

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)

ORDER WR 81-9

Source: Judd Creek

County: Tehama

ORDER DENYING PETITIONS FOR RECONSIDERATION

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 having adopted Decision 81-1575 granting the issuance of a permit for Application 26056 and ordering the applicant to cease diverting and using water in violation of Section 2, Article 10 of the California Constitution; the Department of Fish and Game and Richard P. and Christine L. O-Sullivan having petitioned for reconsideration of Decision 81-1575; the petitions having been duly considered, the Board finds as follows:

Substance of Application, Applicants' Project and Complaint

1. The substance of the application, applicants' project and the complaint are set forth in Decision 81-1575. Repetition of those details is not necessary in this proceeding.

Petitions for Reconsideration

2. The Department of Fish and Game's (Department) Petition for Reconsideration requests the inclusion of the following condition in any permit to be issued pursuant to Application 26056:

"For the protection of fish and wildlife, permittee shall, during the period January 1 through December 31 bypass a minimum of 1.0 cubic feet per second. The total streamflow shall be bypassed whenever it is less than the designated amount for that period."

3. The O'Sullivans Petition for Reconsideration includes the following points:

a) The petitioners do not believe that the applicants are entitled to a pre-1914 appropriative right of six miners inches. Rather, they believe that the applicants' pre-1914 right is for a fluctuating amount of water depending upon the water supply in the stream and the water needs of users with higher priority rights,

b) The petitioners allege that the Board is operating outside of its jurisdiction in requiring the applicants to measure the amount of water they are diverting under their pre-1914 right after April 1 of each year. They are opposed to the installation of a permanent measuring structure for this purpose.

c) Decision 1575 should be reconsidered because the petitioners own irrigable property below the applicants' point of diversion and they were not notified of the October 17, 1980 hearing on Application 26056.

d) The petitioners contend that there is insufficient water from the springs in Brazell Meadows to adequately irrigate the meadows for grazing, and that the Board's requirement that the applicants install a device to measure their diversions from Judd Creek will hamper adequate irrigation of Brazell Meadows by not allowing sufficient water to be diverted to maintain the meadow.

Discussion

4. Although specifically notified of the Reis application, the Department did not protest it. Further, the Board's records indicate that the Department was notified of the Board's hearing and was aware well in advance of the Board's October 17, 1980 hearing of contentions by one of the parties that Judd Creek went dry as a result of diversions by the applicants (Contact Report dated October 7, 1980). In spite of this, the Department chose not to appear at the Board's hearing.

5. During the October 17, 1980, hearing on Application 26056, a party to the proceeding testified that the Department had concerns over the environmental impact of Application 26056. Furthermore, the party stated that the Department had not filed a protest because of an alleged misunderstanding of the factual circumstances regarding the application. The hearing record was held open in order to give the Department an opportunity to comment on the application. After conducting a field investigation and taking flow measurements, the Department still did not

request a minimum bypass. The Department merely sent a letter to the Board stating that it had no objection to a diversion at the rate applied for (.15 cfs).

6. Based upon measurements in the Board's records it was the opinion of the Board that no water would reach the applicant's reservoir at the diversion rate applied for (.15 cfs). Therefore, the Board ordered that the following three terms be inserted in the permit for the Reis project:

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

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.*

7. The Department stated in its petition that it now believes that a specific release flow should be included in the Reis permit for the following reasons:

a) The Department has learned that the Reis diversion occasionally diverts the entire flow of Judd Creek.

b) Decision 81-1575 allows for a greater rate of diversion to off-stream storage than stated in the application.

With regard to the first point, the decision requires the installation of a diversion structure and measuring device at the point of diversion. This will eliminate the uncontrolled diversion of most of the stream flow by the applicants that has occurred in the past. The applicants will not be allowed to divert more than they are entitled to. With respect to the second point raised by the Department, the Board has provided for future revisions in the permit for protection of instream beneficial uses (see term 8 above) if a period of operation of the project shows this to be necessary.

8. The points raised in O'Sullivan's Petition for Reconsideration will be briefly restated and addressed in the same order as presented above:

a) Contention: *The Applicant does not have a pre-1914 right to six miners inches but rather has a right that fluctuates with conditions in the area.* The decision does not confirm or establish what pre-1914 appropriative right, if any, the applicant possesses. It is a fundamental of water rights law that although an appropriative right may be stated in terms of a fixed quantity (in this case, for example, the applicants claim a pre-1914 right of 6 miners inches) the holder of the right may not always be able to take and use the maximum amount of water to which he is entitled. The stated amount of the right fixes the maximum that can ever be legally taken under that right but depending upon water supply conditions in the stream and the water needs of those with better priority rights the actual amount of water which can be taken may fluctuate from time to time.

b) Contention: *The Board has no authority to require the applicant to measure the amount of water taken under a pre-1914 right.* Under Section 2 Article 10 of the California Constitution and Section 275 of the Water Code, the Board has the responsibility to act in situations where there is waste and unreasonable use or unreasonable method of diversion of water. The Board's authority extends to the prevention of these unreasonable practices no matter what the basis of the right claimed by the party engaging in the unreasonable practice may be. The Board's authority in this regard extends to pre-1914 rights as well as any other type of water right. The Board has determined that the applicants present method of diversion consisting of an open ditch with no diversion or measurement facilities is unreasonable and that it must cease. The Board is not "interpreting pre-1914 historic water rights" by requiring the applicant to measure and control the amount of water being diverted.

c) Contention: *The Board should reconsider its decision because the petitioners own irrigable property below the applicants' and were not notified of the Board's hearing.* The Petitioners state that they "are not opposed to the Reis' reservoir nor to their appropriation of water for that reservoir during the authorized diversion season subject to all the conditions and restrictions of the permit order." They have requested reconsideration only of the Board's decision that the Reises are using an unreasonable method of diversion in the exercise of Reis' alleged pre-1914 right and are non-beneficially using the water taken under that right.

There is no way that petitioners could be adversely affected in the exercise of their own water rights by the Board's determination that an upstream diverter has been violating the Constitutional prohibitions

against unreasonable use and unreasonable method of diversion of water.

The reises will gain no additional rights to water simply by being required to measure their use of water. The Board very explicitly declined to make any findings in its decision as to whether the Reises in fact had a pre-1914 right and, if they did, what the amount of that right was. The Board simply said that, assuming the Reises continue to exercise their claimed pre-1914 right they must in the future do so only via a suitable diversion structure and measuring device. Reises cannot, by measuring their use, acquire any rights they do not already have. The Petitioners own the land on which the diversion structure and measuring device will have to be located. However, the Reises in the application claim a right of access to this area appurtenant to their claimed pre-1914 water right. The Board's decision in no way attempts to resolve any dispute that may exist between Petitioners and the Reises over access. If such a dispute exists, it will have to be resolved by settlement or in a court of law.

Since it is inconceivable that any property right of the petitioners could be adversely affected by the Board's decision regarding waste and unreasonable method of diversion of water, the fact that they were not notified of the Board's hearing in no way deprived them of any legal right.

d) Contention: *There is insufficient flow from the Springs in Brazell Meadow to adequately irrigate it, and a diversion structure and device to measure their diversion from Judd Creek will hamper adequate irrigation of the Meadow.* The decision does not say that there is sufficient spring flow to irrigate the entire Brazell Meadows. The decision only says that in the lower portion of the meadow there is sufficient spring flow for irrigation and that it is a waste and nonbeneficial use to irrigate this area further with water from Judd Creek. As previously stated, the Board drew no conclusions in

its Decision regarding the existence or amount of Reis' alleged pre-1914 right. The mere installation of a diversion structure and measuring device will not affect the Reis' ability to exercise whatever right they may have in a reasonable, non-wasteful manner.

Conclusion

9. The Board concludes that the Petitions for Reconsideration fail to raise substantial issues related to the causes for reconsideration set out in Section 737,1, Title 23, California Administrative Code.

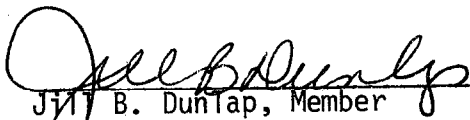
ORDER

NOW, THEREFORE, IT IS ORDERED, that the petitions for reconsideration of Decision 81-1575 are denied.

Dated: August 6, 1981


Carra M. Bard, Chairwoman

VOTED NO
L. L. Mitchell, Vice-Chairman


Jill B. Duntap, Member


F. K. Aljibury, Member