

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

In the Matter of	)	ORDER:	WR 95-11
Application 28550	)		
SALVATORE CAMPAGNA,	)	SOURCE:	Keynot Canyon and
	)		Beveridge Canyon
Applicant and Petitioner.	)		tributary to Salt Lake
<hr/>		COUNTY:	Inyo

ORDER GRANTING PETITION FOR RECONSIDERATION

BY THE BOARD:

On May 2, 1995, the Chief of the Division of Water Rights issued an Order Rejecting and Canceling Application 28550 for failure to submit complete or adequate information pursuant to Government Code Section 65956. The Chief of the Division of Water Rights is delegated to act for the State Water Resources Control Board (SWRCB) under Resolution No. 93-87, paragraph 3.2.1.4.

Mr. Salvatore Campagna (applicant) filed a timely petition for reconsideration (petition) on May 19, 1995.

Section 768 of Title 23 of the California Code of Regulations authorizes reconsideration based upon any of the following causes:

- "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."

Requirements for petitions for reconsideration are set forth in Section 769 of Title 23 of the California Code of Regulations. Section 769 states:

"(a) Any petition for reconsideration of a decision or order shall be submitted in writing and shall contain the following:

- (1) Name and address of the petitioner.
- (2) The specific board action of which petitioner requests reconsideration.
- (3) The date on which the order or decision was made by the board.
- (4) The reason the action was inappropriate or improper.
- (5) The specific action which petitioner requests.
- (6) A statement that copies of the petition and any accompanying materials have been sent to all interested parties.

"(b) If reconsideration is requested based in whole or in part on Section 768(c), the petition shall include an affidavit or declaration under penalty of perjury stating that additional evidence is available that was not presented to the board and the reason it was not presented. A general statement of the nature of the evidence and of the facts to be proved shall also be included.

"(c) The petition shall be accompanied by a statement of points and authorities in support of legal issues raised in the petition."

The petition does not comply with the requirements of Section 769 because it does not state the reason the action was inappropriate or improper, the specific action which petitioner requests, and that copies of the petition have been sent to all interested parties. Notwithstanding the applicant's failure to comply with

the requirements for petitions for reconsideration set forth in Section 769, reconsideration should be granted because of an error in law. Government Code Section 65956, upon which the cancellation order is based, does not apply to the circumstances of this case.<sup>1</sup>

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<sup>1</sup> Government Code Section 65956 states:

"(a) If any provision of law requires the lead agency or responsible agency to provide public notice of the development project or to hold a public hearing, or both, on the development project and the agency has not provided the public notice or held the hearing, or both, at least 60 days prior to the expiration of the time limits established by Sections 65950 and 65952, the applicant or his or her representative may file an action pursuant to Section 1085 of the Code of Civil Procedure to compel the agency to provide the public notice or hold the hearing, or both, and the court shall give the proceedings preference over all other civil actions or proceedings, except older matters of the same character.

"(b) In the event that a lead agency or a responsible agency fails to act to approve or to disapprove a development project within the time limits required by this article, the failure to act shall be deemed approval of the permit application for the development project. However, the permit shall be deemed approved only if the public notice required by law has occurred. If the applicant has provided seven days advance notice to the permitting agency of the intent to provide public notice, then no earlier than 60 days from the expiration of the time limits established by Sections 65950 and 65952, an applicant may provide the required public notice using the distribution information provided pursuant to Section 65941.5. If the applicant chooses to provide public notice, that notice shall include a description of the proposed development substantially similar to the descriptions which are commonly used in public notices by the permitting agency, the location of the proposed development, the permit application number, the name and address of the permitting agency, and a statement that the project shall be deemed approved if the permitting agency has not acted within 60 days. If the applicant has provided the public notice required by this section, the time limit for action by the permitting agency shall be extended to 60 days after the public notice is provided. If the applicant provides notice pursuant to this section, the permitting agency shall refund to the applicant any fees which were collected for providing notice and which were not used for that purpose.

"(c) Failure of an applicant to submit complete or adequate information pursuant to Sections 65943 to 65946, inclusive, may constitute grounds for disapproving a development project.

"(d) Nothing in this section shall diminish the permitting agency's legal responsibility to provide, where applicable, public notice and hearing before acting on a permit application."

Because this is a protested application, Section 65956 does not apply. Government Code Section 65955. Even when Section 65956 does apply, it sets deadlines for action, it does not specify when an application can be dismissed without a hearing.

In acting on a petition for reconsideration, the SWRCB may take any of the following actions in accordance with Section 770 of Title 23 of the California Code of Regulations:

- a. Refuse to reconsider the decision or order;
- b. Deny the petition upon a finding that the decision was appropriate and proper;
- c. Set aside or modify the decision; or
- d. Take other appropriate action.

Other appropriate action in this case includes ordering reconsideration and holding a hearing to determine whether the applicant can obtain access to the proposed point of diversion in the Inyo Mountains Wilderness Area.

Application 28550 was filed on September 11, 1985 for direct diversion of 500 gallons per day from Keynot and Beveridge Canyons to be used for mining purposes. The notice of application was issued on October 25, 1985, and protests were received from the Department of Fish and Game, Stanley J. Haye, Mary Ann Henry, Mary De Decker, Desert Survivors, and the Sierra Club. On May 7, 1986, a field investigation was held. The Division of Water Rights (Division) staff engineer recommended that processing of the project be held in abeyance until a settlement was reached between the applicant and one of the protestants regarding a right-of-way from the point of diversion to the place of use. In addition, the proposed point of diversion is located in an area that was then being considered for federal designation as a wilderness area. The applicant and the Division agreed that the application would be held in abeyance until a decision was made regarding whether the proposed point of diversion would be in a designated wilderness area. In 1994, the location of the proposed point of diversion was made a part of the Inyo Mountains Wilderness Area.

On November 23, 1994, Division staff sent a letter to the applicant asking whether he wished to request cancellation of the application because of the wilderness area designation. The applicant did not respond. A second letter was sent March 1, 1995 by certified mail asking for a response to the November 23, 1994 letter and notifying the applicant that failure to provide information as requested would result in cancellation of the application. Again the applicant did not respond. Consequently, on May 2, 1995, the Chief of the Division of Water Rights issued the Order Rejecting and Canceling Application 28550.

In his petition, the applicant states that he will be gathering data from a past meeting with Division staff and will forward this information to the SWRCB at a later date. It is unknown what these data are; however, based on information in the Division's files, it appears that the applicant may be of the opinion that it may be possible for him to obtain approval from the U.S. Bureau of Land Management (BLM) to pursue his application even though the point of diversion is within a federal wilderness area.

According to the BLM, it is very unlikely that a special use permit would be granted to the applicant which would authorize him to proceed with the proposed project.<sup>2</sup> Further, the applicant has not submitted the necessary documents and information to BLM which would enable it to consider granting access and issue a special use permit. Section 776 of Title 23 of the California Code of Regulations authorizes rejection of the application "[i]f the proposed project will require a permit, license, or approval from another public agency or officer and it

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<sup>2</sup> This case is distinguishable from the Bella Vista Water District (District) order regarding the SWRCB's cancellation of the District's Application 28888 (Order WR 90-4) without a hearing. In Bella Vista, after the SWRCB authorized two extensions of time to enable the parties to negotiate whether the U. S. Bureau of Reclamation (USBR) would grant access to USBR facilities to the District, the USBR explicitly denied access to the District. Here, the BLM has indicated that it is very unlikely that access would be granted but no decision has been made.

becomes evident that regardless of the action taken by the board, such permit, license, or approval could not be secured from the proper agency." Therefore, reconsideration should be granted and a hearing scheduled to provide the applicant an opportunity to provide proof that he will be able to obtain federal approval for his project. If the applicant is unable to provide such proof, the application should be canceled in accordance with Section 776.

**ORDER**

NOW, THEREFORE, IT IS ORDERED that the petition for reconsideration of the Order Rejecting and Canceling Application 28550 is granted. The Division of Water Rights shall schedule a hearing to receive evidence regarding the likelihood of obtaining federal approval for the applicant's project and whether rejection of the application is appropriate.

**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 July 20, 1995.

AYE:                   John Caffrey  
                          Marc Del Piero  
                          James M. Stubchaer  
                          John W. Brown

NO:                     None

ABSENT:               Mary Jane Forster

ABSTAIN:             None

  
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Maureen Marché  
Administrative Assistant to the Board