

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Licenses 1907 & 4677)
Issued Pursuant to)
Applications 7260 & 9133)
CLARE OLIVE HOLSCLOW et al,)
Licensees)

ORDER: WR 81-17
SOURCE: Peavine Creek
COUNTY: Placer

ORDER DECIDING NOT TO REVOKE LICENSES
TO APPROPRIATE WATER

BY BOARD MEMBER DUNLAP:

A hearing having been held pursuant to Section 1675 of the Water Code by the State Water Resources Control Board, hereafter Board, on September 15, 1981 for the purpose of allowing Clare Olive Holsclaw et al., hereafter Licensees, to show cause why License 1907 (Application 7260) should not be revoked to the extent it pertains to mining use and why License 4677 (Application 9133) should not be totally revoked; licensees and other interested persons having appeared and presented evidence; the evidence received at the hearing having been duly considered, the Board finds as follows:

Substance of Licenses

1. License 1907 was issued to the mother of Clare Olive Holsclaw et al. on December 20, 1938 and was transferred to the present licensees on April 12, 1957. The license allows the appropriation of three cubic feet per second (cfs) from Peavine Creek from November 1 of each year to September 1 of the succeeding year for gold mining and domestic use. The point of diversion is within SW $\frac{1}{4}$ of SW $\frac{1}{4}$ of Section 14, T14N, R12E, Mount Diablo Base and Meridian (MDB&M). The places of use are within the NW $\frac{1}{4}$ of NW $\frac{1}{4}$ of Section 21, SW $\frac{1}{4}$ of NW $\frac{1}{4}$ Section 21, SW $\frac{1}{4}$ of NE $\frac{1}{4}$ Section 20, SE $\frac{1}{4}$ of NE $\frac{1}{4}$ Section 20, NW $\frac{1}{4}$ of SE $\frac{1}{4}$ Section 20 and the NE $\frac{1}{4}$ of SE $\frac{1}{4}$ Section 20, all within T14N, R12E, MDB&M.

2. License 4677 was issued to Clare Olive Holsclaw et al. on August 9, 1957. The license allows the appropriation of 1.5 cfs from Peavine Creek from December 1 of each year to August 1 of the succeeding year for power use. The point of diversion is the same as that for License 1907 and the place of use is within NW $\frac{1}{4}$ of NW $\frac{1}{4}$ of Section 21, T14N, R12E, MDB&M.

Beneficial Use of Water

3. The record before the Board indicates that water was used, sporadically, for mining and power generation through 1973. For the purposes of this proceeding the critical period needing close review for the failure to beneficially use water commences in 1974, a year in which the record does not show any use of water.

4. In 1975, an uncertain quantity of water was used for domestic use and the production of power for domestic use.

5. During 1976 and 1977 there was no use of water due to the drought during those years. As one consequence of the drought, the licensee could not obtain a lessee to operate the Big Chief Mine.

6. The water conveyance system from the point of diversion to places of use consists of a ditch and flume system over two miles long which primarily traverses Tahoe National Forest land. Because there was no lessee during the drought, the ditch and flume system fell into disrepair. This condition was aggravated by other persons using the lands of the national forest. Cattle operations were conducted on the same land and damaged the ditch and flume system.

7. As a result of the damage to the ditch and flume system during the drought, no water was diverted to beneficial use in 1978 and 1979 through the ditch and flume system; however, in 1978 licensed water was trucked to the place of use for domestic purposes.

8. In January 1980, the U. S. Forest Service terminated a special use permit for access across public land between the point of diversion and place of use. The decision to terminate the permit was based in part on the Forest Service's interpretation of California water law. (RT, p. 96-98) The Forest Service apparently believed that any non-use for the statutory period resulted in revocation of a water right license regardless of the reasons for the non-use.

9. During the same month of 1980 the licensee also entered into an agreement leasing the Big Chief Mine for operation. Negotiations were at an advanced stage when the Forest Service revoked the special use permit. Because a special use permit could not be obtained from the Forest Service these lessees surrendered their lease in November of 1980. (RT, p.23)

10. On April 10, 1981, licensees leased the Big Chief Gold Mine in Section 21 of the place of use for five years with an option to buy. Between May 1 and the end of June of 1981 the lessees substantially completed the work necessary to place the ditch and flume system in good repair. However, Forest Service personnel, after first warning the lessees against continuing work, forceably halted further progress in June of the same year. (RT, pp. 57 and 58).

11. The licensees have an application pending with the U. S. Forest Service for a new special use permit to allow access from the point of diversion to the place of use.

12. In the past, the full amount of water was used on an alternate basis for operation of the Fairview and Big Chief Mines. The lessees anticipate a need for the full amount of licensed water for use at the Big Chief Mine. The Fairview Mine in Section 20 of the place of use has not used water for many years. The licensees testified that they have no plans to reactivate its uses and the ditch to the Fairview Mine has been abandoned. There is no license for the use of power at the Fairview Mine.

13. The Forest Service representative testified that he thought that the right to the use of water was lost through three years of non-use.

Applicable Law

14. Water Code, Section 1241 provides in part that:

"When the person entitled to the use of water fails to use beneficially all or any part of the water...for which a right of use has vested...for a period of five years, such unused water may revert to the public....Such reversion shall occur upon a finding by the board...."

In 1980, the legislature amended the period for which non-use may result in the loss of a water right from three years to five years (Stats 1980, C.933, P92120, Section 5).

15. A right to appropriate water obtained from this board or its predecessor does not expire merely from the passage of the prescribed time. A permit or license remains in effect until revoked in the manner prescribed by the Water Code (Eaton v. State Water Rights Board, 1959, 171 C.A.2d 409; 340 p.2d 722).

16. The California Supreme Court has stated that the inability to obtain water because of a natural shortage does not of itself cause a forfeiture of an appropriative right (Huffner v. Sawdau, 1968, 153 Calif. 86, 94 Pac 424).

Conclusions

17. Some use of water was demonstrated through 1975. Water was unavailable for use during 1976 and 1977. Some water was used for domestic purposes in 1978. Recommencement of the beneficial use of water was not possible in 1980 and thereafter due to the misunderstanding of California water law by the Forest Service.

18. But for the revocation of the special use permit by the Forest Service it appears that the licensee could have put water to beneficial use in 1980, that is, before the expiration of the five year period. When considering the additional problems

encountered by the licensees as a result of two drought years, it does not appear that Water Code, Section 1241 is properly applicable to the facts in this case.

19. The place of use that pertains to Fairview Mine should be deleted from License 1907.

20. The total diversion under both licenses is three cfs (1.5 cfs of this is allocated to power generation, a nonconsumptive use prior to its use for mining and domestic purposes). If the licensees need more than three cfs of water, such as for use on the Myers property, which is a residence within the defined place of use, a new application to appropriate water must be filed with the Board.

21. Licensees must petition the Board for a change in purpose of use if they intend to use the water for road sprinkling, as they discussed at the Board hearing.

22. No changes should be made to License 4677.

NOW, THEREFORE, IT IS ORDERED:

1. That Licenses 1907 and 4677 not be revoked.

2. That License 1907 is amended to delete the place of use involving the Fairview Mine, that is

SW $\frac{1}{4}$ of NE $\frac{1}{4}$ of Section 20

SE $\frac{1}{4}$ of NE $\frac{1}{4}$ of Section 20

NW $\frac{1}{4}$ of SE $\frac{1}{4}$ of Section 20

NE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Section 20

All within T14N, R12E of MDB&M

3. That the place of use for License 1907 shall thus be limited to NW $\frac{1}{4}$ of NW $\frac{1}{4}$ and SW $\frac{1}{4}$ of NW $\frac{1}{4}$ of Section 21, T14N, R12E of MDB&M.

4. That the following condition shall be added to License 1907:

No water shall be used under this license until the licensee has filed a report of waste discharge with the California Regional Water Quality Control Board, Central Valley Region, Sacramento, pursuant to Water Code Section 13260, and the regional board or State Water Resources Control Board has prescribed waste discharge requirements or has indicated that waste discharge requirements are not required.

Dated: November 19, 1981

WE CONCUR:




Jill B. Dunlap, Member

ABSENT

Carla M. Bard, Chairwoman



L. L. Mitchell, Vice-Chairman



F. K. Aljibury, Member