

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2009-0063-EXEC

In the Matter of the Petitions of the United States Bureau of Reclamation,
Fallbrook Public Utility District and the California Department of Water Resources for
Reconsideration of Order WR 2009-0028-DWR, which denied the
United States Bureau of Reclamation's Petitions for Extension of Time for
Water Right Permits 8511, 11357 and 15000B
(Applications 11587, 12179 and 21471B, respectively)

UNITED STATES BUREAU OF RECLAMATION
Petitioner and Permittee

FALLBROOK PUBLIC UTILITY DISTRICT
Petitioner

CALIFORNIA DEPARTMENT OF WATER RESOURCES
Petitioner¹

SOURCE: Santa Margarita River

COUNTY: San Diego

ORDER GRANTING PETITIONS FOR RECONSIDERATION

BY THE EXECUTIVE DIRECTOR:

By Order WR 2009-0028-DWR, the State Water Resources Control Board (State Water Board or Board) Division of Water Rights (Division) denied time extension petitions for development of water diversion and use under United States Bureau of Reclamation (Reclamation) Permits 8511, 11357 and 15000B, which authorize construction of a two-dam project, diverting

¹ The term "Petitioner" is used for ease of reference, and does not confer upon the California Department of Water Resources the legal status of petitioner.

185,000 acre-feet per annum (afa) from the Santa Margarita River.² The time extension petitions described plans for a conjunctive use project in the Santa Margarita River watershed for use by the Fallbrook Public Utility District (Fallbrook) and Camp Pendleton Marine Corps Base (Camp Pendleton), as well as supplying water for export to the San Diego region.

Reclamation and Fallbrook requested reconsideration of the Division's order, and the Department of Water Resources (DWR) also submitted a memorandum in support of reconsideration. DWR's memorandum failed to meet the requirements for petition submittal described in California Code of Regulations, title 23, section 769, and failed to raise substantial issues related to the causes for reconsideration set out in California Code of Regulations, title 23, section 768, and is therefore dismissed.

When Order WR 2009-0028-DWR was issued on June 15, 2009, the permittee had not filed change petitions: the change petitions were filed on September 14, 2009. On September 22, 2009, the change petitions were rejected by the Division because they failed to comply with Water Code section 1701.1(d) and California Code of Regulations, title 23, section 794. However, the State Water Board anticipates that the petitions will be re-filed and the deficiencies corrected. The State Water Board, in its discretion, would prefer to consider the petitions for time extension and the petitions for change in the same proceeding.

The environmental documentation required under the California Environmental Quality Act (CEQA) has not yet been completed for the project: a final environmental impact report is anticipated in spring of 2010. Without a CEQA document, the State Water Board cannot approve either the time extension request or the recently submitted change petitions. As the CEQA review required for a decision has not yet been completed, it would be inappropriate to pass judgment at this time on whether the findings necessary to support an extension have been met, or what conditions should be imposed in the public interest.

² Order WR 2009-0028-DWR was issued on June 15, 2009. 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. (See *California Correctional Peace Officers Ass'n. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1147-48, 1150-51 [43 Cal.Rptr.2d 681]; State Water Board Order WQ 98-05-UST at pp. 3-4.)

This order is based on the unique circumstances of this case: (1) where a change petition was filed after the initial denial for a project that only recently obtained Congressional authorization, (2) where the Board anticipates that CEQA documentation will be completed promptly, and (3) where the change petition furthers the state policy favoring conjunctive use projects. Staff shall continue to fully apply due diligence requirements to other pending and future requests for extensions of time, and to deny extensions without waiting for preparation of a CEQA document where the causes for an extension have not been satisfied.

ORDER

IT IS HEREBY ORDERED that the petitions for reconsideration of the United States Bureau of Reclamation and of Fallbrook Public Utility District are granted. Order WR 2009-0028-DWR is vacated, and the time extension petitions are remanded to the Division of Water Rights for consideration in tandem with the change petitions.

Dated: **December 7, 2009**

ORIGINAL SIGNED BY
Dorothy Rice
Executive Director

STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD

DIVISION OF WATER RIGHTS

ORDER WR 2009-0028-DWR

In the Matter of Permits 8511, 11357 and 15000B (Applications 11587, 12179 and 21471B)

U.S. Bureau of Reclamation

ORDER DENYING PETITIONS FOR EXTENSION OF TIME

SOURCE: Santa Margarita River

COUNTY: San Diego

WHEREAS:

1. The State Water Resources Control Board (State Water Board), Division of Water Rights (Division) issued Permit 8511 to Fallbrook Public Utility District (Fallbrook) on April 23, 1951 pursuant to Application 11587. The permit authorizes collection to storage of 10,000 acre-feet per annum (afa) from the Santa Margarita River. The permit required that construction be completed by December 1, 1953 and full beneficial use of water be completed by December 1, 1958.
2. The Division issued Permit 11357 to Fallbrook on May 2, 1958. The permit authorizes collection to storage of 10,000 afa from the Santa Margarita River. The permit required that construction be completed by December 1, 1961 and full beneficial use of water be completed by December 1, 1966.
3. The Division issued Permit 15000 to U.S. Department of the Navy (Navy) on November 18, 1965. The permit authorizes collection to storage of 165,000 afa from the Santa Margarita River. The permit required that construction be completed by December 1, 1968 and full beneficial use of water be completed by December 1, 1970.
4. Order WR 73-50 approved the assignment of Permits 8511, 11357 and 15000B to U.S. Bureau of Reclamation (Reclamation). The order also required that Permit 15000 be split, and the portion put to beneficial use by the Navy (Permit 15000A) be licensed. The remaining portion of the right was assigned to Reclamation (Permit 15000B).
5. Order WR 83-11 approved extensions of time for the permits, extending the time for construction to December 31, 1990 and extending the time to complete full beneficial use to December 31, 1996. The order documents that there had been eight previous time extensions granted for Permit 8511; four previous time extensions for Permit 11357, and one previous time extension for Permit 15000B. Therefore, Order WR 83-11 was the ninth time extension for Permit 8511; the fifth time extension for Permit 11357 and the second time extension for Permit 15000B.
6. On December 23, 1996, the Permittee requested an extension of time to complete use to December 31, 2007. On August 26, 1997, the Division granted the request. The August 26, 1997 transmittal letter emphasized the importance of maintaining the time schedule and noted that any

further time extensions would be subject to the cause requirements of California Code of Regulations, title 23, section 844.

7. On February 2, 1998, the Division issued an order extending the time to develop the project and extended the complete use date another year to December 31, 2008.
8. At this time, 11 time extensions have been granted for Permit 8511; seven time extensions have been granted for Permit 11357 and four time extensions have been granted for Permit 15000B (counting the two separate time extension orders on the December 24, 1996 petitions).
9. Division records show that Permittee has failed to commence or complete construction work and complete application of water to beneficial use within the time provided under the permits. No diversion works have been built and no water has been diverted under the permits, as documented in the Progress Reports by Permittee. For example, the 2007 Progress Report by Permittee for Permit 8511 documents that Permits 8511, 11357 and 15000B were issued to construct two dams on the Santa Margarita River. The Progress Report box asking whether construction work has commenced is marked "No."

Following a 1984 Environmental Impact Study and 1989 Basin Wide Water Requirement and Availability Study, it was concluded that a two-dam Santa Margarita Project was no longer a feasible solution to water supply. Fallbrook prepared a Clean Water Act permit application for a single dam project in 1990, but abandoned the effort due to mitigation costs.

10. On February 1, 2005, Division staff met with the Permittee's representatives, among others, to discuss the Santa Margarita River Conjunctive Use Project (SMCUP). That meeting is memorialized in a March 15, 2005 letter from Katherine Mrowka to William J. Steele. At the meeting, Division staff expressed concern regarding the lack of progress under Permits 8511, 11357 and 15000B, and advised Permittee that it was uncertain whether the State Water Board would grant additional time to perfect the rights.
11. A December 11, 2007 letter memorializes a December 7, 2007 meeting between Division staff and the Permittee. At the meeting, the Permittee affirmed that it is not pursuing development of the surface storage reservoirs authorized by the permits, that the reservoirs have not been built and that water use under the permits has not begun. Instead, Permittee was considering a conjunctive use project involving underground storage. Division staff advised the Permittee of the need to address the non-use issue as part of the showing of cause for any extension of time petitions submitted.
12. On December 11, 2008, the Division advised the Permittee that it had received the petitions for time extension submitted on November 14, 2008. The petitions seek a 50-year extension of time to build an underground storage project. Since the Permittee intends to build a different project than the permitted project, change petitions are required. The Division returned the time extension petitions, but offered to hold this matter in abeyance for one year to provide opportunity for the Permittee to re-submit the time extension petitions along with change petitions and underground storage supplements describing any then-proposed project. This would allow the Division to evaluate the proposed project, as a whole.
13. On January 15, 2009, Permittee resubmitted the November 14, 2008 petitions for extension of time. These petitions are subsequently referred to as the 2009 petitions. The cover letter states that the time extension petitions are ready for processing and the Permittee is not aware of any reason that the petitions will need to be revised and resubmitted. Permittee states that the petitions are being resubmitted for either notice in the normal course of business, or to be held in abeyance from notice and processing pending receipt of the other filings needed to implement the reformulated project. The petitions document that no water has been used under the permits.

The petitions state that the extension of time is needed in order to pursue development of an alternate project, the SMCUP. The petitions document money expended on developing the alternate project, and indicate the progress that Permittee intends to make on the alternate project in the future. The petitions state that since 1996, the SMCUP Proponents have overcome substantial unavoidable obstacles and have diligently pursued conjunctive use approaches to put the water at issue to beneficial use.

However, the SMCUP is not the permitted project. As described on the petitions, this alternate project has a different point of diversion, method of diversion, and place of storage from the permitted project. Permittee has not requested modifications to the permits needed to implement the alternate project.

14. The Division has not publicly noticed the petitions.
15. The State Water Board may grant an extension of time within which to commence or complete construction work or apply water to beneficial use only upon a showing of good cause. (Wat. Code, § 1398.) Permittee must show that (1) due diligence has been exercised; (2) failure to comply with previous time requirements has been occasioned by obstacles which could not be reasonably avoided; and (3) satisfactory progress will be made if an extension of time is granted. Lack of finances, occupation with other work, physical disability, and other conditions incident to the person and not to the enterprise will not generally be accepted as good cause for delay.
16. The permits were first issued between 1951 and 1965, and were granted a series of time extensions, with the most recent granted in 1998. Permittee has not shown that due diligence has been exercised. While some preliminary studies were conducted over the years, the two-dam project authorized by the permits has not been built. The project has been found to be environmentally and economically infeasible. (2009 time extension petitions.) No water has been used under the permits. (Ibid.)
17. Permittee has not shown that failure to comply with previous time requirements has been occasioned by obstacles that could not be reasonably avoided. Permittee did not move forward on the permitted project because it was found to be infeasible.

Permittee offers studies and other activities associated with developing an alternate water supply project, the SMCUP, as obstacles that could not be reasonably avoided. Regardless whether the scenario presented would present an obstacle to developing the SMCUP, activities related to this different project do not constitute an obstacle to developing the permitted project.
18. Permittee has not shown that satisfactory progress on the permitted project will be made if a time extension is granted. Permittee suggests that it will make satisfactory progress if the extensions are granted because Permittee intends to proceed with the SMCUP within the next 50 years. However, the SMCUP is not the permitted project. As noted previously, the permitted project has been found to be infeasible and Permittee has expressed that it does not intend to construct the envisioned dams.
19. The Division has not entered into a Memorandum of Understanding with Permittee for preparation of the California Environmental Quality Act document for the time extension petitions, because of the infeasibility of the permitted project.
20. Permittee has not shown good cause for the time extension.
21. The State Water Board has delegated the authority to act on requests for an extension of time to the Deputy Director for Water Rights pursuant to Resolution No. 2007-0057. (Resolution No. 2007-0057, section 4.2.7) The Deputy Director has re-delegated this authority to the Assistant Deputy Director.

Applications 11587, 12179, 21471B Permits 8511, 11357, 15000B

NOW, THEREFORE, IT IS ORDERED THAT THE STATE WATER BOARD, DIVISION OF WATER RIGHTS, HEREBY DENIES THE PETITIONS FOR EXTENSION OF TIME.

STATE WATER RESOURCES CONTROL BOARD

Original Signed by:

James W. Kassel
Assistant Deputy Director for Water Rights

Dated: June 15, 2009

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD
DIVISION OF WATER RIGHTS
ORDER

APPLICATION 21471B PERMIT 15000 LICENSE _____

ORDER APPROVING NEW DEVELOPMENT SCHEDULE

WHEREAS:

1. Permit 15000 was issued to the United State Bureau of Reclamation on April 17, 1985 pursuant to Application 21471B.
2. A petition for an extension of time within which to develop the proposed Santa Margarita Project has been filed with the State Water Resources Control Board (SWRCB) on December 24, 1996.
3. The permittee has requested an extension of time to finalize studies of alternative facilities, file and process appropriate petitions for change, construct facilities and apply water to full beneficial use.
4. The SWRCB has determined the petition for an extension of time is appropriate and will not operate to the injury of any other lawful user of water.
5. The permittee has proceeded with diligence and good cause has been shown for the extension of time.

NOW, THEREFORE, IT IS ORDERED THAT:

Condition 8 of this permit be amended to read:

COMPLETE APPLICATION OF THE
WATER TO THE PROPOSED USE
SHALL BE MADE ON OR BEFORE

December 31, 2008

(0000009)

Dated: **FEBRUARY 2 1998**

for Roger Anton
Edward C. Anton, Chief
Division of Water Rights

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD
DIVISION OF WATER RIGHTS

ORDER

APPLICATION 21471B PERMIT 15000 LICENSE _____

ORDER APPROVING NEW DEVELOPMENT SCHEDULE

WHEREAS:

1. Permit 15000 was issued to the United State Bureau of Reclamation on November 18, 1965 pursuant to Application 21471B.
2. A petition for an extension of time within which to develop the proposed Santa Margarita Project has been filed with the State Water Resources Control Board (SWRCB) on December 24, 1996.
3. The permittee has requested an extension of time to finalize studies of alternative facilities, file and process appropriate petitions for change, construct facilities and apply water to full beneficial use.
4. The SWRCB has determined the petition for an extension of time is appropriate and will not operate to the injury of any other lawful user of water.
5. The permittee has proceeded with diligence and good cause has been shown for the extension of time.

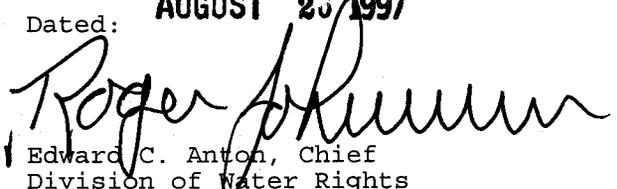
NOW, THEREFORE, IT IS ORDERED THAT:

Condition 8 of this permit be amended to read:

COMPLETE APPLICATION OF THE
WATER TO THE PROPOSED USE
SHALL BE MADE ON OR BEFORE

December 31, 2007 (0000009)

Dated: **AUGUST 23 1997**


Edward C. Anton, Chief
Division of Water Rights

STATE WATER RESOURCES CONTROL BOARD
 DIVISION OF WATER RIGHTS
 AMENDED

PERMIT FOR DIVERSION AND USE OF WATER

PERMIT 15000

Application 21471B of United States Bureau of Reclamation

P. O. Box 427, Boulder City, Nevada 89005

filed on September 23, 1963, has been approved by the State Water Resources Control Board SUBJECT TO VESTED RIGHTS and to the limitations and conditions of this Permit.

Permittee is hereby authorized to divert and use water as follows:

1. Source:

Tributary to:

Santa Margarita River

Pacific Ocean

2. Location of point of diversion:	40-acre subdivision of public land survey or projection thereof	Section	Township	Range	Base and Meridian
De Luz Dam to be located on the main channel of the Santa Margarita River a short distance below the confluence of De Luz Creek with that stream in	NW $\frac{1}{4}$ of NW $\frac{1}{4}$	32	9S	4W	SB

County of San Diego

3. Purpose of use:	4. Place of use:	Section	Township	Range	Base and Meridian	Acres
Military						
Municipal						
Domestic	within Camp Pendleton Naval Enclave					
Irrigation	within Camp Pendleton Naval Enclave					5600

The place of use is shown on map filed with the State Water Resources Control Board.

5. The water appropriated shall be limited to the quantity which can be beneficially used and shall not exceed 165,000 acre-feet per annum to be collected from January 1 to December 31 of each year.
6. The amount authorized for appropriation may be reduced in the license if investigation warrants.
7. Construction work shall be completed by December 31, 1990.
8. Complete application of the water to the authorized use shall be made by December 31, 1996.
9. Progress reports shall be submitted promptly by permittee when requested by the State Water Resources Control Board until license is issued.
10. Permittee shall allow representatives of the State Water Resources Control Board and other parties as may be authorized from time to time by said Board, reasonable access to project works to determine compliance with the terms of this permit.
11. Pursuant to California Water Code Sections 100 and 275, and the common law public trust doctrine, all rights and privileges under this permit and under any license issued pursuant thereto, including method of diversion, method of use, and quantity of water diverted, are subject to the continuing authority of the State Water Resources Control Board in accordance with law and in the interest of the public welfare to protect public trust uses and to prevent waste, unreasonable use, unreasonable method of use or unreasonable method of diversion of said water.

The continuing authority of the Board may be exercised by imposing specific requirements over and above those contained in this permit with a view to eliminating waste of water and to meeting the reasonable water requirements of permittee without unreasonable draft on the source. Permittee may be required to implement a water conservation plan, features of which may include but not necessarily be limited to: (1) reusing or reclaiming the water allocated; (2) using water reclaimed by another entity instead of all or part of the water allocated; (3) restricting diversions so as to eliminate agricultural tailwater or to reduce return flow; (4) suppressing evaporation losses from water surfaces; (5) controlling phreatophytic growth; and (6) to installing, maintaining, and operating efficient water measuring devices to assure compliance with the quantity limitations of this permit and to determine accurately water use as against reasonable water requirements for the authorized project. No action will be taken pursuant to this paragraph unless the Board determines, after notice to affected parties and opportunity for hearing, that such specific requirements are physically and financially feasible and are appropriate to the particular situation. The continuing authority of the Board also may be exercised by imposing further limitations on the diversion and use of water by the permittee in order to protect public trust uses. No action will be taken pursuant to this paragraph unless the Board determines, after notice to affected parties and opportunity for hearing, that such action is consistent with California Constitution Article X, Section 2; is consistent with the public interest and is necessary to preserve or restore the uses protected by the public trust.
12. The quantity of water diverted under this permit and under any license issued pursuant thereto is subject to modification by the State Water Resources Control Board if, after notice to the permittee and an opportunity for hearing, the Board finds that such modification is necessary to meet water quality objectives in water quality control plans which have been or hereafter may be established or modified pursuant to Division 7 of the Water Code. No action will be taken pursuant to this paragraph unless the Board finds that (1) adequate waste discharge requirements have been prescribed and are in effect with respect to all waste discharges which have any substantial effect upon water quality in the area involved, and (2) the water quality objectives cannot be achieved solely through the control of waste discharges.

13. The State Water Resources Control Board reserves jurisdiction over this permit to reconsider the development schedule if Congressional authorization and initial funding for the project is not obtained by December 31, 1985, or if obtained by said date, the Secretary of the Interior, or other federal official, subsequently determines that the project is not economically justified or environmentally acceptable. Action by the Board will be taken only after notice to interested parties and opportunity for hearing.

14. Permittee shall consult with the Division of Water Rights and the Department of Water Resources and develop and implement a water conservation program. The Water Conservation Plan, dated March 1981, prepared for the Fallbrook Public Utility District by the San Diego County Water Authority, shall constitute minimum actions to be included in the permittee's program for the place of use outside of Camp Pendleton. Camp Pendleton's current water management plan should be included in the conservation program for the place of use within the military reservation. A progress report on development of the program shall be submitted to the State Water Resources Control Board within 6 months from the date of this order. The program shall be presented to the Board for approval within one year from the date of this order or such further time as may, for good cause shown, be allowed by the Board.

15. Permittee shall install and maintain an outlet pipe of adequate capacity in its dam as near as practicable to the bottom of the natural stream channel in order that water entering the reservoir which is not authorized for appropriation may be released.

16. In accordance with the requirements of Water Code Section 1393, permittee shall clear the site of the reservoir of all structures, trees and other vegetation which would interfere with the use of the reservoir for water storage and recreational purposes.

17. In order to prevent degradation of the quality of water during and after construction of the project, prior to commencement of construction permittee shall file a report pursuant to Water Code Section 13260 and shall comply with any waste discharge requirements imposed by the California Regional Water Quality Control Board, San Diego Region, or by the State Water Resources Control Board.

Failure of permittee to comply with this term will subject the permit to revocation, after opportunity for hearing.

18. The issuance of this amended permit shall not be construed as placing a limitation on any riparian right or decreed right to the waters of the Santa Margarita River held by the permittee or any user of the water appropriated hereunder.

19. The State Water Resources Control Board reserves jurisdiction over this permit to impose further conditions in the public interest pursuant to Water Code Sections 1243, 1243.5, 1253, and 1257, and pursuant to the Board's public trust authority to include measures necessary to mitigate significant environmental impacts of the project. All such conditions and measures shall conform to the standard of reasonableness contained in Article X, Section 2 of the California Constitution. Action by the Board will be taken only after notice to interested parties and an opportunity for hearing.

This permit is issued and permittee takes it subject to the following provisions of the Water Code:

Section 1390. A permit shall be effective for such time as the water actually appropriated under it is used for a useful and beneficial purpose in conformity with this division (of the Water Code), but no longer.

Section 1391. Every permit shall include the enumeration of conditions therein which in substance shall include all of the provisions of this article and the statement that any appropriator of water to whom a permit is issued takes it subject to the conditions therein expressed.

Section 1392. Every permittee, if he accepts a permit, does so under the conditions precedent that no value whatsoever in excess of the actual amount paid to the State therefor shall at any time be assigned to or claimed for any permit granted or issued under the provisions of this division (of the Water Code), or for any rights granted or acquired under the provisions of this division (of the Water Code), in respect to the regulation by any competent public authority of the services or the price of the services to be rendered by any permittee or by the holder of any rights granted or acquired under the provisions of this division (of the Water Code) or in respect to any valuation for purposes of sale to or purchase, whether through condemnation proceedings or otherwise, by the State or any city, city and county, municipal water district, irrigation district, lighting district, or any political subdivision of the State, of the rights and property of any permittee, or the possessor of any rights granted, issued, or acquired under the provisions of this division (of the Water Code).

Dated: APRIL 17 1985

STATE WATER RESOURCES CONTROL BOARD

Raymond Walsh

Chief, Division of Water Rights