

STATE OF CALIFORNIA
STATE WATER RIGHTS BOARD

In the Matter of Application 21516
of Raymond W. and Edna K. Hansen
to Appropriate from the Russian River
in Mendocino County

Approved by
Decision 1333
Decision D 1247

ADOPTED MAR 30 1966

1247

DECISION APPROVING APPLICATION

Application 21516 of Raymond W. and Edna K. Hansen having been filed; protests having been received; a public hearing having been held before the State Water Rights Board on September 8, 1965, conducted by Kent Silverthorne, Chairman; applicants and protestant Sonoma County Flood Control and Water Conservation District having appeared and presented evidence; the evidence received at the hearing having been duly considered; the Board finds as follows:

1. Application 21516 is for a permit to appropriate 0.7 cubic foot per second (cfs) by direct diversion from May 1 to November 1 of each year for irrigation purposes from the Russian River in Mendocino County. The point of diversion is located within the $SE\frac{1}{4}$ of $NE\frac{1}{4}$ of Section 30, T13N, R11W, MDB&M.

2. The applicants' diversion system is already installed, and upon completion of land leveling, the water will be used to irrigate approximately 56 acres of pear orchard. The applicants claim a riparian right to the use

of water from the river on the place of use described in their application.

3. Protestant Sonoma County Flood Control and Water Conservation District (hereinafter referred to as "Sonoma District") and Mendocino County Russian River Flood Control and Water Conservation Improvement District (hereinafter referred to as "Mendocino District") hold Permits 12947 and 12948 (Applications 12919A and 12920A) to appropriate water from the East Fork of the Russian River and the Russian River for their Coyote Valley Project. These permits, in accordance with the Board's Decision D 1030, contain the following term:

"These permits are subject to rights acquired or to be acquired pursuant to applications by others whether heretofore or hereafter filed for use of water within the service area of Mendocino County Russian River Flood Control and Water Conservation Improvement District and within the Russian River Valley in Sonoma County, as said valley is defined in Decision D 1030 of the State Water Rights Board at page 9, to the extent that water has been beneficially used continuously on the place of use described in said applications since prior to January 28, 1949, (the date of filing Applications 12919 and 12920)."

4. Official notice is taken of subsequent Board Decisions D 1110 and D 1142 which found that no water, in addition to the water covered by the permits of the Districts, was available for appropriation from the Russian River during the months of July through October. These months constitute the major portion of the applicants' diversion season. During the remainder of the applicants' diversion season, there is sufficient water available during most years to supply the applicants and the holders of prior rights.

5. The use of water proposed by the applicants is within the service area of the Mendocino District. Therefore, approval or denial of Application 21516 for the months of July through October hinges on whether the quantity of water applied for has been beneficially used continuously on the applicants' place of use since prior to January 28, 1949, within the meaning of the permit term set forth in Paragraph 3 of this decision.

6. The place of use designated by the application was irrigated with water from the Russian River prior to and through the year 1949. The use of water for this purpose continued every year until 1962 except for an interruption in the year 1950 or 1951 for land leveling operations. In 1956, a part of the land was not irrigated due to flooding and destruction of crops by silt deposits. The land had been tenant-operated since prior to 1952. It was not leased and no irrigated crops were grown in 1962 and 1963 because of efforts by the then owner to sell the land. Applicants purchased it and filed this application in the fall of 1963. During the summer of 1964 they releveled the land in preparation for planting an orchard. Floods during the winter of 1964-65 disrupted the leveling that had been completed and the work was done over again in 1965 preparatory to planting fruit trees the following year.

7. "Continuously" has been defined by the law governing prescriptive water rights and the law governing forfeiture of water rights through nonuse. The reasons for

the strict requirement of uninterrupted use in the acquisition of a prescriptive right do not apply to the present circumstances. An adverse user obtains his right through invading the right of another and his use is the outward manifestation of the necessary intent to acquire such a right. On the other hand, water users requesting a permit on the basis of the condition in the Districts' permits provided by Decision D 1030 have, by reason of special circumstances, already been recognized to have at least an equitable right to the water. The Board has previously determined that unappropriated water is available to satisfy such applications because the Districts' permits are not a bar to their approval. The only function of the Board that remains is to determine in each instance whether the applicants' use comes within the permit condition and, if it does, to issue a permit. Therefore, the standard to be applied in determining continuity of use since 1949 should be the same as that applied in cases involving loss of a water right by forfeiture for nonuse, that is, unexcused failure to beneficially use all or any part of the water claimed by the user for the purpose for which it was appropriated for a period of at least three years (Water Code Section 1241).

8. The Board, consistent with the general policy of the law which does not favor forfeitures, has not held a licensee to strict account for nonuse of water due to destruction of diversion facilities by floods, governmental restrictions, and other circumstances in which a prudent man, following the

dictates of good husbandry, either could not or should not reasonably be expected to use the water during the interim.

9. Use of water on applicants' land has been continuous since 1949 within the meaning of Decision D 1030.

10. The Department of Fish and Game did not appear in support of its protest. Decision D 1030 requires the Districts to maintain certain flows at various points along the Russian River for the protection of fishlife without regard to streamflow depletions by others having rights superior to those of the Districts. Therefore, approval of Application 21516 should not interfere with the Russian River as a fishery resource.

11. There is unappropriated water available to supply the applicants, and subject to suitable conditions, such water may be diverted and used in the manner proposed without causing substantial injury to any lawful user of water.

12. The intended use is beneficial.

From the foregoing findings, the Board concludes that Application 21516 should be approved and that a permit should be issued to the applicants subject to the limitations and conditions set forth in the following Order.

ORDER

IT IS HEREBY ORDERED that Application 21516 be, and it is, approved, and that a permit be issued to the applicants subject to vested rights and to the following limitations and conditions:

1. The water appropriated shall be limited to the quantity which can be beneficially used and shall not exceed 0.7 cubic foot per second by direct diversion to be diverted from about May 1 of each year to about November 1 of each year. The equivalent of such continuous flow allowance for any thirty-day period may be diverted in a shorter time if there be no interference with vested rights.

2. The maximum quantity herein stated may be reduced in the license if investigation warrants.

3. Complete application of the water to the proposed use shall be made on or before December 1, 1969.

4. Progress reports shall be filed promptly by permittee on forms which will be provided annually by the State Water Rights Board until license is issued.

5. All rights and privileges under this permit, including method of diversion, method of use, and quantity of water diverted are subject to the continuing authority of the State Water Rights Board in accordance with law and in the interest of the public welfare to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of said water.

6. Permittee shall allow representatives of the State Water Rights 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.

7. Upon a judicial determination that the place of use under this permit or a portion thereof is entitled to the use of water by riparian right, the right so determined and the right acquired under this permit shall not result in a combined right to the use of water in excess of that which could be claimed under the larger of the two rights.

Adopted as the decision and order of the State Water Rights Board at a meeting duly called and held at Sacramento, California, on the day of 1966.

/s/ Kent Silverthorne
Kent Silverthorne, Chairman

/s/ Ralph J. McGill
Ralph J. McGill, Member

/s/ W. A. Alexander
W. A. Alexander, Member