

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Application 26056
and of the Alleged Illegal Diversion by
ROBERT S. REIS, ET UX.
Applicants and Diverters
MARCEL J. CASENAVE, ET AL.
Protestants and Complainants

DECISION 81-1575

Source: Judd Creek

County: Tehama

DECISION APPROVING APPLICATION 26056 AND
DIRECTING THE CESSATION OF A DIVERSION AND USE OF WATER
IN VIOLATION OF SECTION 2, ARTICLE 10 OF
CALIFORNIA CONSTITUTION

BY THE BOARD:

Robert S. Reis and his wife Kato M. Reis having filed Application 26056 for a permit to appropriate unappropriated water from Judd Creek, protests having been received; a complaint alleging a diversion of water in violation of Section 2, Article 10 of the California Constitution and in absence or in excess of any right to the use of water having been filed by Marcel J. Casenave against Robert S. Reis, et ux.; a hearing having been held on Application 26056 and on said complaint on October 17, 1980; the Board having considered all evidence in the record; the Board finds as follows:

Substance of the Application

1. Application 26056, as amended, is for a permit to appropriate 12 acre-feet per annum (afa) to offstream storage from December 1 to April 1 from Judd Creek tributary to North Fork Antelope Creek. Water will be diverted from a point within SW $\frac{1}{4}$ of SW $\frac{1}{4}$, Section 3, T28N, R2E, MDB&M^{1/}. The purposes of use named in the application are irrigation, stockwatering, recreation, and wildlife

^{1/} The application also designates a point within the SE $\frac{1}{4}$ of NE $\frac{1}{4}$, Section 9, T28N, R2E, MDB&M as a point of diversion. This point is the location of the offstream reservoir. Since said point is not located in any watercourse, it is not a point of diversion or of rediversion.

enhancement. However, the applicants indicated at the hearing that they did not intend to use water for irrigation or stockwatering under any right acquired under Application 26056 (RT 54, 56, 57). The Board understands these statements to be a request to the Board to amend Application 26056 by deleting irrigation and stockwatering as purposes of use.

Applicants' Project

2. The applicants have constructed a plastic lined pond for swimming and an offstream reservoir within the SE $\frac{1}{4}$ of NE $\frac{1}{4}$, Section 9, T28N, R2E, MDB&M. The diversion point on Judd Creek is about 3,700 feet from the offstream reservoir. The water is conveyed from Judd Creek to the offstream reservoir by gravity flow earth ditch. The diversion point on Judd Creek consists of an opening about 4-5 feet in width in the bank of Judd Creek. Since the bottom of the ditch is lower than the bed of Judd Creek, the ditch diverts a substantial portion of the natural flow of Judd Creek. The applicants regulate the flow into the ditch by placing rocks in the bottom of the ditch.

3. The applicants also claim a pre-1914 appropriative right to the use of water from Judd Creek year round in an amount of six miners inches. The point of diversion and conveyance system for this alleged right is the same as for the project contemplated by Application 26056.

4. The applicants propose to divert water to storage in their reservoir from December 1 to April 1 under their permit right.

Throughout the year water would also be diverted in exercise of applicants' alleged pre-1914 appropriative right; this water would be released from the earth ditch at various turnouts to irrigate the portion of the applicants' meadow (Brazell Meadows) upgradient from the applicants' reservoir. A portion of the water would be passed through the reservoir. The outflow

from the reservoir would then irrigate the lower portion of Brazell Meadows. Any water not consumed for irrigation flows into an unnamed stream tributary to the North Fork of Antelope Creek. In a field investigation conducted on October 7, 1980, surface hydraulic continuity did not exist between the irrigation return flow and North Fork Antelope Creek. However, since that day was hot and since flow was observed about 100 yards above the confluence of the unnamed stream and North Fork Antelope Creek, there would be surface hydraulic continuity some of the time.

5. The applicants have specified six miners inches as the rate of diversion to offstream storage in Application 26056. However, as a result of evaporation and seepage losses, it is unlikely that any water will reach the reservoir via the existing 3,700-foot earth ditch if it is diverted at that rate. Six miners inches is 0.15 cubic feet per second (cfs) (see discussion on pg. 4, below). The staff's October 7, 1980 pre-hearing inspection determined that the ditch loss was 0.20 cfs when 0.45 cfs was measured at the head of the ditch. In order that the applicants can divert at a rate which will allow water to reach their reservoir, a term will be inserted in the permit authorizing diversion at a rate greater than six miners inches so long as the total diversion does not exceed the equivalent of a six miners inch diversion over the four month diversion season and so long as instream uses and vested rights are not interfered with. An additional term will be added to the permit reserving jurisdiction to modify the permitted rate of diversion to offstream storage if this is found to be necessary for protection of instream uses. This term is necessary because there is currently no evidence in the record regarding instream flow needs downstream from applicants' proposed diversion. The Department of Fish and Game agreed to a 0.15 cfs diversion rate

(see discussion below) but made no comment regarding instream flow needs. We assume the Department concluded that sufficient flow would remain in the stream to provide reasonable protection of instream uses if the diversion at no time exceeded 0.15 cfs. Since we now intend to permit a diversion in excess of this rate in order to allow water to reach the applicants' reservoir, we are reserving jurisdiction to allow a modification in the permitted rate of diversion if a period of actual operation demonstrates that instream beneficial uses are unreasonably affected by diversion at a rate exceeding 0.15 cfs.

The record does not indicate whether the rate of diversion to offstream storage of six miners inches applied for is under a six- or four-inch pressure head (RT 25). We will use the "Statutory Miner's Inch" which means a six-inch pressure head. Thus, the rate of diversion to offstream storage is 0.15 cfs.

Protests and Complaint

6. Protests against the approval of Application 26056 were filed as follows: Marcel Casenave, United States Water and Power Resources Service (Service), Henry Edwards, and Los Molinos Mutual Water Company. The Service's protest was dismissed on the basis that certain standard terms will be included in any permit issued by the Board on streams tributary to the Sacramento-San Joaquin Delta.

7. Protestant Casenave's protest alleged that approval of Application 26056 was contrary to law and would injure his vested right. Protestant Casenave also filed a complaint against the applicants' exercise of their alleged pre-1914 appropriative right. Protestant Casenave claims that the applicants are not putting water to beneficial use, and that water is being wasted.

8. Protestant Casenave owns property about four miles downstream of the applicants' point of diversion on Judd Creek. Protestant Casenave diverts water for domestic use from Judd Creek. In addition, Protestant Casenave has developed a tree farm on his property. He irrigates a nursery of small trees under the exercise of a riparian right. These trees are later transplanted to other locations on the property where they presently receive no irrigation. Protestant Casenave has filed Statement of Water Diversion and Use No. S9646 regarding said use.

9. Protestants Edwards and Los Molinos Mutual Water Company are in excess of 20 miles downstream of the applicant. They have filed Statements of Water Diversion and Use Nos. 3134 and 2908 respectively. Both statements indicate use of water throughout the entire year.

10. Protestant Edwards also protested Application 26056 on the grounds that the proposed appropriation will be contrary to law and that it will not best conserve the public interest.

Department of Fish and Game

11. Subsequent to the hearing, the Department of Fish and Game (Department) was contacted to assure that the Department would have an opportunity to express its views on the record (the record was held open for this purpose). After being contacted, the Department conducted its own investigation on November 4, 1980, and made the following recommendation.

"We recommend that for maintenance of aquatic habitat in Judd Creek downstream from point of diversion, the maximum amount of water to be diverted from Judd Creek be 0.083 cfs as filed in Application 26056."^{2/}

^{2/}0.083 cfs was the rate of direct diversion on Application 26056. The applicant subsequently deleted the portion of his application which sought a permit for direct diversion. The Department mistakenly used this number as the rate of diversion to offstream storage. The rate of diversion to offstream storage actually applied for was six miners inches. The Department's apparent misunderstanding was pointed out in a letter from Board staff to the Department dated February 23, 1981. The letter explained that the Board would assume that the Department accepted a rate of diversion to offstream storage equivalent to six miners inches unless the Department objected within a specified period. No objection was received.

Availability of Unappropriated Water

12. The Judd Creek watershed above the Reis point of diversion comprises approximately 2,800 acres. In the absence of stream flow data on Judd Creek, runoff was estimated using precipitation data reported at Mineral, approximately three miles northeast of the subject watershed. Runoff was estimated only for the diversion season requested in Application 26056. Based on a 50 percent runoff factor, the 12 acre-feet under Application 26056 is minuscule compared to the expected runoff from the watershed between December 1 and April 1.

13. The protestants and complainant did not attempt to show that unappropriated water is not available during the months of December through March.

Illegal Diversion of Water by the Applicant:

14. The applicants claim a pre-1914 appropriative right to divert water from Judd Creek in the amount of 6 miners inches. The complaint filed herein raises three issues concerning this claim: (1) Has the claimed right been lost by no beneficial use of water for a continuous period of five years when water was available under the priority of right^{3/}; (2) Have the applicants diverted water in excess of their claimed right; and (3) Has the exercise of this purported right been in violation of Section 2, Article 10 of the California Constitution? The latter question will be considered in a later portion of the decision.

15. The applicants claim to have diverted water from Judd Creek under the exercise of their alleged pre-1914 appropriative right since the time they purchased the property in 1973 and 1974 (Applicants' Exhibits 2 and 3). The applicants also produced written statements from long-time residents of the area and previous owners of their property indicating that water has been continuously

^{3/} A pre-1914 appropriative right may be lost by no beneficial use of water for a continuous period of five years. Smith v. Hankins (1895), 110 Cal. 122. However, water must be available under the priority of right.

diverted to applicants' property since prior to 1914 (Applicants' Exhibits 4, 5 and 7). Applicants produced no non-hearsay evidence of continuous use since prior to 1914. On the other hand, complainants produced no evidence tending to show non-use of the right. As a matter of fact, complainants admitted the ditch involved has been used "from time immemorial." (RT 67). Therefore, we do not have sufficient evidence to conclude that there has been non-use of water for the 5-year forfeiture period.

16. The evidence concerning the second issue (whether the applicant has been taking water in excess of his claimed pre-1914 right) is not clear. Complainants contend that the applicants' ditch was of a much smaller capacity prior to being enlarged by applicants in the recent past. Applicants admitted that they had had the ditch backhoed twice since they purchased the property (RT 17). The evidence at the hearing abundantly established that the regulation of the diversion from Judd Creek is most imprecise (RT 54, 55). There is no diversion structure or measuring device of any kind at the point of diversion. The applicants stated, both on their application form and at the Board's hearing, that they claimed a pre-1914 right to divert six miners inches (0.15 cfs). During a field inspection on October 18, 1978, Board staff measured a flow of about 0.7 cfs (or more than four times the claimed pre-1914 right) entering the applicants' ditch (Staff Exhibit 1, Complaint Investigation Report dated May 15, 1979). Measurements taken by Board staff during another field inspection, on October 7, 1980, indicated that the flow into applicants' ditch was three times the applicants' claimed pre-1914 right (RT 98). The applicants' present inability to regulate their diversion from Judd Creek precludes the applicants from knowing the amount of water they are in fact diverting and from conforming their diversion to the limits of their pre-1914 right.

17. Although applicant Mr. Reis testified and the applicants' application form stated that their claimed pre-1914 right was for six miners inches, we have reason to believe that they may have been in error. On two occasions Board staff took measurements of the ditch losses in applicants' diversion ditch and found the ditch losses alone to be well in excess of six miners inches. (Staff Exhibit 1, Staff Reports dated May 15, 1979 and October 7, 1980.) For this reason, the Board is unable to conclude at this time the amount of the applicants' pre-1914 right in order to determine whether they have been diverting in excess of that right. However, this order places restrictions on the exercise of the right in order to correct past non-beneficial use of water (see discussion entitled "Section 2, Article 10 of the California Constitution", below). These restrictions may very well provide the relief sought by complainant Casenave. If after a period of operation consistent with these restrictions, the amount of applicants' pre-1914 right continues to be a serious issue the Board will conduct further investigations as necessary to conclude whether that right has been exceeded.^{4/} The order herein contains a provision requiring the applicants to exercise their existing right in conformity with law. Therefore, if subsequent investigation is necessary and if the applicants fail to conform their water use under their pre-1914 right to what the Board concludes are the limits of the right based upon such investigation, the Board would have the option of revoking the permit as well as taking any of the other enforcement actions available to it under law.

Section 2, Article 10 of the California Constitution

18. The present exercise of the applicants' purported pre-1914 appropriative right is a violation of Section 2, Article 10 of the California

^{4/} The Board does not have the legal authority to ultimately decide the existence or extent of a pre-1914 water right; only a court can do this. The Board may, however, make a preliminary decision regarding these issues as necessary to decide whether the Board should pursue an action for trespass pursuant to Water Code Section 1052.

Constitution. The applicants have no method of controlling or measuring the flow into their ditch and therefore no method of determining whether they are operating in conformity with their pre-1914 right and limiting their diversion to the amount to which they are legally entitled. This is an unreasonable method of diversion and must be ceased. In addition, the applicants continuously divert water from Judd Creek into the ditch which carries the water to their property, then run the water through their reservoir and, finally, allow it to flow out of the reservoir after which it meanders through and irrigates a small portion of their lower meadow. If the flow is great enough, it eventually reaches the North Fork of Antelope Creek. During dry periods, surface flow may dissipate before reaching Antelope Creek. During periods of low flow, most of the natural flow of Judd Creek enters the applicants' diversion ditch. (Staff Exhibit 1, Inspection Report dated December 10, 1979.) The applicants executed a lease of a portion of their property for grazing of cattle for the fall of 1980. The alleged pre-1914 right is presently exercised for irrigation of the lower portion of applicants' meadow, for stockwatering and for maintaining the level of applicants' recreational reservoir and their swimming hole. However, the field investigations by the Board staff indicate that Brazell Meadows contains springs whose natural flow provides water for the first two uses (RT 91-95). Consequently, the diversion of water from Judd Creek for irrigation of the lower meadow and stockwatering is for no useful or beneficial purpose and is a waste prohibited by Section 2, Article 10 of the California Constitution. In addition, the continuous diversion of water from Judd Creek into the applicants' swimming hole and reservoir is wasteful and a violation of Section 2, Article 10. No evidence was presented that a continuous diversion was necessary to maintain the pool and reservoir. There was substantial testimony that a significant quantity of water merely

flows through the reservoir and is discharged into the lower portion of the applicants' meadow which is already well watered by springs in the meadow (RT 26. 31, 91-95).

19. We have concluded that the applicants are using an unreasonable method of diversion and that this must be ceased by the installation of a diversion structure and measuring device as discussed above. This conclusion is unconditional. On the other hand, our conclusion that the present use to which the applicants are putting the water diverted under their alleged pre-1914 right is not beneficial and is wasteful is a limited one.

It only means that the present exercise of the alleged pre-1914 right is wasteful and not beneficial. The Board does not speculate whether the applicants will find a means to exercise their right in conformance with Section 2, Article 10 of the California Constitution. Since the Board has already concluded that we do not have sufficient evidence of a forfeiture of said right, the applicants should be allowed to continue to exercise their alleged pre-1914 right so long as this is done in conformance with Section 2, Article 10 of the California Constitution. The order herein directs the applicants to cease diversion and use of water in violation of Section 2, Article 10 of the California Constitution and authorizes the Chief of the Division of Water Rights to refer the matter to the Attorney General's office for appropriate enforcement action if the applicants do not comply with this order. The order also provides that as a condition of the applicants' permit, the applicants must cease wasting water under their alleged pre-1914 right.

Resolution of Objections to Introduction of Evidence at the Hearing

20. Two objections to the introduction of evidence were made by Protestant Edwards at the hearing. First, Protestant Edwards objected to the introduction of any exhibits by the applicants because of the alleged failure of the applicants to comply with Section 733.5(c) of Title 23, California Administrative Code, which requires an applicant to submit a copy of each exhibit to other parties at least ten days prior to the date of the hearing (RT 8). The second objection related to certain exhibits as being inadmissible hearsay (RT 113). The Hearing Officer received such exhibits into evidence subject to a Motion to Strike. The ruling on the Motion was reserved to this decision (RT 123). Said motion is hereby denied for both objections. At the hearing it was established that the exhibits were in fact sent by the applicants in conformity with Section 733.5(c). The Board did not receive the exhibits until the day of the hearing. Because the parties and the Board did not receive the documents in time to review them prior to the hearing, the Board took a recess to allow the parties and the Board to review the documents. This action eliminated any prejudice to the parties. The second objection relates to the introduction of hearsay evidence. Said evidence is admissible in Board hearings. The fact that it is hearsay goes to the weight and not the admissibility.

Environmental Considerations

21. This Board decision authorizes the collection and storage of water in an existing reservoir with a capacity of 12 af. Such activity constitutes only a minor modification to land, and such activity is thereby

exempt from the provisions of the California Environmental Quality Act (Public Resources Code Section 21000, et seq.) in accordance with Section 15104, Chapter 3, Title 14, California Administrative Code.

Conclusions

22. From the foregoing findings, the Board concludes that water is available for appropriation and that Application 26056, as amended, should be approved, that a permit should be issued to the applicants subject to the terms and conditions set forth in the order following, and that the applicants should be directed to cease diverting and using water in violation of Section 2, Article 10 of the California Constitution.

ORDER

IT IS HEREBY ORDERED that Application 26056 be approved and a permit be issued to the applicants subject to vested rights. The permit shall contain all applicable standard permit terms (5i, 6, 10, 11, 12 and 13)* in addition to the following conditions:

1. The water appropriated shall be limited to the quantity which can be beneficially used and shall not exceed 12.0 acre-feet per annum to be collected from December 1 of each year to April 1 of the succeeding year.

2. Complete application of the water to the proposed use shall be made on or before December 1, 1985.

3. After the initial filling of the storage reservoir, permittees' right under this permit extends only to water necessary to keep the reservoir full by replacing water lost by evaporation and

* A copy of the Board's standard permit terms is available upon request.

seepage, and to refill if emptied for necessary maintenance or repair. Such right shall be exercised only during the authorized diversion season.

4. The maximum rate of diversion to offstream storage shall not exceed 0.15 cubic feet per second.

5. No water shall be diverted under this permit until permittee has installed a permanent diversion structure and measuring device satisfactory to the Board to facilitate regulation of the diversions from Judd Creek as necessary to comply with the terms of this permit. The measuring device shall be properly maintained by the permittee. Applicant shall install said diversion structure and measuring device on or before October 15, 1981.

6. This permit is subject to the continuing authority of the State Water Resources Control Board to reduce the amount of water named in the permit upon a finding by the Board that the amount is in excess of that reasonably needed to be held in storage for the authorized uses. No action will be taken by the Board without prior notice to the owner and an opportunity for hearing.

7. The equivalent of the rate of diversion to offstream storage during the authorized diversion season may be diverted in a shorter time, provided there be no interference with other vested rights and instream beneficial uses; and provided further that all terms or conditions protecting instream beneficial uses be observed.

8. The State Water Resources Control Board reserves jurisdiction over this permit to change the rate of diversion to offstream storage if necessary for protection of instream beneficial uses or vested rights. Action to change the rate of diversion to offstream storage will be taken only after notice to interested parties and opportunity for hearing.

9. Permittee shall divert and use water under his claimed pre-1914 right in a reasonable, beneficial non-wasteful manner as required by Article 10, Section 2 of the California Constitution and otherwise in accordance with law.

10. The State Water Resources Control Board reserves jurisdiction over this permit to change the season of diversion to conform to the results of a comprehensive analysis of the availability of unappropriated water in the Sacramento River Basin. Action to change the season of diversion will be taken only after notice to interested parties and opportunity for hearing.

11. This permit is subject to prior rights. Permittee is put on notice that during some years water will not be available for diversion during portions or all of the season authorized herein. The annual variations in demands and hydrologic conditions in the Sacramento River Basin are such that in any year of water scarcity the season of diversion authorized herein may be reduced or completely eliminated on order of this Board made after notice to interested parties and opportunity for hearing.

12. No diversion is authorized by this permit when satisfaction of inbasin entitlements requires release of supplemental Project water. The Board shall advise permittee of the probability of imminent curtailment of diversion as far in advance as practicable based on anticipated requirements for supplemental Project water provided by the Central Valley Project or the State Water Project operators. The Board shall notify the permittee of curtailment of diversion when it finds that no water is available for diversion under this permit.

For the purpose of initially determining supplemental Project water required for inbasin entitlements, the following definitions shall apply:

a. Inbasin entitlements are defined as all rights to divert water from streams tributary to the Sacramento-San Joaquin Delta or the Delta for use within the respective basins of origin or the Legal Delta, unavoidable natural requirements for riparian habitat and conveyance losses, and flows required by the Board for maintenance of water quality and fish and wildlife. Export diversions and Project carriage water are specifically excluded from the definition of inbasin entitlements.

b. Supplemental Project water is defined as water imported to the basin by the Projects, and water released from Project storage, which is in excess of water required for Project export and Project inbasin deliveries.

Notice of curtailment of diversion under this term shall not be issued by the Board until:

1. Project operators jointly develop and demonstrate to the Board a reasonably accurate method of calculating supplemental Project water.

2. The Board has approved the method of calculating supplemental Project water and has confirmed the definitions of inbasin entitlements and supplemental Project water after public hearing.

3. The Project operators have notified the Board that the release of supplemental water is imminent or has occurred. Such notice should include the times and amounts of releases or potential releases.

4. The Board finds that supplemental Project water has been released or will be released.

IT IS HEREBY FURTHER ORDERED that the applicant cease diverting and using water in violation of Section 2, Article 10 of the California Constitution as described in Findings 18 and 19 of this decision. If the applicant fails or refuses to cease said illegal diversion and use, the Board directs the Chief of the Division of Water Rights to refer the matter to the Attorney General for appropriate enforcement action.

Dated: June 18, 1981


Carla M. Bard, Chairwoman


L. L. Mitchell, Vice Chairman


Jill B. Dunlap, Member


F. K. Aljibury, Member

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