



Linda S. Adams
Secretary for
Environmental Protection

State Water Resources Control Board



Arnold Schwarzenegger
Governor

Office of Chief Counsel
1001 I Street, 22nd Floor, Sacramento, California 95814
P.O. Box 100, Sacramento, California 95812-0100
(916) 341-5161 ♦ FAX (916) 341-5199 ♦ <http://www.waterboards.ca.gov>

January 14, 2010

Via email and U.S. Mail

Mr. Michael J. Barkley
161 N. Sheridan Ave. #1
Manteca, CA 95336
mjbarkl@inreach.com

Dear Mr. Barkley:

PUBLIC RECORDS ACT REQUEST FOR RECORDS RELATED TO THE DIVISION OF WATER RIGHTS PROTEST PROCEDURES

This letter responds to your written request for public records, a request you delivered to the State Water Resources Control Board (State Water Board or Board) at the January 5, 2010 public board meeting. You have asked for various records related to the United States Bureau of Reclamation's Application 18115, as well as additional records that pertain to the Division of Water Rights (Division) internal procedures regarding protests of applications.

The following is an itemized list of your requests and a response indicating whether the requested records are available.

1. A copy of all writings of the procedures the Division uses to examine protests and to decide what the issues are, choose which protests the Division will accept and reject, and which issues the Division will accept and reject.

The Division processes and evaluates protests in accordance with the requirements listed in Water Code sections 1330-1348 and 1703.1. et seq. Applicable regulations that govern protest procedures and requirements can be found in California Code of Regulations, title 23, sections 745-753, section 796 and section 843.

The statutory and regulatory requirements have been summarized in the enclosed/provided document titled "Protest Process". This reference document is available to staff. Staff are not required to use it or give it any weight in processing protests, and the document has not been used in connection with any protests for a currently pending petition for extension of time under Application 18115.

2. Any templates or checklists of how such issues are to be analyzed, described, accepted, or rejected.

The above-mentioned document is the only responsive record available.

3. Records pertaining to how the board treats jurisdictional issues, any statistical surveys of protest acceptance/rejections, concerns regarding imbalance of treatment between protestants and applicants/petitioners and writings on whether certain protestants receive preferential treatment in protest evaluation.

The Division has no responsive records for these classes of documents. The Division does not compile statistics on protest acceptances/dismissals and has no writings that reference a policy of providing preferential treatment to certain protested applicants or protestants.

4. Circumstances under which the Division would allow an upstream protest against a downstream appropriation

As stated in California Code of Regulations title 23, section 749, because an upstream user can take water before it reaches a downstream applicant, a protest based on interference with a prior right of such upstream user normally will not be accepted. The Division does not have any records which outline specific circumstances under which an upstream protest will be accepted against a downstream appropriation.

5. Any guidelines, rules, suggestions, or comments or memos or notes or other writings as to how protest acceptance or rejection letters are to be drafted.

The Division has several draft templates available to staff to assist them in responding to protests. The draft templates are enclosed/provided. Staff is not required to use the templates, they are provided as examples that may help facilitate responses.

6. If protest rejection letters are generated by successive re-use with custom modification, all letters and notes going back from the rejection letter dated December 14, 2009 to the beginning of the process.

The December 14, 2009 Division letter responding to your protest of Application 18115 was not based on, or modified from any previously used draft. As previously discussed, example letter templates are available to staff but staff has discretion on whether to use the template in responding to individual protests.

7. Any discussions contrasting the Division's issue analysis procedures and issue-presentation requirements of the Water Code or Government Code.

The Division's issue analysis procedures are based on the above-cited sections of the Water Code and applicable regulations. Based on the information given, the board has no disclosable records. Your request does not identify which section of the Government Code contains issue-presentation requirements that are applicable to the State Water Board in this context so it is difficult to determine what types of records you are interested in obtaining. Please contact the Office of Chief Counsel using the contact information provided below if we can provide assistance in clarifying your request.

8. Any writing on whether or not to inform protestants of appeal procedures available to them and what the procedures are.

The Division has no documents that specify circumstances under which protestants are informed of appeal procedures. Pursuant to Water Code section 1122, any interested person can request reconsideration of a board decision or order. Water Code section 1122 applies to protest dismissals and applicable regulations can be found at California Code of Regulations, title 23, sections 745-753.

9. Any writings on the Division's conclusion that applicants and petitioners are entitled to a hearing or formal hearing on any rejection but protestants are not.

The Division does not have any writings that express the alleged conclusion and no responsive records.

10. Any writings on furnishing ADA considerations for protestants who may not have the equivalent litigation skills of petitioners or applicants.

The board has no disclosable records which specifically address ADA obligations relative to a protestant's litigation skills. If you have specific questions regarding the board's ADA procedures please contact Catherine Foreman in the Office of Employee Assistance at (916) 341-5881.

11. Any writings on the Division's use of allowing some issues to remain protested as a way to cause the statute of limitations to run on others.

The Division has no such policy and no records attesting to such a policy.

12. Any writings on whether protest rejection letters need to furnish information contemplated by California Code of Civil Procedure section 1094.5.

The Division has no writings which discuss the need to disclose information contained in Code of Civil Procedure section 1094.5 in protest rejection letters.

Your request dated January 5, 2010, is for the State Water Board to provide public records pursuant to the California Public Records Act, section 6250 et seq. At the conclusion of your request, you ask for a formal hearing. It is unclear what is meant by this request, and in what context you are requesting a hearing. No provision in the Public Records Act provides for a formal hearing with respect to a public records request.

Our files are available to the public during our normal business hours of 8:00 a.m. to 5:00 P.M. Monday through Friday, with the exception of those Fridays that the building is closed due to employee furloughs. In addition, our "e-wrims" database is a valuable research tool. The database allows for a search of water right application files, permits and licenses. The database can be accessed at: <http://ciwqs.waterboards.ca.gov/ewrims/ewrims/EWMMenuPublic.jsp>.

Mr. Michael J. Barkley

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January 14, 2010

If you have any questions related to this response, please feel free to contact Nathan Jacobsen, staff counsel at (916) 341-5181.

Sincerely,



Andrew Sawyer
Assistant Chief Counsel

Enclosures (9)



State Water Resources Control Board



Linda S. Adams
Secretary for
Environmental Protection

Division of Water Rights
1001 I Street, 14th Floor ♦ Sacramento, California 95814 ♦ 916.341.5300
P.O. Box 2000 ♦ Sacramento, California 95812-2000
Fax: 916.341.5400 ♦ www.waterrights.ca.gov

Arnold Schwarzenegger
Governor

MEMORANDUM

TO: _____, Regional Manager
Department of Fish and Game
_____ Region
Address _____

FROM: XXXXXXXXX
Environmental Scientist
Permitting Section, Watershed Unit X
DIVISION OF WATER RIGHTS

DATE: _____

SUBJECT: APPLICATION XXX FOR XXXXXX TO APPROPRIATE WATER FROM
UNNAMED STREAMS TRIBUTARY TO XXXX CREEK THENCE THE XXXXX
RIVER IN XXXX COUNTY

The Division of Water Rights (Division) received the protest filed against Application XXXX of XXXXX (Applicant) on [insert Division date stamp date here]. The protest appears to substantially comply with the requirements for protest filing, as specified in Water Code section 1703.2 and California Code of Regulations, title 23, section 745 et. seq.

By copy of this letter, the Applicant is instructed to respond to the allegations contained in your protest within 30-days from the date of this letter. A copy of said response shall be sent to the Protestant with another copy forwarded to the Division.

If you have questions regarding this matter, please contact me at XXXXX or by email at XXXXX.

cc: Applicant



State Water Resources Control Board



Division of Water Rights

1001 I Street, 14th Floor ♦ Sacramento, California 95814 ♦ 916.341.5300
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Fax: 916.341.5400 ♦ www.waterrights.ca.gov

Arnold Schwarzenegger
Governor

Linda S. Adams
Secretary for
Environmental Protection

In Reply Refer To:
XXX:XXXXX

Protestant
Protestant Address

Dear Protestant:

APPLICATION XXXXX FOR _____ TO APPROPRIATE WATER FROM _____ IN _____
COUNTY

The Division of Water Rights (Division) received the protest you filed against Application XXXX
of XXXXX (Applicant) on [insert Division date stamp date here]. The protest appears to
substantially comply with the requirements for protest filing, as specified in Water Code section
1331 and California Code of Regulations, title 23, section 745 et. seq.

By copy of this letter, the Applicant is instructed to respond to the allegations contained in your
protest within 30-days from the date of this letter. A copy of said response shall be sent to the
Protestant with another copy forwarded to the Division.

If you have questions regarding this matter, please contact me at XXXXX or by email at
XXXXX.

Sincerely,

cc: Applicant
Applicant Address



State Water Resources Control Board



Linda S. Adams
Secretary for
Environmental Protection

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Fax: 916.341.5400 ♦ www.waterrights.ca.gov

Arnold Schwarzenegger
Governor

MEMORANDUM

TO: _____, Regional Manager
Department of Fish and Game
_____ Region
Address _____

FROM: XXXXXXXXX
Environmental Scientist
Permitting Section, Watershed Unit X
DIVISION OF WATER RIGHTS

DATE:

SUBJECT: APPLICATION XXX FOR XXXXXX TO APPROPRIATE WATER FROM
UNNAMED STREAMS TRIBUTARY TO XXXX CREEK THENCE THE XXXXX
RIVER IN XXXX COUNTY

The Division of Water Rights (Division) received the protest filed against Application XXXX of XXXXX (Applicant) on [insert Division date stamp date here]. The protest appears to substantially comply with the requirements for protest filing, as specified in Water Code section 1331 and California Code of Regulations, title 23, section 745 et. seq.

By copy of this letter, the Applicant is instructed to respond to the allegations contained in your protest within 30-days from the date of this letter. A copy of said response shall be sent to the Protestant with another copy forwarded to the Division.

If you have questions regarding this matter, please contact me at XXXXX or by email at XXXXX.

cc: Applicant

Protestant Name
Address

Dear Mr. Protestant Name:

PERMIT xxxxx (APPLICATION xxxxx) OF XXXXXXXX, SOURCE NAME IN XXXX COUNTY

Your protest filed against the petition for extension of time has been received. The protest appears to be related to the existing operation of the project and not specific to the petition for extension of time.

The petition requests an extension of time to complete the full beneficial use of water under Permit XXXXX. The Division of Water Rights (Division) will grant the requested extension of time only upon a showing to the Division's satisfaction that: (1) due diligence has been exercised by the permittee, (2) failure to comply with previous time requirements has resulted from obstacles which reasonably could not be avoided, and (3) satisfactory progress will be made if an extension of time is granted. (tit. 23, CCR § 844.)

Protests in a time extension proceeding are limited to consideration of the effects of the time extension itself. This is not a new application where the applicant must show that water is available for the proposed use over and above the amounts needed for prior rights and public trust resources. Those issues were decided when the permit was issued.

The protest did not provide a statement of facts supporting an allegation of impacts to public trust resources due to the extension of time, as required by title 23, California Code of Regulations, section 745. Therefore, the protest is not acceptable. Unless we receive a statement of facts that supports specific allegations of injury within 30 days, your protest will be rejected pursuant to California Code of Regulations, title 23, section 749 without further notice.

If you have any questions regarding this matter, please contact Staff person, the staff person handling this matter at (916) 341-

Sincerely,

Division Chief Name, Chief
Division of Water Rights



State Water Resources Control Board



Linda S. Adams
Secretary for
Environmental Protection

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Fax: 916.341.5400 ♦ www.waterrights.ca.gov

Arnold Schwarzenegger
Governor

In Reply Refer
to:JDM:31616

Protestant
Address

Dear Mr. Protestant Name:

PROTEST OF APPLICATION XXXXX OF XXXXXXXX TO APPROPRIATE WATER FROM
LIST SOURCE IN XXXXX COUNTY

The Division of Water Rights (Division) notified you by letter dated September 28, 2007 that the protest filed against Application XXXXX did not specifically address how approving the application (pick the ones that apply): (a) would not be within the State Water Resources Control Board's jurisdiction, (b) would not best conserve the public trust uses, (c) would not best conserve the public interest, (d) would have an adverse environmental impact, (e) would be contrary to law, or (f) would affect your claimed prior rights. Division staff requested that you submit a statement of facts in support of the protest allegations by XXXXX. The Division has not received a response from you. The protest does not comply with the requirements for protest filing, as specified in Water Code section 1331 and California Code of Regulations, title 23, section 745 and is hereby rejected.

If you have questions regarding this matter, please contact staff name at (916) xxx-xxxx.

Sincerely,

Victoria A. Whitney
Division Chief

cc: Applicant



State Water Resources Control Board



Division of Water Rights

1001 I Street, 14th Floor ♦ Sacramento, California 95814 ♦ 916.341.5300

P.O. Box 2000 ♦ Sacramento, California 95812-2000

Fax: 916.341.5400 ♦ www.waterrights.ca.gov

Linda S. Adams

*Secretary for
Environmental Protection*

Arnold Schwarzenegger

Governor

In Reply Refer To:
XXX:XXXXX

Protestant
Protestant Address

Dear Protestant:

APPLICATION XXXXX FOR _____ TO APPROPRIATE WATER FROM _____ IN _____
COUNTY

The Division of Water Rights (Division) received the protest that (protestant's name) filed against Application XXXXX on (date). As indicated in the notice, protests must be received by the Division on or before the (date) deadline. The protest was received outside of the required time frame and is therefore unacceptable.

If you have questions regarding this matter, please contact me at XXXXX or by email at XXXXXX.

Sincerely,

Victoria A. Whitney
Division Chief

cc: Applicant/Agent
Applicant/Agent Address



State Water Resources Control Board



Linda S. Adams
Secretary for
Environmental Protection

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Arnold Schwarzenegger
Governor

MEMORANDUM

TO: _____, Regional Manager
Department of Fish and Game
_____ Region
Address

FROM: Victoria A. Whitney
Division Chief
DIVISION OF WATER RIGHTS

DATE:

SUBJECT: APPLICATION XXXX FOR (Applicant's name) TO APPROPRIATE WATER
FROM XXXXXX TRIBUTARY TO XXXXXX, THENCE XXXX IN XXXX COUNTY

The Division of Water Rights (Division) received the protest that (protestant's name) filed against Application XXXXX on (date). As indicated in the notice, protests must be received by the Division on or before the (date) deadline. The protest was received outside of the required time frame and is therefore unacceptable.

If you have questions regarding this matter, please contact me at XXXXX or by email at XXXXXX.

cc: Applicant

Protest Process

Step 1: Time for filing

Was the protest filed within the required time?

If yes, proceed to Step 2

Was good cause shown for not protesting within the allowed time?

If yes, proceed to Step 2

If no, provide time to show good cause. If good cause is not shown, reject the protest

Step 2: Content

Did the protestant state his/her name and address?

If yes, continue

If no, provide time to correct the deficiency, if possible. If not corrected within the allowed time, reject the protest.

Did the protestant, the agent or attorney sign the protest?

If yes, continue

If no, provide time to correct the deficiency. If not corrected within the allowed time, reject the protest.

Did the protestant serve the applicant with a copy of the protest?

If yes, continue

If no, provide time to correct the deficiency. If not corrected within the allowed time, reject the protest.

Did the protestant clearly and specifically state his/her objection to the project?

If no, provide the protestant with time to correct the deficiency. If not corrected within the allowed time, reject the protest.

If yes, is the protest based on issues within the jurisdiction of the board?

If no, provide the protestant with time to correct the deficiency. If not corrected within the allowed time, reject the protest.

If yes, continue.

If yes, is the protest based on claim of prior vested right?

If yes, does the protestant have either a license, permit, small domestic registration, stockpond certificate, senior application, or statement of water diversion and use on file with the board or is the protestant pumping percolating groundwater?

If no, reject the protest (in the case of a claim of pre-1914 or riparian right, the protest should be rejected only if the protestant fails to submit a statement after being requested to).

If yes, is the protestant's point of diversion located downstream of the applicant's point of diversion?

If no, is there a court decree, board order, or other regulatory requirement that either requires that the protestant release previously stored water downstream for public trust resources or prohibits the protestants diversion in the absence of certain flows or water quality standards?

If yes, require the applicant to respond to the protest and continue.

If no, reject the protest.

If yes, does the proposed project have the potential to affect the protestant's ability to divert water?

If yes, require the applicant to respond to the protest and continue.

If no, reject the protest after providing the protestant with time to provide the requested information.

If no, continue.

Is the protest based on the public interest, public trust or adverse environmental impacts?

If yes, did the protestant submit a statement of fact to support the protest? Is there a basis for potential impacts?

If no, reject the protest after providing the protestant with time to provide the requested information.

If yes, is there a basis for potential impacts?

If no, reject the protest

If yes, has the public review period for the draft environmental document expired?

If no, hold the protest in abeyance until the comment period expires.

If yes, did the environmental document identify impacts as alleged by the protestant?

If no, request the protestant to provide information to support the alleged impact. If the protestant fails to provide the requested information within the specified time, reject the protest. If the protestant provides satisfactory information, require the applicant to address the protest.

If yes, were feasible mitigation measures within the board's jurisdiction identified to reduce the impacts to less than significant measures?

If no, require the applicant to respond to the protest and continue

If yes, request the protestant to provide information to demonstrate that the mitigation measure is inadequate. If the protestant fails to provide the requested information within the specified time, reject the protest. If the protestant provides satisfactory information, require the applicant to respond to the protest and continue.

If no, reject the protest.

Step 3: Acceptance/Negotiation: If the protest meets the requirements, direct the applicant to respond to the protest (normally within 15 days) and to serve a copy of the response on the protestant. The applicant should be directed to file the a statement of service with the board together with the response.

Review response. If appropriate, direct the applicant and protestant to negotiate to resolve the protest. File all protest related materials.

Step 4: Protest Resolution (normally to be taken 180 after the applicant and protestant were directed to negotiate)

Have the applicant and protestant negotiated a resolution to the protest?

If yes, is the resolution acceptable to the Division/Board?

If no, notify the applicant and protestant that the condition for dismissal is unacceptable and why. Provide them with time to correct any problems.

If yes, include in the draft permit/order any necessary terms to implement the settlement.

If no, refer to the hearing unit for hearing (major projects) or schedule field investigation (minor projects)

Note: A protest can be rejected for failure to provide requested information only if the protestant has been notified by certified mail that the board will dismiss the protest if he/she fails to respond within 30 days of the request.



State Water Resources Control Board



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Environmental Protection

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Mailing Address: P.O. Box 2000 ♦ Sacramento, California 95812-2000
FAX: 916.341.5400 ♦ www.waterrights.ca.gov

Arnold Schwarzenegger
Governor

In Reply Refer To:
XXX:XXXX

Applicant/Agent
Applicant/Agent Address

Dear Applicant/Agent:

PROTEST OF APPLICATION XXXXX OF _____ TO APPROPRIATE WATER FROM _____
IN _____ COUNTY

The Division of Water Rights (Division) received your response in regards to the protests filed by _____ indicating their concerns have not been satisfied. The issues raised by the Protestant(s) include water availability and environmental concerns that should be addressed when the Water Availability Analysis and/or analysis of cumulative flow related impacts is prepared and measures to address environmental considerations have been identified. The Division expects the parties to continue protest negotiations as further information becomes available.

If you have questions regarding this matter, please contact me at (916) XXX-XXXX or at
_____@waterboards.ca.gov.

Sincerely,

cc: Protestant
Protestant Address