

STATE OF CALIFORNIA
STATE WATER RIGHTS BOARD

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In the Matter of Applications 17979)
and 17980 by George Moskowite to)
appropriate from two unnamed streams)
in Napa County)

Decision No. D 936

ADOPTED AUG 27 '59

Substance of the Applications

Application 17979, filed February 6, 1958, by George Moskowite, is for a permit to appropriate five acre-feet per annum by storage to be collected between November 1 of each year and May 15 of the succeeding year from an unnamed stream in Napa County for stockwatering purposes. Water is to be collected by an earth dam 22 feet high and 135 feet long located within the SE $\frac{1}{4}$ of SW $\frac{1}{4}$ of Section 9, T7N, R3W, MDB&M. The dam will create a reservoir which with a freeboard of 3 feet on the dam will have a surface area of one acre and a capacity of 10 acre-feet. The reservoir will be used to provide stockwater for 100 head of cattle.

Application 17980, filed February 6, 1958, by George Moskowite, is for a permit to appropriate eight acre-feet per annum by storage to be collected between November 1 of each year and May 15 of the succeeding year from an unnamed stream in Napa County for stockwatering purposes. Water is to be collected by an earth dam 20 feet high and 117 feet long located within the

SE $\frac{1}{4}$ of SW $\frac{1}{4}$ of Section 9, T7N, R3W, MDB&M. The dam will create a reservoir which with a freeboard of 4 feet on the dam will have a surface area of one acre and a capacity of 8 acre-feet. The reservoir will be used to provide stockwater for 100 head of cattle.

Protest

Leroy E. Gray protests against the approval of Applications 17979 and 17980 and alleges that during the fall and early winter there is not enough runoff to fill the reservoirs and supply water to his property for livestock use which is immediately downstream from the applicant's project; that during dry seasons the dams might cut off his supply for the entire year; that water has been used on his property since the 1850's for stockwatering in variable amounts up to 1500 gallons per day; and that his right to the use of water is based on use begun prior to December 19, 1914.

Answer to Protest

In answer to the protest against the applications, the applicant alleges that building of the dams will benefit protestant "by putting and keeping the water in the underground and by raising the water level"; that only a small part of the winter runoff will be stored and that it will be used exclusively for stockwatering purposes; that one of the reservoirs was built a number of years ago and at that time there was no protest; that both of the dams have been approved by the Soil Conservation Service.

Field Investigation

Applicant and protestant, with the approval of the State Water Rights Board, stipulated to proceedings in lieu of hearing as provided for under Section 737 of the Board's rules. A field investigation was conducted on September 24, 1958, by J. Victor Scammon, an engineer of the Board, at which the applicant and the protestant were present. On January 26, 1959, Mr. Scammon interviewed the applicant and the protestant and made further observation of flows in the sources.

Records Relied Upon

The records relied upon in support of this decision are Applications 17979 and 17980 and all relevant information on file therewith, with particular reference to the report of the field investigation made on September 24, 1958, and the memorandum of investigation made on January 26, 1959, both by the above-named engineer; a report of the Division of Water Resources, entitled "Putah Creek Cone Investigation", dated December, 1955; United States Geological Survey, "Capell Valley" quadrangle, 7½-minute series, Edition of 1951.

Sources and Water Supply

The sources of the proposed appropriations are branches of an intermittent stream rising on the northern slope of Capell Valley within Section 9, T7N, R3W. The west branch is the source under Application 17979; the east branch is the source under Applica-

tion 17980. The drainage area above each point of diversion is about 140 acres sparsely covered with brush and timber. Capell Valley is drained by Capell Creek which is tributary to Putah Creek above Monticello Reservoir of the United States.

With regard to water supply, the report of the Division of Water Resources entitled, "Putah Creek Cone Investigation", dated December, 1955, discloses that the water supply available to the area in the vicinity of applicant's projects results from precipitation directly on the area; that mean seasonal precipitation in the vicinity is about 28 inches; that the average seasonal runoff of Putah Creek from the area above Monticello Dam with a watershed of 577 square miles is about 625 acre-feet per square mile of watershed as determined from the estimated natural runoff at United States Geological Survey gaging station "Putah Creek near Winters"; that extremes in seasonal natural runoff at said station varied from a minimum of 65 acre-feet per square mile during 1930-31 to a maximum of 1,750 acre-feet per square mile during 1940-41; and that mean seasonal precipitation over the watershed above Monticello Dam is about 36 inches. This ratio might not prevail at the reservoir sites because of the lower elevation of their drainage area but the amount of runoff should be sufficient to fill the reservoirs to overflow level each winter.

Mr. Scammon's observations on January 26, 1959, of flow in the sources the day after a rainfall of 0.27 inches at Monticello are as follows:

Unnamed stream (west branch - Application 17979) Immediately below damsite	.020 cfs
Unnamed stream (east branch - Application 17980) Immediately below dam	.012 cfs
In spillway channel - (Application 17980)	slight trickle
In creek immediately above reservoir - (Application 17980)	no flow
In creek about 500 feet above reservoir - (Application 17980)	surface flow at some locations
At point on protestant's land below con- fluence of the two unnamed sources	0.045 cfs

No flows were observed in either of the sources on September 24, 1958.

Applicant's Projects

Concerning the projects covered by the applications at issue, the investigation report of September 24, 1958, discloses that the dam and reservoir described under Application 17980 are constructed and have been used for the past five or six years; that an inspection of the spillway of said dam indicated that said reservoir had filled and spilled during the winter of 1957-58; and that the dam is not provided with outlet works.

Position of Protestant

At the field investigation held on September 24, 1958, Mr. Gray further expressed apprehension over the effect operation of the proposed reservoirs would have on maintenance of the supply to satisfy his requirements for watering livestock; but stated that he would withdraw his protest against Application 17979

if applicant would reduce the season of collection in storage to the period January 1 to May 15 and provide a method of bypassing flows that would occur outside of that season; and that if applicant were to consent to these conditions he would also withdraw his protest against Application 17980.

Applicant objected to the additional cost of providing outlet works to the dam.

Discussion

Concerning the seasonal occurrence of water in sufficient quantities to satisfy the applications, the evidence is undisputed in this respect. Based upon the recorded runoff of the entire upper Putah Creek watershed as previously discussed, expectation of seasonal runoff above the proposed points of diversion is at least 625 acre-feet per square-mile per season which in terms of the 140 acres tributary to each reservoir site would amount to an average of some 136 acre-feet per season. This is far in excess of the amounts for which permits are sought.

While a finding that the existence of unappropriated water is a necessary prerequisite to issuance of a permit, that in itself in this instance is not sufficient basis for approval of the subject applications. It is settled law that the first duty of this Board in performing its functions is to protect prior rights to the use of water.* Applicant's projects as proposed under the subject applications do not include provision for the

* Meridian, Ltd., v. San Francisco, 13 Cal. 2d 424.

bypassing or release of water and thereby could under circumstances of low flow, deprive protestant of his reasonable and lawful supply. The facts that the reservoirs were approved by the Soil Conservation Service, and that the reservoir described under Application 17980 was constructed and placed into operation without objection do not relieve applicant of the responsibility of providing in advance competent assurance that the projects can be operated without injury to lawful users of water. In view of protestant's stated conditions for withdrawal of his protest, it will suffice for applicant to provide for the bypassing or releasing of water around or from the reservoir proposed under Application 17979 in amounts sufficient to satisfy protestant's rights to the flow from this source.

Conclusion

In view of the foregoing, we find that unappropriated water normally exists in the sources named in the subject applications which water may be taken and used in the amounts proposed under the applications with the proviso that the reservoir under Application 17979 be equipped with physical means for the bypassing around or the releasing of water therefrom.

ORDER

Applications 17979 and 17980 for permits to appropriate unappropriated water having been filed, a protest having been received, stipulations to proceedings in lieu of hearing having

been submitted, an investigation having been held by the State Water Rights Board, and said Board having considered the available information and now being fully informed in the premises:

IT IS HEREBY ORDERED that Application 17979 be and the same is hereby approved, and it is ordered that a permit be issued to the applicant subject to vested rights and the following terms and conditions, to wit:

1. The amount of water appropriated shall be limited to the amount which can be beneficially used and shall not exceed five (5) acre-feet per annum by storage to be collected from about November 1 of each year to about May 15 of the succeeding year.
2. The maximum amount herein stated may be reduced in the license if investigation so warrants.
3. Actual construction work shall begin on or before December 1, 1959, and shall thereafter be prosecuted with reasonable diligence, and if not so commenced and prosecuted, this permit may be revoked.
4. Said construction work shall be completed on or before December 1, 1961.
5. Complete application of the water to the proposed use shall be made on or before December 1, 1962.
6. Progress reports shall be filed promptly by permittee on forms which will be provided annually by the State Water Rights Board until license is issued.
7. All rights and privileges under this permit including method of diversion, method of use and quantity of water diverted are subject to the continuing authority of the State Water Rights 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.
8. Permittee shall provide means for the bypassing or releasing of water around or from the reservoir to the extent necessary to satisfy downstream rights but not in excess of flows that would occur in the absence of regulation by the reservoir.

AND IT IS FURTHER ORDERED that Application 17980 be and the same is hereby approved, and it is ordered that a permit be issued subject to vested rights and to the following terms and conditions; to wit:

1. the amount of water appropriated shall be limited to the amount which can be beneficially used and shall not exceed eight (8) acre-feet per annum by storage to be collected from about November 1 of each year to about May 15 of the succeeding year.
2. The maximum amount herein stated may be reduced in the license if investigation so warrants.
3. Construction work shall be completed on or before December 1, 1961.
4. Complete application of the water to the proposed use shall be made on or before December 1, 1962.
5. Progress reports shall be filed promptly by permittee on forms which will be provided annually by the State Water Rights Board until license is issued.
6. All rights and privileges under this permit including method of diversion, method of use and quantity of water diverted are subject to the continuing authority of the State Water Rights 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.

Adopted as the decision and order of the State Water Rights Board at a meeting duly called and held at California, on this day of 1959.

Kent Silverthorne, Chairman

W. P. Rowe, Member

Ralph J. McGill, Member