around the meandering drainage easements and the extent of damages. Resolution of these issues is not within the jurisdiction of the Board. What to do about the fact that a water user's recreational lake has caused and continues to cause damage to property due to leakage from that lake, however, is the question currently before the Board.

The State has declared a policy that water be applied to beneficial use to the fullest extent possible. This holds true particularly in watersheds where there is heavy demand for

water and supply is limited. The Sacramento River watershed is such a watershed, where competition for limited water resources is intense, and the disparity between demand and available supply has been increasing, especially in the San Francisco Bay/Sacramento-San Joaquin Delta. Increasing demands on water from the Bay-Delta and the Sacramento River by water users and mounting environmental concerns increase the need for the State Water Board to enforce the constitutional, statutory, regulatory and prudential prohibitions against waste and unreasonable use. The Board has a strong interest in the efficient and productive use of the waters of the state, and allowing a waste of water, no matter the amount, is inconsistent with achievement of this goal.

IV. CONCLUSION

Based on the evidence presented at the hearing, viewed in light of past court decisions and decisions of the Board, a misuse of water is occurring and the Board should require the Homeowners Association to correct that misuse, both as a matter of law and a matter of sound policy.

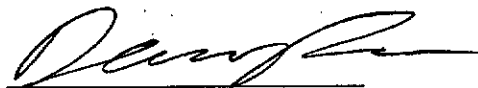
The Homeowners Association owns and controls the lake that is leaking water continuously onto the properties below, causing damage to those properties. The Homeowners Association has known of this problem for some time and has failed to correct it. The leaking water serves no beneficial purpose. The leakage from the lake can be corrected.

Although the annual misuse of water in this case is small, it would be a mistake for the Board to place great weight on the amount of water being wasted each year. Focusing on the size of the misuse would confound future attempts by the Board to deal with the cumulative

impacts of individual instances of misuse of water, or the varying needs of water-short areas. Where the evidence shows water is being misused, size should be considered only to the extent it aids the Board in determining the reasonableness of a particular course of correction.

Because a number of factors previously considered by the Board to be reflective of the waste and unreasonable use of water are present in this case, and the costs of adequately correcting the misuse are reasonable when spread out among the many homeowners over time, the Board should order the Homeowners Association to correct its misuse of water, both as a matter of law and of policy.

I declare that the foregoing is true and correct. Executed this 22nd day of March 2010, at Sacramento, California.



David Rose
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STATE WATER RESOURCES CONTROL BOARD