

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2008-0041-EXEC

In the Matter of the Petition for Reconsideration of

ROBERT V. SCIAINI

Regarding Revocation of License 11661 (Application 24951)

ORDER APPROVING IN PART RECONSIDERATION OF REVOCATION

BY THE EXECUTIVE DIRECTOR:¹

This matter comes before the State Water Resources Control Board (State Water Board) on a request to set aside an Order by the Division of Water Rights (Division) revoking water right License 11661. The holder of the license, Robert Sciaini (Licensee), requests that the State Water Board reinstate License 11661, in part. In this Order, the State Water Board approves the request.

1.0 INTRODUCTION

On December 5, 1975, Robert Sciaini filed Application 24951 to appropriate water from the Russian River for irrigation and domestic use. The Division issued License 11661 on January 29, 1985. The license covered three points of diversion - two offset wells diverting Russian River underflow, and one direct diversion ditch from the Russian River. Licensee reports for 1985-2003 show that water was diverted for domestic and agricultural purposes, but the Licensee report for 2004-2006 states that the pump for the diversion ditch was abandoned in 2003.

¹ State Water Board Resolution No. 2002-0104 delegates to the Executive Director the authority to supervise the activities of the State Water Board. Unless a petition for reconsideration raises matters that the State Water Board wishes to address or requires an evidentiary hearing before the State Water Board, the Executive Director's consideration of a petition for reconsideration falls within the scope of the authority delegated under Resolution No. 2002-0104. Accordingly, the Executive Director has the authority to refuse to reconsider a petition for reconsideration, deny the petition, set aside or modify the decision or order, or take other appropriate action. The State Water Board has not designated decisions by the Executive Director as precedent decisions pursuant to the Administrative Procedures Act. (WR Order 96-1, at p. 17, fn. 11.)

Mr. Sciaini filed a request with the Division to revoke License 11661 on November 6, 2007. On the voluntary revocation form, Mr. Sciaini waived his right to a hearing under Water Code section 1675.1 and reinstatement under section 1675.2. On January 17, 2008, prior to issuing the revocation order, the Division attempted to contact Mr. Sciaini by phone to confirm abandonment of the water right. After failing to hear from Mr. Sciaini, the Division processed the requested revocation and issued an order of revocation on January 25, 2008.

On January 25, 2008, the Division received a phone call from Mr. Sciaini's wife. She claimed that their intention was to abandon only the pump and ditch that diverted water from the Russian River. She confirmed that the two wells that covered Russian River underflow were still in use. On February 6, 2008, the Division received a request to set aside the revocation order. Mr. Sciaini asked the Division to set aside the revocation order, but restated the abandonment of the Russian River pump.

2.0 LAW GOVERNING REVOCATIONS AND REINSTATEMENTS

California Water Code section 1675.1 authorizes the State Water Board to act on a proposed revocation without a hearing unless the licensee or licensee's representative submits a written request for a hearing within 15 days of receiving the proposed revocation notice. Water Code section 1675.2 provides: "In any case when a license is revoked without a hearing, as provided in section 1675.1, the licensee, within 90 days of the order of revocation may file with the board a request to set aside the revocation, and the board, for good cause shown, may reinstate the license".

Section 1675.2 of the Water Code has a similar effect to that of Code of Civil Procedure section 473, which allows a court to relieve a party from a judgment, dismissal, order or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. The question of good cause to reinstate the license does not reach the merits of the revocation. Rather, the party must show why they failed to file a request for a hearing within the time specified.

3.0 ANALYSIS OF ALLEGED CAUSES FOR RECONSIDERATION

The Division received Mr. Sciaini's timely request to set aside the revocation and maintain the water right. Mr. Sciaini claims not to have understood that the voluntary revocation included the two wells on the property that divert Russian River underflow. Mr. Sciaini states that he continues to divert water for irrigation and domestic use and he was under the impression that his revocation request only applied to the "sump pump in the Russian River." This claim is supported by the revocation request where Sciaini wrote, "the pump has been abandoned since 2003." This indicates abandonment of a single point of diversion, not the entire project. Additionally, Licensee's progress reports for 2004-2006 state that the Russian River pump was abandoned in 2003, but the reports do not show intent to abandon the additional points of diversion covered by the license.

Thus, Mr. Sciaini waived his right to a hearing due to a mistaken belief that the voluntary revocation applied only to the abandoned diversion pump and ditch. The two wells that divert Russian River underflow are still in use, and Mr. Sciaini did not intend to cause revocation of his entire water right. Interpreting section 1675.2 consistent with Civil Code section 473, Mr. Sciaini has shown good cause to reinstate the license, insofar as it authorizes diversion and use from the two offset wells. Mr. Sciaini has not provided any basis for reinstating the authorization to divert from the surface flow of the Russian River. Accordingly, the license should be reinstated, in part, retaining the right to divert from the underflow of the Russian River, but revoking the right to divert from the surface flow of the Russian River.

ORDER

IT IS HEREBY ORDERED THAT the request to set aside the Order revoking License 11661 and the request to reinstate the license are approved, in part. License 11661 is reinstated, except that the license is modified to remove authorization for direct diversion from the Russian River. The attached amended license is issued.

Dated: **NOV 14 2008**



Dorothy Ridge
Executive Director

Attachment



STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD

DIVISION OF WATER RIGHTS

Amended License for Diversion and Use of Water

APPLICATION 24951

PERMIT 17643

LICENSE 11661

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THIS IS TO CERTIFY, That

Robert V. Sciaini
25975 River Road
Cloverdale, CA 95425

has the right to the use of the waters of **(1)(2) Russian River Underflow in Sonoma County**
tributary to **Pacific Ocean**

for the purposes of **Irrigation, Frost Protection, Heat Protection, Domestic and Fire Protection uses.**

Amended License 11661 supersedes the license originally issued on **January 29, 1985**, which was perfected in accordance with the laws of California, the Regulations of the State Water Resources Control Board (State Water Board), or its predecessor, and the terms of **Permit 17643**. The priority of this right dates from **December 5, 1975**. Proof of maximum beneficial use of water under this license was made as of **September 6, 1984** (the date of inspection).

The amount of water to which this right is entitled and hereby confirmed is limited to the amount actually beneficially used for the stated purposes and shall not exceed: **(a) one and thirty-seven hundredths (1.37) cubic feet per second by direct diversion from March 1 to June 1 of each year for Frost Protection use; (b) seventy-three hundredths (0.73) cubic foot per second by direct diversion from May 1 to September 30 of each year for Heat Protection use; (c) one-tenth (0.10) cubic foot per second by direct diversion from March 1 to September 1 of each year for Irrigation use; and (d) six hundred twenty (620) gallons per day by direct diversion from January 1 to December 31 of each year for Domestic and Fire Protection uses. The maximum amount diverted under this license for all uses shall not exceed 11 acre-feet per year.**

The equivalent of such continuous flow allowance for any 30-day period 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 are observed.

THE POINTS OF DIVERSION OF SUCH WATER ARE LOCATED:

- (1) By California Coordinate System of 1983, Zone 2, North 2,041,245 feet and East 6,286,556 feet, being within NE $\frac{1}{4}$ of NW $\frac{1}{4}$ of projected Section 34, T11N, R10W, MDB&M.
- (2) By California Coordinate System of 1983, Zone 2, North 2,041,695 feet and East 6,286,356 feet, being within NE $\frac{1}{4}$ of NW $\frac{1}{4}$ of projected Section 34, T11N, R10W, MDB&M.

A DESCRIPTION OF THE LANDS OR THE PLACE WHERE SUCH WATER IS PUT TO BENEFICIAL USE IS AS FOLLOWS:

Domestic and Fire Protection uses at 2 residences and garden area within NE $\frac{1}{4}$ of NW $\frac{1}{4}$ of projected Section 34, T11N, R10W, MDB&M, and Heat Protection, Frost Protection and Irrigation as follows:

5 acres within SE $\frac{1}{4}$ of SW $\frac{1}{4}$ of projected Section 29, T11N, R10W, MDB&M

6 acres within NE $\frac{1}{4}$ of NW $\frac{1}{4}$ of projected Section 34, T11N, R10W, MDB&M

11 acres total, as shown on map on file with the State Water Board.

To the extent that water available for use under this license is return flow, imported water, or wastewater, this license shall not be construed as giving any assurance that such supply will continue.

(0000025)

The right hereby confirmed to the diversion and use of water is restricted to the point or points of diversion herein specified and to the lands or place of use herein described.

Reports shall be filed promptly by the licensee on the appropriate forms which will be provided for the purpose from time to time by the State Water Board.

Licensee shall allow representatives of the State Water Board and other parties, as may be authorized from time to time by the State Water Board, reasonable access to project works to determine compliance with the terms of this license.

Pursuant to Water Code sections 100 and 275 and the common law public trust doctrine, all rights and privileges under this license, including method of diversion, method of use, and quantity of water diverted, are subject to the continuing authority of the State Water Board in accordance with law and in the interest of the public welfare to protect public trust uses and to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of said water.

The continuing authority of the State Water Board may be exercised by imposing specific requirements over and above those contained in this license with a view to eliminating waste of water and to meeting the reasonable water requirements of licensee without unreasonable draft on the source. Licensee may be required to implement a water conservation plan, features of which may include but not necessarily be limited to: (1) reusing or reclaiming the water allocated; (2) using water reclaimed by another entity instead of all or part of the water allocated; (3) restricting diversions so as to eliminate agricultural tailwater or to reduce return flow; (4) suppressing evaporation losses from water surfaces; (5) controlling phreatophytic growth; and (6) installing, maintaining, and operating efficient water measuring devices to assure compliance with the quantity limitations of this license and to determine accurately water use as against reasonable water requirement for the authorized project. No action will be taken pursuant to this paragraph unless the State Water Board determines, after notice to affected parties and opportunity for hearing, that such specific requirements are physically and financially feasible and are appropriate to the particular situation.

The continuing authority of the State Water Board also may be exercised by imposing further limitations on the diversion and use of water by the licensee in order to protect public trust uses. No action will be taken pursuant to this paragraph unless the State Water Board determines, after notice to affected parties and opportunity for hearing, that such action is consistent with California Constitution article X, section 2; is consistent with the public interest and is necessary to preserve or restore the uses protected by the public trust.

The quantity of water diverted under this license is subject to modification by the State Water Board if, after notice to the licensee and an opportunity for hearing, the State Water Board finds that such modification is necessary to meet water quality objectives in water quality control plans which have been or hereafter may be established or modified pursuant to division 7 of the Water Code. No action will be taken pursuant to this paragraph unless the State Water Board finds that: (1) adequate waste discharge requirements have been prescribed and are in effect with respect to all waste discharges which have any substantial effect upon water quality in the area involved, and (2) the water quality objectives cannot be achieved solely through the control of waste discharges.

This license does not authorize any act which results in the taking of a threatened or endangered species or any act which is now prohibited, or becomes prohibited in the future, under either the California Endangered Species Act (Fish and Game Code sections 2050 to 2097) or the federal Endangered Species Act (16 U.S.C.A. sections 1531 to 1544). If a "take" will result from any act authorized under this water right, the licensee shall obtain authorization for an incidental take prior to construction or operation of the project. Licensee shall be responsible for meeting all requirements of the applicable Endangered Species Act for the project authorized under this license.

If construction or rehabilitation work is required for the diversion works covered by this license within the bed, channel, or bank of the affected water body, the licensee shall enter into a streambed or lake alteration agreement with the State Department of Fish and Game. Licensee shall submit a copy of the agreement, or waiver thereof, to the Division of Water Rights prior to commencement of work. Compliance with the terms and conditions of the agreement is the responsibility of the licensee.

This license is granted and the licensee accepts all rights herein confirmed subject to the following provisions of the Water Code:

Section 1625. Each license shall be in such form and contain such terms as may be prescribed by the State Water Board.

Section 1626. All licenses shall be under the terms and conditions of this division (of the Water Code).

Section 1627. A license shall be effective for such time as the water actually appropriated under it is used for a useful and beneficial purpose in conformity with this division (of the Water Code) but no longer.

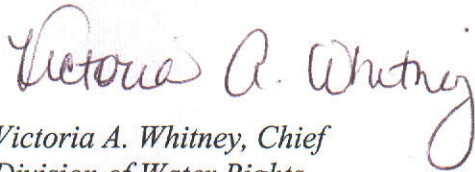
Section 1628. Every license shall include the enumeration of conditions therein which in substance shall include all of the provisions of this article (of the Water Code) and the statement that any appropriator of water to whom a license is issued takes the license subject to the conditions therein expressed.

Section 1629. Every licensee, if he accepts a license, does so under the conditions precedent that no value whatsoever in excess of the actual amount paid to the State therefore shall at any time be assigned to or claimed for any license granted or issued under the provisions of this division (of the Water Code), or for any rights granted or acquired under the provisions of this division (of the Water Code), in respect to the regulation by any competent public authority of the services or the price of the services to be rendered by any licensee or by the holder of any rights granted or acquired under the provisions of this division (of the Water Code) or in respect to any valuation for purposes of sale to or purchase, whether through condemnation proceedings or otherwise, by the State or any city, city and county, municipal water district, irrigation district, lighting district, or any political subdivision of the State, of the rights and property of any licensee, or the possessor of any rights granted, issued, or acquired under the provisions of this division (of the Water Code).

Section 1630. At any time after the expiration of twenty years after the granting of a license, the State or any city, city and county, municipal water district, irrigation district, lighting district, or any political subdivision of the State shall have the right to purchase the works and property occupied and used under the license and the works built or constructed for the enjoyment of the rights granted under the license.

Section 1631. In the event that the State, or any city, city and county, municipal water district, irrigation district, lighting district, or political subdivision of the State so desiring to purchase and the owner of the works and property cannot agree upon the purchase price, the price shall be determined in such manner as is now or may hereafter be provided by law for determining the value of property taken in eminent domain proceedings.

STATE WATER RESOURCES CONTROL BOARD



*Victoria A. Whitney, Chief
Division of Water Rights*

Dated: **NOV 14 2008**