STATE WATER RESOURCES CONTROL BOARD
BOARD MEETING SESSION - DIVISION OF WATER RIGHTS
DECEMBER 4, 2012

ITEM 8

SUBJECT

CONSIDERATION OF A DRAFT ORDER DENYING RECONSIDERATION OF STATE WATER BOARD ORDER WR 2010-0026-EXEC, WHICH APPROVED A SETTLEMENT AGREEMENT IN THE MATTER OF THE DIVERSION AND USE OF WATER BY GALLO VINEYARDS, INC. FROM THE OLD RIVER IN SAN JOAQUIN COUNTY.

DISCUSSION

On December 14, 2009, the Assistant Deputy Director for Water Rights issued a Draft Cease and Desist Order (Draft CDO) against Gallo Vineyards, Inc. (Gallo) alleging an unauthorized diversion and use of water in violation of section 1052 of the Water Code. Gallo and the Division of Water Rights Prosecution Team agreed to settle the matters identified in the Draft CDO through a decision by settlement in lieu of a hearing. On July 2, 2010, the State Water Resources Control Board (State Water Board) Executive Director issued Order WR 2010-0026-EXEC approving the settlement agreement.[1]

The San Luis & Delta-Mendota Water Authority (Water Authority) and State Water Contractors (SWC) (Petitioners) filed a joint petition, dated August 2, 2010, with the State Water Board for reconsideration of Order WR 2010-0026-EXEC. On August 19, 2010, the State Water Board received a Memorandum of Points and Authorities in Opposition to the Petition for Reconsideration from Gallo. The Petitioners request that the State Water Board remand the order to the Executive Director for reconsideration, and require the inclusion of citations to evidence supporting the factual determinations in any subsequent order. Gallo argues that the State Water Board acted fully within its authority when the Executive Director approved the settlement and issued Order WR 2010-0026-EXEC.

The draft Order Denying Reconsideration finds that the settlement agreement and the process used to reach settlement are not contrary to statute or regulation and that the Executive Director acted within the authority delegated to the Executive Director by the Board. The Petitioners fail to raise substantial issues related to the causes for reconsideration set out in California Code of Regulations, Title 23, section 768.

POLICY ISSUES

Should the State Water Board adopt the proposed order?

FISCAL IMPACT

This activity is budgeted within existing resources, and no additional fiscal demands will occur as a result of approving this item.

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[1] State Water Board Resolution No. 2002-0104 delegates to the Executive Director the authority to issue a decision or order by settlement of the parties under Government Code section 11415.60.

REGIONAL BOARD IMPACT

None

STAFF RECOMMENDATION

Staff recommends that the State Water Board adopt the proposed order denying reconsideration.

State Water Board action on this item will assist the Water Boards in reaching Goal 6 of the Strategic Plan Update: 2008-2012 to Enhance consistency across the Water Boards, on an ongoing basis, to ensure our processes are effective, efficient, and predictable, and to promote fair and equitable application of laws, regulations, policies, and procedures.

D R A F T November 6, 2012

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2012-XXXX

In the Matter of the Petition for Reconsideration by

San Luis & Delta-Mendota Water Authority
State Water Contractors

Regarding Order WR 2010-0026-EXEC

SOURCE: Old River

COUNTY: San Joaquin

ORDER DENYING RECONSIDERATION

BY THE BOARD:

1.0 INTRODUCTION

The San Luis & Delta-Mendota Water Authority (Water Authority) and State Water Contractors (SWC) (Petitioners) filed a joint petition with the State Water Resources Control Board (State Water Board or Board) for reconsideration of Board Order WR 2010-0026-EXEC. Order WR 2010-0026-EXEC approved a settlement agreement between the State Water Board's Division of Water Rights (Division) prosecution team (Prosecution Team) and Gallo Vineyards, Inc. (Gallo). The settlement concerns a draft Cease and Desist Order (CDO) issued by the Prosecution Team to Gallo. The Board finds that the petition for reconsideration fails to raise substantial issues related to the causes for reconsideration set out in California Code of Regulations, title 23, section 768 and denies the petition.

2.0 GROUNDS FOR RECONSIDERATION OF A DECISION OR ORDER

Any interested person may petition the State Water Board for reconsideration of a water right decision or order on any of the following grounds:

(a) Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;

(b) The decision or order is not supported by substantial evidence;

(c) There is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;

(d) Error in law.

(Cal. Code Regs., tit. 23, § 768.)

The State Water Board may refuse to reconsider a decision or order if the petition for reconsideration fails to raise substantial issues related to the causes for reconsideration set forth in section 768 of the regulations. (*Id.*, § 770, subd. (a)(1).) Alternatively, after review of the record, the Board may deny the petition upon a finding that the decision or order was appropriate and proper, set aside or modify the decision or order, or take other appropriate action. (*Id*., subd. (a)(2)(A)-(C).)

3.0 THE DECISION BY SETTLEMENT PROCESS

3.1 Applicable Law

Pursuant to California Code of Regulations, title 23, section 648, settlements are authorized under Government Code section 11415.60 which states as follows:

> *(a) An agency may formulate and issue a decision by settlement, pursuant to an agreement of the parties, without conducting an adjudicative proceeding. Subject to subdivision (c), the settlement may be on any terms the parties determine are appropriate….*

> *(b) A settlement may be made before or after issuance of an agency pleading…. A settlement may be made before, during, or after the hearing.*
> *(c) A settlement is subject to any necessary agency approval. An agency head may delegate the power to approve a settlement. The terms of a settlement may not be contrary to statute or regulation….*

3.2 Settlement May Follow Any Appropriate Procedure

Further, Government Code section 11415.50, subdivision (a) states "An agency may provide any appropriate procedure for a decision for which an adjudicative proceeding is not required."

4.0 LEGAL AND FACTUAL BACKGROUND

On February 18, 2009, the Division mailed letters to property owners on Roberts and Union Islands in the Sacramento-San Joaquin Delta (Delta). Based on reviews of U.S. Geological Survey maps, aerial photography, and San Joaquin County Assessor's maps, the Division sent letters to each property owner that appeared to be diverting water for irrigation, and for whom the Division had no record of any basis of right for water diversion. Gallo was mailed a copy of the letter as owner of San Joaquin County Assessor's Parcels 191-050-05, 191-060-02, 191-060-03, 191-060-05 and 191-060-06. The Division received no response, and on July 30, 2009, it sent a second letter requesting the basis of right for the diversion to Gallo's parcels.

On October 27, 2009, Gallo responded by submitting a Statement of Water Diversion and Use for all five parcels as well as a declaration from Lester James Claussen, the former owner of the subject parcels, describing in very broad terms the farming operation on the property during the 1900s. The statement claimed riparian and pre-1914 appropriative rights to Old River for irrigation of 377 acres.

The Division reviewed Gallo's information and determined that two of the five parcels in question were likely riparian to Old River. The Division determined that the other three parcels, amounting to approximately 238.5 acres, did not appear to be riparian to Old River and that Gallo had not provided adequate information to substantiate a riparian or a pre-1914 appropriative water right for the three parcels. On December 14, 2009, the Assistant Deputy Director for the Division issued a Draft CDO against Gallo alleging an unauthorized diversion and use of water in violation of section 1052 of the Water Code. The Draft CDO alleged that Gallo was diverting water from Old River for agricultural use on three specified parcels without a demonstrated basis for a water right.

By letter dated December 31, 2009, Gallo timely requested a hearing on the Draft CDO. The State Water Board scheduled a hearing for May 5, 2010. Before the hearing commenced, Gallo and the Prosecution Team agreed to settle the matters identified in the Draft CDO through a decision by settlement in lieu of a hearing. On March 29, 2010, the State Water Board issued a Notice of Postponement of Public Hearing. On July 20, 2010, the State Water Board cancelled the adjudicative proceeding.

In the Settlement Agreement, the parties stated:

> *Gallo has submitted written evidence to the Division regarding Gallo's claim of a riparian basis of water right to serve San Joaquin County Assessor Parcel Nos. 191-060-02, 191-060-03, 191-060-05, 191-060-06, excepting a strip of land within the northern portion of Parcel Nos. 191-060-02 and 191-060-03, consisting of approximately 3.6 acres (hereinafter referred to as the "**Excluded Land**"). At this time it appears to Division's Prosecution Team that these parcels, less the Excluded Land* [and Parcel No. 191-050-05]*, have a riparian basis of right to water from Old River…. At this time the Division Prosecution Team is satisfied that Gallo appears to be*

> *exercising valid riparian rights with regard to the riparian parcels or portions of parcels, and therefore the Division Prosecution Team does not contest Gallo's use of Old River water on these riparian parcels or portions of parcels.*

The Settlement Agreement further provides:

> *Gallo will immediately cease any diversion or use of Old River for use on Assessors Parcel No. 191-050-05 and the Excluded Land. Gallo will immediately: (1) file a revised Statement of Water Diversion and Use form for its Old River point of diversion, and (2) install and maintain measuring devices on (a) its Old River pumping facility, (b) its connection to any alternative water source to be used to serve the Assessors Parcel No. 191-050-05 and the Excluded Land, and (c) any water conveyance system delivering water to Assessors Parcel No. 191-050-05 and the Excluded Land, such that Gallo can document that water use on Assessors Parcel No. 191-050-05 and the Excluded Land comes from a source other than Old River. Gallo will maintain monthly records of its diversion and use of water under riparian claim to the riparian parcels, and from other sources for use on Assessors Parcel No. 191-050-05 and the Excluded Land, and will submit that information to the Division upon request or when required by law.*

The State Water Board Executive Director, in Order WR 2010-0026-EXEC approved the settlement agreement on July 2, 2010.[1]

[1] State Water Board Resolution No. 2002-0104 delegates to the Executive Director the authority to issue a decision or order by settlement of the parties under Government Code section 11415.60.

5.0 PETITION BY THE WATER AUTHORITY AND SWC

The Petitioners filed a timely petition for reconsideration, dated August 2, 2010.[2] The Petitioners allege that the document approving settlement contains no evidence to support the proposition that Gallo is entitled to riparian rights associated with two of the parcels covered by the order.[3] The Petitioners request that the Board remand the order to the Executive Director for reconsideration, and require the inclusion of citations to evidence supporting the factual determinations (e.g. findings of fact and conclusions) in any subsequent order. On August 19, 2010, the State Water Board received a *Memorandum of Points and Authorities in Opposition to the Petition for Reconsideration* from Gallo, dated August 17, 2010, in which Gallo argues that the State Water Board acted fully within its authority when the Executive Director approved the settlement and issued order WR 2010-0026-EXEC.

Petitioners allege that the Executive Director, Dorothy Rice, erred when she approved the settlement without substantial evidence that supports the decision of the prosecutorial team not to contest the validity of Gallo's riparian rights. Put another way, petitioners object to the lack of specific documentary evidence in the order and the record of settlement that proves the validity of Gallo's riparian rights. Petitioners state that, "In this case, neither the Settlement nor the Order Approving Settlement present findings or cite evidence that

[2] The Water Code directs the State Water Board to act on a petition for reconsideration within 90 days from the date on which the State Water Board adopts the decision or order that is the subject of the petition. (Wat. Code, § 1122.) If the State Water Board fails to act within that 90-day period, a petitioner may seek judicial review, but the State Water Board is not divested of jurisdiction to act upon the petition simply because the State Water Board failed to complete its review of the petition on time. (State Water Board Order WR 2009-0061 at p. 2, fn. 1; see *California Correctional Peace Officers Ass'n, v. State Personnel Bd*. (1995) 10 Cal.4th 1133,1147-48, 1150-51; State Water Board Order WQ 98-05-UST at pp. 3-4.)

[3] The Petitioners also allege in a footnote that since neither the Settlement nor the Order Approving the Settlement are supported by substantial evidence, failure to provide citations to evidence in the record of the decision indicates that the settlement resulted from an irregular proceeding or from errors in law. These arguments are both basically restatements of the main argument. The allegations in the Petition are made without any citations, facts, or supporting analysis. These bare assertions do not raise substantial issues appropriate for reconsideration.

demonstrates Gallo met its burden of demonstrating that an intent existed at the time parcels 191-060-02 and 191-060-0[3] were severed from the watercourse to maintain riparian rights." (Memorandum of Points and Authorities in Support of Petition for Reconsideration, p.4.)

This argument misunderstands the nature of settlement and the evidence needed to support the validity of a settlement. The settlement does not amount to an adjudication or determination of Gallo's riparian right claims, nor does it purport to do so. Rather, the Prosecution Team agreed not to contest some of those claims. There has not been a determination that would bind the State Water Board or third parties if issues concerning the riparian right claims the Prosecution Team agreed not to challenge should arise in connection with a later proceeding before the State Water Board or a court.

Petitioners' argument also ignores the burden of proof in enforcement actions. Unless evidence is submitted at the hearing establishing a prima facie case that a diversion is occurring or threatened without a valid basis of right, the diverter may avoid enforcement without providing any evidence that it has a valid right. (See State Water Board Order WR 2011-0005 at p. 28.) Thus, the Prosecution Team may appropriately decide to terminate an enforcement proceeding, or agree to a settlement that does not require termination of a particular diversion, based on the Prosecution Team's assessment of its ability to prove an unauthorized diversion. The prosecution need not have proof that the diversion is authorized as a prerequisite to settlement. The Prosecution Team's assessment of its ability to meets its burden of proof is only one of many factors that may legitimately be considered in deciding whether to settle.

Entry into a settlement that requires termination of some diversions, but does not require termination of every diversion alleged to be unauthorized in the initial notice of proposed CDO does not indicate that the prosecution team and the Executive Director failed to uphold appropriate law and regulations in negotiating the settlement. Nor should there be a requirement for the settling parties to include evidence documenting that no violations occurred where the prosecution initially alleged such a violation. The Petitioners are asking the Executive Director to cite to evidence considered in a non-evidentiary proceeding and alleging errors in a proceeding that may follow "any appropriate procedure." (Gov. Code, § 11415.50, subd. (a).) The State Water Board believes, however, that it is the informality of the negotiations, conducted without an evidentiary record and in which the prosecution team exercises its prosecutorial discretion, that contributes to possibility of a settlement.

Requiring proof that a violation did or did not occur before the Prosecution Team may enter into a settlement construes too narrowly the universe of information the prosecutor must consider before reaching a decision to settle. The prosecutor in a given case is uniquely situated to understand the strengths and weaknesses of the evidence in that case and to weigh the benefits and costs of proceeding to an evidentiary hearing. (See *Rich Vision Centers, Inc. v. Board of Medical Examiners* (1983) 144 Cal.App.3d 110, 115 [Board of Medical Examiners had inherent authority to settle under predecessor to current Administrative Procedure Act, which did not include express authority of current statute].) Only the prosecution team knows whether any marginal benefit to be gained by litigating its case is worth the extra effort in light of the available evidence, in light of all of the other enforcement actions it is considering, and in light of the probability of achieving the best outcome.

When the Board reviews a settlement, the Board does not look for the evidentiary support proving the facts of the precise settlement. If the Board required that level of documentary evidence, it would not be a settlement between the parties; it would instead be an offer of proof by the prosecution team and the diverter.

6.0 CONCLUSION

The State Water Board finds that the settlement agreement and the process used to reach settlement are not contrary to statute or regulation and that the Executive Director acted within the authority delegated to her by the Board. Petitioners have submitted no information that indicates that the settlement was inappropriate.

Further, it is the desire of the State Water Board to encourage such settlements. Settlements in lieu of a hearing result in resolution of enforcement matters with a considerable savings in time and expense for all parties and allow the Board to allocate its limited resources to other matters, including additional enforcement proceedings.

ORDER

IT IS HEREBY ORDERED THAT the petition of the San Luis & Delta-Mendota Water Authority and State Water Contractors fails to raise substantial issues related to the causes for reconsideration set out in California Code of Regulations, title 23, section 768, and is hereby dismissed.

CERTIFICATION

The undersigned Clerk 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 Board held on December 4, 2012.

AYE:

NO:

ABSENT:

ABSTAIN:

Jeanine Townsend
Clerk to the Board