

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

DIVISION OF WATER RIGHTS

In the Matter of Permits 19164 and 19165 (Applications 26306 and 26307)

Emerson Investment Inc.

NOTICE OF PROPOSED REVOCATION

SOURCE: Shasta River tributary to Klamath River
COUNTY: Siskiyou

You are hereby notified that, pursuant to sections 1410-1410.2 of the California Water Code, the State Water Resources Control Board (State Water Board), Division of Water Rights (Division), is proposing to revoke Permits 19164 and 19165 because the Permittee has failed to commence, prosecute with due diligence, and complete the work necessary to appropriate water under Permits 19164 and 19165 and has not made beneficial use of the water in accordance with the permits, the Water Code, and the State Water Board's regulations.

The proposed revocation is based upon the following facts, information and conclusions:

The State Water Board issued Permits 19164 and 19165 on March 23, 1984 to Shasta Springs Cattle Company (Permittee). The permits authorize the following:

- (a) Permit 19164 – 5 cubic feet per second (cfs) to be diverted from February 1 to November 1 of each year for irrigation and stockwatering. The maximum amount diverted under this permit shall not exceed 400 acre-feet per year (afa).
- (b) Permit 19165 – 14 cfs to be diverted from February 1 to November 1 of each year. The maximum amount diverted under this permit shall not exceed 800 afa.
- (c) The permits require that water be applied to the authorized use by December 1, 1988.
- (d) Both permits include the following terms:

Rights under this permit are, and shall be, subject to existing rights determined by the Shasta River Adjudication, (Adjudication) Superior Court, Siskiyou County, No. 7035, insofar as said adjudicated rights are maintained and such other rights as may presently exist.

No water shall be diverted at any time unless the watermaster has determined that excess water exists in Shasta River and authorizes the Permittee to divert water. The amount of water to be diverted shall at all times be controlled by the watermaster.

For the protection of fish and wildlife, Permittee shall during the period from February 1 through November 1 bypass a minimum of 1 cubic foot per second.

Permittee shall install a device, satisfactory to the State Water Board, which is capable of measuring the flows required by the conditions of the permit. Said measuring device shall be properly maintained.

A. PERMITTEE HAS FAILED TO COMMENCE, PROSECUTE WITH DUE DILIGENCE, AND COMPLETE THE WORK NECESSARY TO APPROPRIATE WATER UNDER THE PERMIT

1. Permits 19164 and 19165 are for water surplus to that distributed in accordance with the Adjudication. Each of the separate points of diversion under these permits also has rights for irrigation water under the Adjudication. At the time of construction of Lake Shastina, a water right settlement allotted a fixed amount of water to specified places of use, to be released each season upon demand and under watermaster supervision, from storage in the reservoir.

2. The ownership of Permits 19164 and 19165 has changed several times. On June 21, 1989, the ownership changed to Shasta Beef, Inc. On June 29, 1990, ownership changed to Shasta Foods International. On January 18, 1995, ownership changed to Emerson Investment, Inc. (Emerson).
3. The Division conducted a May 7, 1990 licensing inspection of the project. The same point of diversion (Diversion 165 in the Adjudication) is used to divert 596 acre-feet of water allotted pursuant to the Adjudication from storage in Lake Shastina (formerly Dwinnell Reservoir). The 1990 inspection found that the Permittee had not kept any records documenting water diversion and use even though a staff gage, parshall flume and Stevens recorder were installed at the diversion works. The Division's May 21, 1990 letter advised the Permittee that there was not enough information on the Permittee's water use to proceed to license. The Permittee was advised to coordinate with the watermaster to keep monthly records of amounts diverted at each diversion and to differentiate amounts taken under Permits 19164 and 19165 from the allotment delivered from Lake Shastina pursuant to the Adjudication.
4. The Permittee submitted petitions for extension of time, dated August 14, 1990, seeking an extension to 1995 for the purpose of keeping records of water use under the permits.
5. The Division's May 3, 1991 Order approved an extension to complete beneficial use of water to December 31, 1995.
6. The Division conducted a licensing inspection on June 13, 2000. The inspection report states that the diversions and place of use were developed years ago. Therefore, beneficial use of water has been completed. However, two issues remain: compliance with the measuring device for fish bypass requirement and keeping of diversion records for licensing purposes. These permits were deemed in compliance with the 1 cfs fish bypass flow in a 1986 inspection based on the watermaster's control of the diversions and his need to maintain flows in excess of 1 cfs for downstream water rights. However, the permit requires a measuring device and one has not been installed.

A Parshall flume with recorder is in place at the head of the ditch used under Permit 19164 and is used by the watermaster, but no diversion records are kept. During the inspection, Division staff advised the Permittee and watermaster of the need to maintain written records of diversion under the permits separated from the records of water diverted under the Adjudication. The watermaster advised Division staff that the purpose of the recorder and flume was not to keep diversion records but to ensure that water is not "stolen" by changing the water levels in the diversions.

Division staff was unable to determine water diverted pursuant to the permits. The 2000 inspection report states that the season of diversion, rates of diversion and annual diversion quantities will have to be determined later after records are submitted.

7. The Division's August 29, 2000 letter discusses the field inspection. The letter notes that construction and use of water are complete but the projects are not ready for license because (1) measuring devices required by term 17 of each permit have not been installed, and (2) no records have been kept of water diverted under each permit. Such records of historical use are needed so the Division can calculate the rate of diversion during the month of maximum diversion and use, the total acre-feet diverted during the season of maximum diversion and use, and to determine the season of diversion.

The August 29 letter states that licenses issued on Permits 19164 and 19165 will be based on measurements taken in future years. Since the time to complete use of water under each of these permits expired on December 31, 1995, extensions of time were required. The letter notes that the 1991 extensions of time were granted for the purpose of keeping diversion records for licensing.

Division staff recommended that extensions of time be denied until the Permittee complies with the fish bypass measuring device requirement and required submittal of a plan and installation schedule for these measuring devices by October 28, 2000. The Permittee was advised that any future diversion under the permits without an approved measuring device at both diversions would be in violation of term 17 of these permits and could result in administrative civil liability of \$500.00 per day.

The Watermaster is responsible for monitoring diversions in the adjudication service area during the irrigation season. Division staff suggested that the Permittee formally request the Watermaster's services for the next few years for making diversion measurements and keeping records for each diversion as follows: (1) the dates surplus water is diverted, (2) the corresponding head on the flumes, and (3) if necessary, a calculation to determine how much of said water is surplus flow and how much is "banked" water released at the Permittee's request from Lake Shastina.

8. The Permittee submitted sketches of the proposed measuring devices in September of 2000 (undated correspondence). Division staff found the measuring devices acceptable by letter dated October 6, 2000 and approved the installation schedule of October or November, 2000.
9. The Permittee submitted petitions for extension of time dated October 13, 2000, seeking a 3-year extension to complete construction and beneficial use. The form also indicates that construction would be completed in November 2000 and beneficial use at an unspecified month in 2000.
10. The Department of Water Resources (DWR), Watermaster Service agreed to keep records of diversions for Permits 19164 and 19165 during the watermaster season by letter dated October 17, 2000.
11. During a December 12, 2000 telephone conversation, the Permittee advised Division staff that the measuring devices had not yet been installed.
12. The DWR watermaster service's December 13, 2000 memorandum advised the Division that it would install and calibrate a stage recorder at the parshall flumes to record diverted flow and would keep records between April 1 and September 30. Before April 1 each year, the Permittee would contact DWR prior to when they desire to begin diversions.
13. Division staff met with the watermaster on April 17, 2001 to review the installation and operation of the measuring device required by term 17 of the permits. Adjustments to the devices were needed due to field conditions. The Division's May 2, 2001 letter to the Permittee describes the adjustments needed, states that no surplus water is available to divert under the permits during the 2001 irrigation season and advises the Permittee of the need to properly adjust the devices the next time that surplus water is available to divert.

14. The Division provided notice of the petitions for extension of time on June 25, 2001. The Department of Fish and Game (DFG) protest based on potential adverse impacts to coho salmon was accepted. DFG recommended the bypass flow be increased from 1 to 5 cfs, installation of an adequate fish passage facility suitable for providing passage upstream and downstream for all fish age classes, installation of fish screens, and raised the issue that the Permittee has had 16 years to comply with the permit terms requiring installation of measuring devices and development of a record of actual beneficial use and had not done so.
15. The Division conducted a compliance inspection on August 23, 2002. At the time of inspection, the proper measuring device to monitor compliance with terms 16 and 17 had not been installed. Division staff subsequently faxed the new design for the measuring device to the ranch manager, the device was installed and the ranch manager submitted photographs showing the installed device to the Division.

The inspection report states that there are no records of diversion available to determine amounts for licensing. Division staff concluded that the permits cannot be licensed because there has not been any recorded use of water under the permits, nor was there any evidence of non-recorded water use. If the pending petitions for extension of time are withdrawn or records of diversion cannot be produced, the inspection report states that revocation of the permits may be warranted.

16. The Division's October 7, 2003 letter advised the Permittee of the results of the August 23, 2002 inspection. The letter notes that, both at this time and during a June 2000 inspection, the Permittee had no diversion records to determine the amount of water being beneficially used under these permits. Since there is still no recorded water diversion and use since the last inspection, Division staff informed the Permittee that licenses cannot be issued. Division staff again reminded the Permittee of the need to keep diversion records.
17. The Division's February 18, 2004 letter reiterated the findings of the 2000 and 2002 inspections regarding lack of record keeping. The Permittee was also instructed to respond to the DFG protest to the time extension petition by March 20, 2004. Division staff requested information to document the frequency when water is available to serve these permits, and the months when water is available in order to document that there is sufficient water available to warrant granting the time extensions. Division staff advised that if there is no water available to serve the permits, it did not appear that the Permittee could show good cause for the time extensions pursuant to title 23, California Code of Regulations, section 681.

The Permittee was also advised that approval of the petitions is a discretionary action, pursuant to the California Environmental Quality Act (CEQA). The petitioner is responsible for paying for preparation of the CEQA document. The Permittee was asked to respond by March 20, 2004 and state whether he wanted to proceed with the petitions.

The Permittee was warned that failure to provide an adequate response may result in cancellation of the petitions and potential issuance of a Notice of Proposed Revocation of Permits 19164 and 19165 due to non-use.

18. The Permittee's March 22, 2004 letter states that the Permittee had scheduled a site visit with DFG to show DFG the project facilities and discuss the protest.
19. The Division's November 16, 2004 letter reiterated the information requested in the February 18, 2004 letter and advised the Permittee that the Division had not yet received a written response to the DFG protest. The Permittee was reminded that failure to respond may result in cancellation of the petitions and issuance of a Notice of Proposed Revocation due to non-use.
20. The Permittee's November 22, 2004 letter stated that the cost of installing the fish passage structure was \$216,878 to \$250,628. The Permittee was evaluating options to installation of the passage structure.

21. The Division's December 28, 2004 letter restated the need for formal response to the DFG protest regarding potential impacts to coho salmon and states that it is unclear whether any, or all, of the alternative options that the Permittee is investigating will address the DFG protest. The December 28 letter requested that the Permittee provide a work plan with time schedule for complying with the permit requirement to install measuring devices and address the DFG protest issues. The Permittee was also requested to respond stating whether he was amenable to paying the cost to prepare the CEQA document for the petitions.

The Division's December 28 letter reviewed November 22, 2004 data submitted by the Permittee regarding water used in 2003 and found that it was unclear whether this was water used pursuant to adjudicated rights or the permits. The Permittee was asked to identify the quantities used pursuant to adjudicated rights. The notes on the data indicate that the watermaster was reporting releases from Lake Shastina during June, July, August and September. The Permittee's adjudicated rights are for water released from Lake Shastina, but Permits 19164 and 19165 are only for direct diversion. Consequently, the Permittee's data regarding releases from Lake Shastina does not substantiate water use under the permits.

The Division has no records of water use pursuant to the permits. Therefore, it was unclear to Division staff whether water is available to serve Permits 19164 and 19165 after taking into account adjudicated rights. The Division's December 28 letter requested that the Permittee provide monthly data documenting the availability of water to serve the priority of Permits 19164 and 19165. The analysis should use streamgage or other relevant records, and identify the quantities of water needed to serve prior rights, and the quantity remaining to serve Permits 19164 and 19165 after taking any required bypass flows into consideration.

The December 28 letter reiterated the need to submit a written response to the DFG protest. A response was requested by January 26, 2005. The Permittee was advised that failure to provide an adequate response may result in petition cancellation and issuance of a Notice of Proposed Revocation for non-use.

22. The Permittee's February 14, 2005 response provided documentation regarding water available to serve the permits, agreed to pay for preparation of the CEQA document, states that the time extension petitions may be moot because the Permittee has sufficient information to show beneficial use under the permits, and responded to the DFG protest.

The February 14 letter states that there is no single measurement that correlates with the availability of water surplus to the adjudication. Because of variable real-time river conditions, there is no water to precisely reconstruct when water to serve Permits 19164 and 19165 was available historically. The Permittee concluded that water may be available to serve the permits even in "dry" years in March. In years that might classify on the dry side, but still "normal," surplus water may be available into April or May. Only in "wet" or "very wet" years is there likely to be surplus water through May and possibly into June and July. "Surplus" water may be available in August, September or October, regardless of water year. The Permittee could not provide dates when Emerson had actually diverted surplus water under the permits, stating that the records are in disarray and there are missing records, due to multiple ownership of the property. The Permittee could only speculate that water was likely available in roughly 18 of the last 27 years, or in "normal" or wetter hydrologic conditions.

The February 14 letter acknowledges that the fish screens at both diversions are not adequate to prevent fish from potentially getting into the irrigation delivery system and suggests three alternatives to remedy the situation, but the Permittee stated that Emerson could not commit to completing any of these alternatives.

23. Division staff evaluated the submittal by letter dated November 21, 2005 and found that it was unacceptable. The Permittee is required to maintain actual diversion records and has not done

so. The Permittee was instructed to comply with this requirement during the 1990, 2000 and 2002 Division inspections. The Permittee provided an analysis to show that water has been used under the permits and also provided 2003 diversion data. Regarding the 2003 diversion data, the Permittee did not differentiate water diverted under adjudicated rights and the permits, although the Permittee was requested to do so by the Division. Regarding the analysis to show that diversions occurred under the permits, the Permittee did not take bypass flow requirements into consideration, did not adequately account for downstream water rights, did not show the diversion quantities at the points of diversion for the permits (the analysis omits the permit diversion locations and concludes that water was available to serve the permits based on evaluation solely at the gage locations), the analysis did not correspond to the actual water supply situation (the Division's 2002 compliance report documents that no water was available for the permits in 1999, 2000, 2001 and 2002, yet the analysis shows available water during those years), the analysis was not pro-rated to adjust for different drainage basin sizes at the gages used, the analysis states that water is available under the permits when 35 cfs is available at the Montague gage when it appears that water is not available unless the gage reading is 50 cfs (adding the instream loss estimate of 5 to 15 cfs to the 35 cfs required for other rights equals 50 cfs), and the analysis concludes that the two stream gages used show good data correlation without providing substantiation of the alleged correlation.

The November 21 letter notes that the diversion works have been in place since permit issuance. The Division is unable to document that water is available to serve these permits and cannot document the quantity put to beneficial use. Failure to document diversion and beneficial use of water is not a valid basis for granting time extension. The three-year requested extension would have run from December 31, 1995 to December 31, 1998. Therefore, Division staff advised the Permittee that denial of the petitions was recommended because (a) the basis for requesting additional time does not meet the requirements of CCR section 844, and (b) the requested time has already elapsed. The Permittee was advised that, if the petitions are denied, the Division's licensing unit would determine whether the permits can be licensed or should be revoked. The Permittee was given 30 days to respond.

24. The Permittee's December 16, 2005 letter withdraws the petitions and requests that licenses be issued. The December 16 letter states that water has been used pursuant to the permits but does not provide substantiation of this claim. Regarding the lack of documentation of water use, the Permittee states that the watermaster is the person responsible for reporting water delivery, not the Permittee, and the watermaster has not done so. However, it is the Permittee's responsibility to measure all diversions made pursuant to Permits 19164 and 19165. The Permittee states that he has submitted records of use for 2003 showing that water was directly diverted and would be submitting reports for 2004 and 2005 showing water use.

The Division will base any license on water used in compliance with permit conditions during the authorized time to complete full beneficial use, which ended on December 31, 1995. Therefore, the Division is unable to use the 2003 data for licensing purposes.

25. The Division confirmed, by letter dated December 29, 2005, that the petitions had been withdrawn based on the December 16, 2005 letter from the Permittee. The Permittee was advised that the Division's licensing unit would determine whether licenses could be issued for the permits.
26. The Progress Reports by Permittee for the years 1984, 1986, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1997, 1998, 1999, 2000 and 2002 for both permits indicate that water was diverted in each month from February through November of each of these years. The Permittee did not provide Progress Reports for any other years. The Progress Reports indicate that water was used during years when Division staff confirmed during site inspections that no surplus water was available (2000 and 2002, for example) for diversion pursuant to the permits. None of the reports lists quantities diverted pursuant to the permits.

27. The Licensing Unit determined, by memorandum dated January 4, 2006, that the permits could not be licensed based on the lack of records documenting water diversion and use, as noted in the Division's June 13, 2000 and August 23, 2002 inspection reports.

B. PERMITEE HAS FAILED TO COMMENCE, PROSECUTE WITH DUE DILIGENCE, AND COMPLETE THE WORK NECESSARY TO APPROPRIATE WATER UNDER THE PERMIT

1. The Division has been unable to document any water diversion and use pursuant to the permits. The diversion works are used to divert adjudicated water, in addition to water pursuant to these permits. The Permittee is required to measure diversions pursuant to the permits. The Division granted an extension in 1991 solely for the purpose of documenting the quantities diverted and put to beneficial use. The Permittee has not measured diversions and has not provided records of water diversion and use to document the diversion season, quantities directly diverted and maximum annual diversions.

The Division inspected the project in 1990, 2000 and 2002 and has been unable to document the quantities, if any, put to beneficial use. The 2000 and 2002 inspections found that no diversion was occurring. The 2002 inspection found that no diversion had occurred for four years. The permit remains in effect only as long as the water appropriated under the permit is put to beneficial use.

2. The time to complete full beneficial use ended in 1995 and the Permittee has not obtained an extension of time.
3. The Permittee has not submitted an annual Progress Report of Permittee, summarizing water use and project status as required by conditions in the Permit since 2002. The Progress Reports submitted indicate water use even during those years when the Division has confirmed that no water was available to serve these permits.
 - a. 4. When a person fails to use beneficially all or any part of the water claimed by him or her for the purpose for which it was appropriated or adjudicated for a period of five years, such unused water may revert to the public. (Wat. Code, § 1241.)

C. BASED ON THE ABOVE FACTS AND INFORMATION, THE DIVISION CONCLUDES THAT CAUSE EXISTS FOR THE REVOCATION OF PERMITS 19164 AND 19165 PURSUANT TO WATER CODE SECTION 1410, SUBDIVISION (a) BECAUSE:

Permittee has failed to commence, prosecute with due diligence, and complete the work necessary to appropriate water under Permits 19164 and 19165 and has failed to apply to beneficial use all or part of the water authorized for appropriation as contemplated in the permit and in accordance with the Water Code and the regulations of the State Water Board.

As required by Water Code section 1410.1, you are hereby notified that unless the Division receives a written request for a hearing, signed by or on behalf of the Permittee, the State Water Board will revoke Permits 19164 and 19165, based on the above facts, information and conclusions. The written request for hearing must be postmarked or delivered no later than 15 days from the receipt of this notice. You may request a hearing by delivering or mailing the request to the State Water Board at the following address within the time period provided: Division of Water Rights, P. O. Box 2000, 1001 I Street, Sacramento, CA 95812-2000.

Based on the above facts and conclusions, the State Water Board, Division of Water Rights will revoke Permits 19164 and 19165 unless the Division receives a written request for hearing within the time period specified above.

STATE WATER RESOURCES CONTROL BOARD

Victoria A. Whitney, Chief
Division of Water Rights

Dated: **January 18, 2008**

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