

see WR 82-3
& D-1422

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STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Permits 16597,)
16598, 16599 and 16600, Issued)
on Applications 14858, 14859,)
19303, and 19304,)
U. S. BUREAU OF RECLAMATION)
Permittee.)

ORDER: WR 82-9
SOURCE: Stanislaus
River
COUNTIES: Calaveras and
Tuolumne

ORDER DENYING PETITION OF
UNITED STATES BUREAU OF RECLAMATION
FOR RECONSIDERATION OF ORDER WR 82-3

BY THE BOARD:

1. On June 21, 1982, permittee U. S. Bureau of Reclamation (Bureau) filed with the State Water Resources Control Board a document entitled "Petition for Reconsideration". The petition requests reconsideration of Order WR 82-3, which interprets Water Right Decision 1422.

2. The Bureau requests that the Board modify Order WR 82-3 to specify that the Bureau may directly divert and use up to 8,800 cfs, 6,000 cfs, and 2,250 cfs from the Stanislaus River from November 1 to June 30 each year, under Permits 16597, 16599, and 16600.

3. The Bureau attached to its petition a statement in support of Petition for Reconsideration (hereinafter referred to as Statement), which sets forth supporting arguments. The Bureau's arguments are arranged in two main sections. These are entitled "The Requirements of Proper Administrative Action", and "Order WR 82-3 is Not Supported by the Evidence". These arguments are discussed hereinbelow.

4. Under its heading entitled "The Requirements of Proper Administrative Action", the Bureau argues that in Order WR 82-3 the Board should have construed D-1422 to mean that the direct diversion portions of Applications 14858, 19303, and 19304 were approved. The Bureau cites several cases which purportedly recite principles of statutory construction. The principles alleged are: (a) an interpretation should give meaning to all parts of the document and should avoid an absurd result; (b) an ambiguous document should be construed against the drafter; (c) reasons should be stated for the decision, so that the parties know whether and upon what basis they should seek review. The Bureau does not explain how each of these principles apply to D-1422.

(a) The first principle advanced is that an interpretation should give meaning to all parts of a document and should avoid an absurd result. We find that Order WR 82-3 does give effect to all relevant parts of D-1422. The result is not absurd. It correctly states what rights were granted.

(b) The second principle advanced is that an ambiguous document should be construed against the drafter. We assume that the Bureau is alleging that D-1422 is ambiguous in its delineation of the amount of water to be appropriated under permits issued pursuant to Applications 14858, 19303, and 19304. An examination of Terms l.a., l.c., and l.d. of the Order in D-1422 reveals the opposite. These terms explicitly set forth the quantities of water to be appropriated under each permit. Each term sets forth a specific maximum quantity. In Term l.b.,

which allocates some water for direct diversion as well as storage, the amount of water for direct diversion is explicitly set forth. No reason exists to suggest that in Terms l.a., l.c., and l.d., where no water was mentioned for direct diversion, quantities for direct diversion were to be implied.

The case cited by the Bureau to support its proposition that the order should be construed against the drafter is inapplicable. The case, Taylor v. J. B. Hill Co., 31 Cal.2d 373, 374, 189 P.2d 258 (1948), is a contract interpretation case involving a contract for the sale of barley. It is not, as the Bureau suggests, a statutory construction case. Even if, as the Bureau suggests in its lead-in paragraph, the rules of statutory construction apply to Board orders, the Taylor case is inapplicable to construction of D-1422. No rule similar to the Taylor rule exists among rules of statutory construction*

Even if a rule of contract interpretation were applicable to Board orders, the Bureau would be wrong in its contention. Under Civil Code Section 1654, a state government contract is to be construed against the party with whom the state government contracts.

* At the Board's workshop discussion of a draft of this order on August 4, 1982, the Bureau's counsel argued that the interpretation rule in the Taylor case was supported for use in interpreting a government order in the case of Cole v. Young, 351 U.S. 536, 556, 76 S.Ct. 861, 873 (1956). Neither the Taylor case nor any other authority is cited in the Cole case to support construction against the federal government of ambiguities in an Executive Order. Cole was a case in which a government employee had been fired for disloyalty without a certain factual determination having been made. The court held that the firing was illegal. The Cole case must be construed with reference to its facts. It is inapplicable to the interpretation of Decision 1422.

(c) The third principle of construction advanced by the Bureau is based on Topanga Association for a Scenic Community v. County of Los Angeles, 11 Cal.3d 506, 522 P.2d 12 (1974). This case requires that administrative agencies set forth findings to support their orders. The rule enunciated by this case is not a rule of statutory construction. It is instead a rule of administrative procedure for deciding a case. Consequently, it is inappropriate as a basis for construing D-1422. By citing this rule, the Bureau appears to argue that the findings in D-1422 are in some way defective. If this is the Bureau's argument, the Bureau should have raised this point within the applicable statutory time limits after D-1422 was adopted. (Water Code §§1357, 1360.)

The Topanga case was decided in the year following issuance of D-1422. Consequently, the Board could not have been expected to follow it, and the Bureau's assertion that the Board abrogated its responsibility to the parties is incorrect regardless of the findings. Nevertheless, D-1422 contains findings which support its conclusions. This is what the Topanga case requires. The findings contain numerous statements supporting the Bureau's appropriation by storage of water in New Melones Reservoir up to the capacity of the reservoir or the availability of unappropriated water. These findings are qualified by statements that the Bureau should not be permitted to impound water in excess of that for which it has firm commitments to deliver water for consumptive purposes. (See Finding 8, especially.) In addition, the Board made a finding that storage for power purposes should not exceed the amount of conservation storage for consumptive uses, and that direct diversion for power purposes should be limited to 6,000 cfs. (See Finding 11.) These findings support the Order's Terms 1 and 2.

In analyzing D-1422 for compliance with the Topanga principles, it must be observed that a decision on an application to appropriate water is a decision in which the Board, among other considerations, decides whether an application should be approved, how much water is to be allocated to the applicant, and what conditions will be placed on the applicant's appropriation of water. The applicant does not acquire a right to take and use any water until a permit is issued. (Water Code §1455.) When the permit is issued, the new permittee acquires the right to take and use water only to the extent and for the purpose allowed in the permit. (Water Code §§1381 and 1455.)

An examination of the findings in D-1422 reveals no findings which would support approval of direct diversion for consumptive uses. Under the principles enunciated in the Topanga case, findings supporting direct diversion for consumptive uses would be necessary if the Board had granted such a diversion right. In the absence of such findings, a grant of direct diversion rights for consumptive uses might have been cause for complaint by several of the protestants against the Bureau's applications.

The Bureau's assertion that it was given rights of direct diversion for consumptive uses is based on a premise that if it was not granted everything for which it applied, then the rights would have to be explicitly denied. This is incorrect. As can be seen from reading D-1422, the issues were not centered upon denial of the applications but rather upon how much of the applications would be approved, and the conditions to be applied. Under Water Code Sections 1381 and 1455 it is clear that the applicant receives only the rights which are approved.

The Bureau's troubles appear to result from failure to look sufficiently closely at the Order to determine the nature and extent of the rights granted to it. It appears that the Bureau failed to read closely either the Order or the permits issued in accordance with the Order. Since the permits and the Order set forth the allowed quantities of water, types of diversion, and seasons of diversion, any lack of knowledge by the Bureau of its rights is due to failure to take note of its rights, and is not due to any alleged defects in the findings.

(d) Finally, the rule of construction which does apply to the Bureau's petition is that set forth in Water Code Section 1381. It states: "The issuance of a permit gives the right to take and use water only to the extent and for the purposes allowed in the permit." Pursuant to D-1422, permits were issued to the Bureau which set forth the same quantities of water as are set forth in Terms 1.a. through 1.d. of the Order. Pursuant to Section 1381, the Bureau has only the right to take and use water to the extent set forth in the permits, which repeat the quantities set forth plainly in the Order of D-1422 at Terms 1.a. through 1.d.

5. Under the heading entitled "Order WR 82-3 is Not Supported by the Evidence", the Bureau argues that Order WR 82-3 is not supported by the evidence. First, the Bureau discusses Applications 14858, 19303 and 19304 together, and then separately discusses Application 14858. The Bureau appears to refer to the evidence presented in the hearing leading to issuance of D-1422, rather than to evidence submitted relative to Order

WR 82-3. Since D-1422 was not timely challenged regarding the direct diversion rights, the evidence upon which D-1422 was based can hardly be used to reform D-1422. The decision has become final in this respect. Nevertheless, a review of such evidence might lead to a better understanding of D-1422. Consequently, it is reviewed herein as guidance.

(a) In each portion of its discussion of the evidence, the Bureau raises several points. We first discuss the points raised under the sub-heading, "Bureau Applications 14858, 19303 and 19304".

(1) At page 5, the Bureau states that in D-1422 the Board stated that "unappropriated water is available to the Bureau". Language similar to this, at page 26 of D-1422,* is part of a summary of the findings. To fully understand this statement we must refer to page 10 under Finding No. 6 (Availability of Unappropriated Water). Finding No. 6, taken as a whole, can only be understood to say that some unappropriated water is available. It states, in addition to language similar to the Bureau's quotation, that the average annual volume of water available is "335,000 acre-feet and varies from zero which occurs in nine years of the period of study to 1,980,000 acre-feet". It also notes that in some months no unappropriated water was available.

(2) At page 5, the Bureau states that except for Condition 1-b, "there is no indication that the Board had any intention of denying the direct diversion rights sought...." In making this statement, the Bureau overlooks the lead-in

* The Bureau's counsel stated at the Board's workshop discussion on August 4, 1982, that he had intended to cite page 26, not 16, in the Statement.

paragraph to the second part of the Order, which states: "IT IS FURTHER ORDERED that Applications 14853, 19303 and 19304 be approved in part...." (Emphasis added.) This is a clear indication that parts of the applications were not approved. Upon reading this paragraph, the Bureau should have examined the order to discern which parts of the applications were approved and which were not.

(3) Starting on page 5, the Bureau states that it believes that the Board meant only to retain jurisdiction over direct diversion rights for the public interest, and not to deny such rights. It bases this belief on several quotations from D-1422 dealing with retention of jurisdiction and with conditions protecting instream beneficial uses of the water. The Bureau postulates that much of the public interest concerns would be unaffected by direct diversions. Based on this assumption, the Bureau then reasons that the Board did not intend to deny the direct diversions. This reasoning is inapposite. It is obvious in reading D-1422 that all retentions of jurisdiction and conditions imposed for the public interest, including instream beneficial uses, apply only to the rights that were granted. They do not and cannot apply to rights that are not granted. The Bureau cannot argue that certain rights were granted by referring to the conditions placed on the rights which actually were granted.

(4) Starting on page 6, the Bureau states that in its water right applications it has always applied for both direct diversion and storage rights and that it needs both. Impliedly, the Bureau is arguing that because of its alleged

general practice and alleged need, the Board must have granted direct diversion rights. However, it does not appear that the Bureau presented these alleged facts in the hearing record leading to D-1422. The Bureau knows very well that facts not in the record cannot be used by the Board to make a decision (23 Cal.Admin.Code §648.7).

(5) On page 7, the Bureau notes that it presented evidence during the hearing that New Melones would be operationally and financially integrated into the Central Valley Project. As a result, the Bureau would lose track of the actual molecules of water. We observe that such testimony does appear in the record. However, no reasons appear either in the record or in the Bureau's argument in the statement why the testimony on operation of the CVP supports a need for a grant of direct diversion rights in D-1422 for Applications 14858, 19303, and 19304. Indeed, a lack of direct diversion rights would not seem to impair the Bureau's ability to integrate the project and pool the water to which it has rights.

(6) The Bureau states that it must have both direct diversion and storage rights in order to provide a firm water supply to purchasers of water. It further argues that operation without direct diversion would result in the waste of water. Based on these assertions, the Bureau argues that D-1422 must have awarded both types of water right. The plain language of the order in D-1422, however, reveals that direct diversion rights were not granted at all for consumptive uses.

The Bureau's argument on this point ignores the fact that the Bureau failed to support on the record its applications for direct diversion rights. Since the Board was not told on the record the things which the Bureau now asserts, the Board could not consider such information in its decision. The Bureau's present attempt to plead its need is a decade too late and fails to support its argument.

The Bureau's allegation in this argument that a lack of direct diversion rights would result in a waste of water is misleading and necessarily assumes several questionable facts. The Bureau would bypass, rather than "release" any water to which it lacked rights. In the example provided by the Bureau, the Bureau would bypass 10,000 cfs and release 500 cfs to deliver to its contractor. It would not, as the Bureau suggests, release 10,000 cfs. The term "release" refers to water stored by the Bureau under a claim of right. Anyone downstream of New Melones Dam with direct diversion rights could divert and use the bypassed water.

By claiming that the water would be wasted, the Bureau must assume, first, that nobody downstream of New Melones has rights to the water; second, that bypassing water to which the Bureau lacks rights is per se a waste of the water; third, that no other reasonable beneficial uses exist for the water downstream. Neither the record nor the Bureau's arguments support these assumptions.

(7) An operation study offered in evidence during a day of hearing on Applications 19303 and 19304 on May 5, 1964, does not support the Bureau's contentions. This study was mentioned to the Board's staff by the Bureau's staff informally in July 1982 as support for the direct diversion request. The 1964 operations study was excluded from consideration at the outset of the hearing in 1972 on Applications 14858, 14859, 19303 and 19304, when Chairman Adams made the following statement:

"However, in view of the fact that the exhibits received and marked for identification at that time have been updated and supplanted by exhibits prepared for this hearing, we will disregard the previous record and proceed anew." (RT, p. 1, lines 23-27.)

Neither the Bureau nor any other party to the hearing objected to the exclusion of all exhibits from the 1964 date. The Bureau did not offer the 1964 operations study or any updated operation study in evidence during the 1972 hearing. The Bureau cannot now ask the Board to consider facts which were not supported in the record. Nor can it ask the Board to reconsider and revise D-1422 or the permits issued pursuant thereto at this late date.

(8) Instead of supporting the direct diversions in the D-1422 hearing, the Bureau's witnesses gave testimony which showed that the Bureau had little prospect of using the consumptive direct diversion rights for which it had applied. In Applications 14858 and 19304, the Bureau applied for consumptive use direct diversions at New Melones Dam and at the

proposed Knight's Ferry diversion dam. In addition Application 14858 showed a direct diversion from the reservoir's bank. The record for D-1422 shows that the Bureau had no facilities for direct diversion out of the river at New Melones Dam, and provided only speculation regarding potential direct diversions at the dam. (RT, pp. 27, 120-121.) The record also shows that the proposed Knights Ferry diversion dam was contingent on the improbable construction of the East Side Canal which has never been authorized by Congress. (RT, pp. 104, 202-205, 1357-1358.) Without physical facilities for direct diversions at the proposed Knights Ferry and New Melones Dam points of direct diversion, no direct diversions could be effected at those locations. The reservoir bank diversion was unsupported in the record. Accordingly, the applications were unsupported insofar as they requested direct diversion rights for consumptive use.

(9) Finally, we take official notice that it has been the Board's practice, at least since 1969, to impose in its permits limits on the number of acre-feet per annum to be taken for consumptive use by direct diversion when appropriation of significant amounts of water is approved. The Bureau suggests that the Board in D-1422 approved the direct diversion of 8,800 cfs in Application 14858 and 2,250 cfs in

Application 19304. These are significant quantities of water. If the Board had approved these direct diversions, it would have placed an annual quantity limit on them. No such limit appears in Terms 1.a. and 1.d. for direct diversions. Annual storage limits are set forth. Because of these factors it is apparent that the Board did not approve or intend to approve direct diversions applied for in Applications 14858 and 19304.

(b) The Bureau next discusses "Bureau Application 14858". Application 14858 is the application originally filed by the State for a permit to appropriate 8,800 cubic feet per second by direct diversion, year-round, and 980,000 acre-feet per annum by collection to storage from October 1 of each year to July 1 of the succeeding year for consumptive uses. The Bureau petitioned for assignment of this application. As observed in Order WR 82-3, the Board in D-1422 approved this application only for the 980,000 acre-feet per annum by storage, and reduced the period of collection. The Bureau suggests, notwithstanding Water Code Section 1381, that the Board fully approved Application 14858. Apparently the Bureau bases this suggestion on the premise that the application was fully assigned to the Bureau. This premise is incorrect, for the reasons set forth below.

Application 14858 was transferred to the State Board under Water Code Section 10504 without having been assigned to the Bureau. Under Water Code Section 10504.01, the Board is required to assign and approve in a single proceeding an application filed under Section 10500. The pertinent language in Section 10504.01 is as follows:

"The hearing shall be for the purpose of determining whether the application should be assigned pursuant to Sections 10504 and 10505 and whether the proposed completed application submitted by the petitioner should be approved in whole or in part. When the board's determination is favorable to the petitioner, it shall assign all or a portion of the application to the petitioner, accept and approve the assigned portion, and issue a permit as in other cases provided by law. Any portion of the application which is not assigned shall remain with the board subject to further disposition by it pursuant to the provisions of this part." (Emphasis added.)

Decision 1422 was made and issued in accordance with this section, among others. The final sentence quoted provides that "[a]ny portion of the application which is not assigned shall remain with the board subject to further disposition by it pursuant to the provisions of this part". Thus the unassigned portion of A-14858 remains available for future assignment.

Preceding this sentence, the section directs that the Board shall "assign all or a portion of the application to the petitioner, accept and approve the assigned portion, and issue a permit". Since the law requires that approval be made of the assigned portion, it is clear that the Board assigned only that part which was approved. The second paragraph of the order shows that Application 14858 was approved only in part. Necessarily, the application must have been assigned in part as well.

Without complaint, the Bureau accepts that the direct diversion requested in Application 14859 was reduced from 8,800 cubic feet per second to 6,000 cubic feet per second. Thus, Application 14859 was assigned only in part. Application 14859 was assigned in the same sentence as Application 14858, without differentiation. Curiously, the Bureau appears to accept that Application 14859 was assigned in part, but declines to accept that Application 14858 was assigned in part.

We take official notice that the direct diversion portion of Application 14858 remains with the Board on this date. Consequently, it is subject to further disposition by this Board pursuant to the provisions of Water Code Section 10500 et seq. The Bureau's petition for assignment of the remaining portion of A-14858, will be considered by the Board in accordance with Water Code Section 10500 et seq.

As pointed out previously, the Bureau failed to support the direct diversion portions of Application 14858 on the record during the hearing leading to D-1422. The portions of the record cited by the Bureau in its statement do not support the Bureau's contention that the evidence it presented supports its present position.

6. In its conclusion, the Bureau asserts that Order WR 82-3 was not based on any evidence. In formulating Order WR 82-3, Decision 1422 was considered along with the Bureau's petition and the statements made by the persons who spoke in favor of the Bureau's petition and against it. Consequently, the Bureau's assertion is frivolous.

ORDER

1. The petition is denied.
2. Order WR 82-3 is affirmed.
3. Denial of this petition is without prejudice to a petition for assignment to the Bureau of the remaining unassigned portion of Application 14858.
4. Denial of this petition is without prejudice to an application or applications for further appropriations of water from the Stanislaus River.

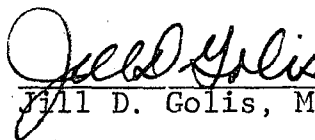
Dated: August 19, 1982

ABSENT

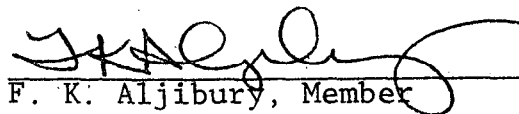
Carla M. Bard, Chairwoman



L. L. Mitchell, Vice Chairman



Will D. Golis, Member



F. K. Aljibury, Member