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STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Application 23826)	
of Clark B. Clayton to Appropriate)	
from Crooks Creek and an Unnamed Dry)	Decision 1437
Wash Tributary to South Fork Pit River)	
in Modoc County.)	
)	

DECISION APPROVING APPLICATION IN PART

Clark B. Clayton having filed Application 23826 for a permit to appropriate unappropriated water; protests having been received; the applicant and the only protestant whose protest was not withdrawn having stipulated to proceedings in lieu of hearing as provided for by Title 23, California Administrative Code, Section 737; an investigation having been made by the State Water Resources Control Board pursuant to said stipulation; the Board, having considered all available information, finds as follows:

The Application

1. Application 23826 is for a permit to appropriate one cubic foot per second (cfs) by direct diversion from January 1 to December 31 of each year and 18 acre-feet per annum (afa) by storage to be collected from November 1 of each year to April 15 of the succeeding year for stockwatering and recreational use at reservoir and for irrigation purposes from Crooks Creek and an unnamed dry wash, both tributary to South Fork Pit River in Modoc County. Two points of diversion from Crooks Creek are to be located in Section 16, and the dry wash point of diversion, where Clayton Reservoir is located, is in Section 17, T39N, R13E, MDB&M.

The Sources

2. Crooks Creek is a small mountain stream which rises from some springs, flows a little westerly of north for one mile, and then almost due north for a mile and a half, where it joins South Fork Pit River. The unnamed dry wash where the application reservoir is located is a swale, situated a little less than a mile northwesterly of the headwaters of Crooks Creek.

Applicant's Project and Past Use of Water from Crooks Creek

3. The applicant has in the past used water from Crooks Creek by a right defined in a court decree in 1913 in Case No. 1827 of the Superior Court of Modoc County, W.H. Nelson v. D.P. McKee, et al. The decree allotted Clayton's predecessor, Nelson, three-fourths of the flow of Crooks Creek for irrigation of a quarter-section of land located just a quarter of a mile south of the point where Crooks Creek flows into South Fork Pit River. The direct diversion portion of this application was filed for the purpose of authorizing the applicant to divert the water to lands most of which are not authorized as a place of use by the decree in Nelson v. McKee. Thirty acres specified as part of the application place of use are within the same area as authorized by the decree, forty adjacent acres are just outside the decreed place of use, and the remaining eighty acres are a half mile south and upstream and include Clayton Reservoir.

4. The applicant constructed Clayton Reservoir to collect 18 afa for use in the summer season to augment the flow of the creek. The upper portion of the old diversion ditch previously used by the applicant has now been abandoned, a new point of diversion upstream has been established, and the new upper ditch extends to the reservoir for off-stream storage. Near the reservoir a division point is located at which the water can be routed around the reservoir for use on applicant's upper eighty acres, thence by the remaining part of the old ditch to protestant's property, and ultimately to applicant's lower place of use.

5. An adjudication and court reference of rights to water of the South Fork Pit River about forty years ago did not include Crooks Creek or the water rights of the applicant or the protestant, or their predecessors.

Protestant's Use of Water

6. The 1913 decree allots one-fourth of the flow of Crooks Creek to the predecessor of protestant, the United States Bureau of Indian Affairs. The place of use authorized by the decree is eighty acres which separates applicant's upper and lower places of use. Water is presently supplied to the protestant for domestic, stockwatering and irrigation use by the same ditch which delivers water to applicant's lower acreage.

Water Supply

7. The 1913 decree indicated that about 0.40 cfs flowed in Crooks Creek at the beginning of the irrigation season. Its measured flow on September 29, 1972, was 0.15 cfs.

Flow of water in the unnamed dry wash which runs into the reservoir occurs only during times of rainfall. The applicant estimates that about 4 afa would be available from this source. The remainder of the 18 afa would be supplied from Crooks Creek by the new upper ditch.

Discussion

8. Although the 1913 decree allocated the entire flow of Crooks Creek, the decree neither authorized nor confirmed the right of either party to store any water during the winter and spring months for use in the summer. The storage portion of the application would supplement the decree in this respect. The portion of the winter and spring flow of Crooks Creek which in the past has been unused is unappropriated water, and is far more than ample to supply the 18 afa requested for storage. The storage part of the application will be approved, but with conditions to assure noninterference with the right of the protestant.

9. In the irrigation season, the flows of Crooks Creek are used in full by the parties under their decreed rights. No unappropriated water is available as required for approval of the direct diversion portion of the application during the irrigation season.

10. Apart from the questions of availability of unappropriated water, the only effect of approving the direct diversion portion of the application would be to authorize use of water on a place of use not authorized by the decree. The Board has no authority to approve or disapprove a change of place of use except with respect to water appropriated under the Water Commission Act or the Water Code (Water Code Section 1700). The 1913 decreed rights antedate the Water Commission Act, so the Board lacks jurisdiction with respect to these proposed changes. The direct diversion part of the applications is, therefore, denied.

11. Water Code Section 1706 does authorize persons entitled to the use of water other than under the Water Commission Act or the Water Code to change a point of diversion or place of use and to make incidental changes in a diversion ditch, if others are not injured by the changes. This section authorizes a court, not this Board, to determine whether applicant's new point of diversion, new upper ditch, and enlarged place of use, all of which are used in the exercise of applicant's decreed right, operate or will operate to the injury of rights of the U. S. Bureau of Indian Affairs.

12. The lower application point of diversion on Crooks Creek does not relate to storage, and is denied. The other two points of diversion named in the application are used to divert water to the storage reservoir.

13. Unappropriated water is available to supply the storage requested by the applicant, 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.

14. The intended use is beneficial.

15. The Board's initial study of applicant's project pursuant to the California Environmental Quality Act indicated that the project would not have a significant effect on the environment. A Negative Declaration to that effect was prepared and circulated in accordance with administrative regulations. No adverse comments having been received, the Board confirms the Negative Declaration.

From the foregoing findings, the Board concludes that Application 23826 should be approved in part and that a permit should be issued to the applicant subject to the limitations and conditions set forth in the order following.

The records, documents, and other data relied upon in determining the matter are: Application 23826 and all relevant information on file therewith, particularly the report of field investigation made September 29, 1972.

ORDER

IT IS HEREBY ORDERED that Application 23826 be approved in part and that a permit be issued to the applicant 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 18 acre-feet per annum by storage to be collected from November 1 of each year to April 15 of the succeeding year.

The maximum rate of diversion to offstream storage shall not exceed three-fourths of the flow in Crooks Creek at the diversion point. No water shall be diverted under this permit until permittee has installed a device at his point of diversion to accurately bypass one-fourth of the flow of Crooks Creek. Said device shall meet the approval of the State Water Resources Control Board and shall be properly maintained.

2. The amount authorized for appropriation may be reduced in the license if investigation warrants.

3. Construction work shall be completed on or before December 1, 1975.

4. Complete application of the water to the proposed use shall be made on or before December 1, 1976.

5. Progress reports shall be submitted promptly by permittee when requested by the State Water Resources Control Board until license is issued.

6. 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 prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of said water.

This continuing authority of the Board may be exercised by imposing specific requirements over and above those contained in this permit with a view to minimizing waste of water and to meeting the reasonable water requirements of permittee without unreasonable draft on the source. Permittee may be required to implement such programs as (1) reusing or reclaiming the water allocated; (2) restricting diversions so as to eliminate agricultural tailwater or to reduce return flow; (3) suppressing evaporation losses from water surfaces; (4) controlling phreatophytic growth; and (5) 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.

7. 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.

8. 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.

9. This permit is subject to any agreement between the permittee and protestant United States Bureau of Indian Affairs which relates to the location, construction and operation of a division structure on Crooks Creek or on the old ditch or new ditch. In the absence of such agreement or of a court order with respect to a division point, the board may prescribe such location, construction and operation of a division structure as in its dis-

cretion may be needed to prevent injury to protestant's right to one-fourth of the flow of Crooks Creek as a result of appropriation to storage authorized by this permit.

Dated: July 18, 1974

W. W. ADAMS

W. W. Adams, Chairman

RONALD B. ROBIE

Ronald B. Robie, Vice Chairman

ROY E. DODSON

Roy E. Dodson, Member

MRS. CARL H. (JEAN) AUER

Mrs. Carl H. (Jean) Auer, Member

W. DON MAUGHAN

W. Don Maughan, Member