

Files

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Permits 15479, 15480,
15481 and 15482, Issued on Applica-
tions 22491, 22492, 22493 and 22494,
Respectively,

GEORGE R. HEATH,

Permittee.

Order: WR 74-25

Source: Certain Unnamed
Streams

County: Lassen

ORDER DIRECTING ISSUANCE OF LICENSES

BY BOARD MEMBER DODSON:

A hearing having been held pursuant to Section 1410 of the Water Code before the State Water Resources Control Board on August 15, 1973, in the Resources Building, 1416 Ninth Street, Sacramento, California, for the purpose of determining whether licenses should be issued for the amounts of water placed to beneficial use under the terms of Permits 15479, 15480, 15481 and 15482 or the permits should be revoked in accordance with Water Code Section 1410, which provides that the Board shall revoke permits after hearing if the project is not completed as contemplated in the permits; due notice of the time, place, and nature of said hearing having been given by certified mail to said permittee; said notice having been received, as is evidenced by signed return receipt; said permittee having appeared at said hearing; evidence having been presented and received at said hearing and having been duly considered, the Board finds as follows:

The Facts

Permits 15479, 15480, 15481 and 15482 were issued in the matter of Applications 22491, 22492, 22493 and 22494, respectively, on September 7, 1967, to George R. Heath for the appropriation of 3 cubic feet per second, each, from April 1 to October 1 for irrigation purposes and year-round for stockwatering purposes from certain unnamed streams tributary to Grasshopper Valley in Lassen County.

Permittee's use of water consists entirely of winter runoff flowing into a shallow lake in Grasshopper Valley which is a closed basin (RT 3). As the lake recedes during the spring and summer months, cattle feed on the natural pasture on the bottom of the lake. The unnamed streams also sustain natural pasture by wild flooding.

Except for Permit 15481, under the authority of which certain levees have been constructed to control the movement of water, no diversion works have been constructed and no physical control over the water has been exercised by the permittee (RT 3, 4).

Before the subject permits were issued the permittee represented that the water covered by the permits was to be diverted by gravity by constructing temporary log and earth dams (memorandum of H. E. Whitver of July 20, 1967; files of Application 22491).

Permittee owns the lake bottom and all the land surrounding it through which the streams flow and which are named as the place of use in the applications and permits.

The permits provide that the use of water shall be complete by December 1, 1971. Permittee having reported use of water complete, a field inspection was made by members of the Board's staff, after which a hearing was held to determine whether licenses should be issued or the permits revoked for failure of the permittee to exercise any control over the water.

The Law

Neither the Water Code nor any other statute expressly provides that an appropriator of water must actually divert water from its natural channel or otherwise exercise some form of physical control over the water. The applicable law is mostly the result of court decisions, although the Water Code does require applicants to describe the proposed place of diversion and the proposed place of use (Water Code Section 1260).

In 1961 the State Water Rights Board adopted Decision 1030 which contains the following statement:

"To the extent the Sonoma District proposes to 'appropriate' 125 cfs by simply allowing that amount of the flow in the river to remain undisturbed for the benefit of recreational facilities, the applications cannot be approved. An essential element of a valid appropriation of water is physical control, akin to possession. Physical control is usually exercised by diverting water from its natural channel, and it has been said that such diversion is necessary in order to constitute a valid appropriation (Simons v. Inyo Cerro Gordo Mining and Power Co., 48 Cal.App. 524). However, the required control may also consist in artificial regulation of natural flow within the channel itself, as by constructing dams to form recreational pools and the like."

There is no question that a water right, like any property right, requires possession, or its equivalent, in order to be legally recognized. This principle was expressly stated in Kelly v. Natoma Water Co., 6 Cal. 105 (1856), where the court announced as law the custom of the gold fields:

"Possession, or actual appropriation, must be the test of priority on all claims to use of water, whenever such claims are not dependent upon ownership of the land through which water flows."

Numerous authorities and court decisions confirm this statement. However, they are not entirely consistent as to what is meant by "possession".

Perhaps the best definition of an appropriation of water is that expressed in McDonald v. Bear River and Auburn Water and Mining Co., 13 Cal. 220, where the court said that an appropriation of water is "the intent to take, accompanied by some open, physical demonstration of the intent, and for some valuable use". (Emphasis added.) This language was quoted and relied upon in Hunter v. U. S., 388 F. 2d 148, where the Ninth Circuit Court of Appeals held that a right to appropriate water had been acquired by watering livestock directly from natural springs by a person entitled to occupy the surrounding land and who had openly used the land for grazing cattle for many years.

In Tartar v. The Spring Creek Mining Co., 5 Cal. 395, the right of the owner of a mill to appropriate the flow of a stream which operated the mill wheel in the stream channel on public land as against a later upstream appropriator was recognized.

The court explained that the first occupant of public land acquires the right of undisturbed enjoyment against all the world but the true owner, and that this right extends to anything incident to the land, including use of water. This possessory right entitles the owner to be protected in the quiet enjoyment of the use of water against a subsequent public land appropriator of the same water.

Consistent with these court decisions, the Board has accepted and approved applications to appropriate water by the owners of land bordering a stream for the purpose of allowing livestock to drink directly from the stream without any artificial regulation of the flow. It has been assumed that ownership of the land with the consequent right of access to the water supplies the necessary possessory right and that the watering of cattle supplies the necessary "open, physical demonstration of intent" to entitle the owner to apply for an appropriation of the water.

There is no apparent difference in principle between watering livestock in the natural channel of a stream by the owner or rightful possessor of adjacent land and such person grazing livestock on the land which, as the result of natural overflow from the stream, produces the pasture on which the livestock feed. In both cases the appropriation is dependent upon a right to possess the land and any water incident to the land and in both cases there is a similar open, physical demonstration of intent to appropriate the water for a valuable use.

It is concluded that water has been appropriated pursuant to Permits 15479, 15480, 15481 and 15482.

IT IS ORDERED THAT licenses be issued for the amounts of water placed to beneficial use under the terms of said permits.

Dated: August 15, 1974

We Concur:

ABSENT

Roy E. Dodson, Member

W. W. ADAMS

W. W. Adams, Chairman

ABSENT

Ronald B. Robie, Vice Chairman

MRS. CARL H. (JEAN) AUER

Mrs. Carl H. (Jean) Auer, Member

W. DON MAUGHAN

W. Don Maughan, Member