

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Application 26017)
JOHN M. AND JANE F. BEHRENS)
Applicant)
FREDERICK AND HELEN WOODWARD, ET AL.)
Protestants)

Decision: 81-1574
Source: Unnamed Stream tribut
to Kentucky Ravine
County: Nevada

DECISION APPROVING APPLICATION 26017

BY THE BOARD:

John M. and Jane F. Behrens, having filed Application 26017 for a permit to appropriate unappropriated water; protests having been received; the applicants and protestants having stipulated to proceedings in lieu of hearing as provided for by Title 23, California Administrative Code, Section 737; an investigation having been made by the State Water Resources Control Board pursuant to said stipulations; the Board, having considered all available information, finds as follows:

Substance of Application:

1. Application 26017 is for a permit to appropriate 2.5 acre-feet of water per annum by storage from November 1 of each year to April 15 of each succeeding year for irrigation and stockwatering purposes from an unnamed stream tributary to Kentucky Ravine in Nevada County. The points of diversion and place of use are located within the NE $\frac{1}{4}$ of SE $\frac{1}{4}$, Section 10, T16N, R7E, MDB&M

Applicants' Project:

2. The applicants' project consists of an existing reservoir which was completed in 1978 and holds about 1.5 acre-feet. The second reservoir, yet to be built, will hold about 0.5 acre-foot and will be located about 500 feet

downstream from the first one. Water is used for stockwatering and irrigation of four acres of pasture to be increased to five acres. At the time of the investigation, Mr. Behrens was pumping from another reservoir constructed prior to development of a subdivision, which is partly on his property. Once his second reservoir is built, he will pump from it and discontinue pumping from the subdivision reservoir. The subdivision reservoir, not covered by this application, is located just downstream from the applicants' proposed lowermost reservoir and is surrounded by and owned by seven property owners including the applicants. Its capacity is about 40 acre-feet and it is used for recreation.

Protests:

3. The application was protested by Nevada Irrigation District, Harry D. and Georgia C. Rawie, Frederick J. and Helen M. Woodward, Ellis and Mamie Lambson, Howard Golub and the U. S. Water and Power Resources Service. The Service's protest was withdrawn based on inclusion of standard Board Permit Terms 80, 90 and 91. The Nevada Irrigation District withdrew its protest pursuant to terms of a private agreement signed by applicant and District. The agreement is conditioned on any permit issued on Application 26017 being subject to the terms of the agreement. Rather than subject the permit to all terms of the private agreement, a term will be imposed which will operate to accomplish the principal feature of the agreement. This feature requires applicant to purchase from the District summer irrigation water flowing in the source stream or to install measuring devices above and below his reservoirs so that District water can be passed on through. Application 26017 does not seek to appropriate water during the irrigation season. It is proper for any permit issued to require outlet pipes in the dams and measuring devices in the stream channel to assure that District water or any other water not authorized for diversion by applicant is passed through the reservoirs.

4. The protests of the lower property owners were based on grounds that the proposed appropriation would injure vested rights and adversely affect the environment. Protestants claim riparian and prescriptive rights and rights under their Application 26067 for storage of water in the subdivision reservoir. The priority of this application is junior to Application 26017. Protestants' environmental concerns include possible stagnation of water, mosquitos, mud, injury to fish, and surrounding habitat due to the lack of fresh water entering their reservoir.

Availability of Unappropriated Water:

5. The applicants' project is near the headwaters of the unnamed stream. The annual runoff tributary to the applicants' proposed reservoir has been estimated at 111 acre-feet, most of which occurs during the winter and early spring when there is little need for water. The application seeks 2.5 acre-feet. Unappropriated water is available during the season requested.

6. The protestants contend that the proposed lower dam will obstruct a recreational easement around the existing lake. The easement includes a ten-foot wide strip around the perimeter of the lake for fishing and recreation. As described in various deeds "the boundary of said easement shall be a line drawn 10.00 feet beyond the mean high water contour of said lake as measured horizontal and parallel to said water contour".

7. Since the initial construction of the subdivision reservoir and the creation of the easement, the spillway crest has been raised by the addition of flashboards. This change has raised the high water line of the reservoir. The protestants apparently believe that their recreational easement moved outward to accommodate the higher level of water in the reservoir. The applicant asserts that the easement is fixed and is inundated by the higher water level. The applicant's lower dam will be situated within several yards or less of the level of the water in the reservoir wit out the flashboards.

8. This Board's regulations provide that the Board will not undertake to determine the right to occupy and use land and that the existence of a dispute concerning such right is not cause for denial of an application (23 Cal. Administrative Code 749). The protestants should take notice that this issue can only be resolved by the judiciary, binding arbitration or an agreement reached with the applicant. This order will delay the applicants' right to commence construction of the lower dam for a period of sixty (60) days to give the protestants time to consider what additional action they may wish to take with regard to this issue.

Environmental Considerations:

9. Protests based on possible adverse environmental effects were not supported with evidence or facts either before, during or after the investigation. This project involves only a minor modification to land, and such activity is exempt from the provisions of the California Environmental Quality Act (Public Resources Code Section 2100 et seq.) in accordance with Section 15104, Chapter 3, Title 14, California Administrative Code.

Record in this Matter:

10. The records, documents, and information used in deciding this matter are: The files of Applications 26017, 26067 and 26232, and all information on file therein, especially the Engineering Staff Analysis of Record dated November 13, 1980, rainfall records and USGS topographic maps of the area.

Conclusions:

11. From the foregoing findings, the Board concludes that Application 26017 should be approved and a permit issued to the applicants subject to the conditions set forth in the order following.

ORDER

IT IS HEREBY ORDERED that Application 26017 be approved and a permit issued to the applicant subject to vested rights. The permit shall contain all applicable standard terms (6, 10, 11, 12, 13, 80, 90 and 91)* in addition to the following conditions:

1. The Water appropriated shall be limited to the quantity which can be beneficially used and shall not exceed 2.5 acre-feet per annum to be collected from November 1 of each year to April 15 of the succeeding year.

2. Permittee shall not commence construction until 60 days after the water right permit is issued.

3. Complete application of the water to the authorized use shall be made by December 1, 1984.

4. Permittee shall install and maintain outlet pipes of adequate capacity in their dams as near as practicable to the bottom of the natural stream channel in order that water entering the reservoirs which is not authorized for appropriation under this permit may be released.

5. This permit does not authorize collection of water to storage outside of the specified season to offset evaporation and seepage losses or for any other purpose. All water entering the reservoirs during the period April 16 through October 31 shall be released either through a spillway or through the outlet pipe required by the term next above.

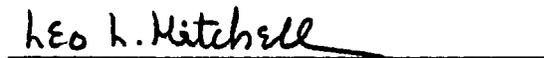
* The Board maintains a list of standard permit terms. Copies of these are available upon request.

6. Permittee shall either purchase water from the Nevada Irrigation District during the irrigation season or install and maintain devices satisfactory to the State Water Resources Control Board, capable of measuring the flow into and out of the reservoirs during the non-storage season, as specified in the agreement between permittee and Nevada Irrigation District executed by the District October 14, 1980.

7. Permittee shall immediately cease all diversion of water from the subdivision reservoir specified in Application 26067 and, if litigation is not commenced within 60 days, shall remove all pumping equipment from the site within 60 days after the water right permit is issued.

Dated: June 18, 1981


Carla M. Bard, Chairwoman


L. L. Mitchell, Vice-Chairman


Bill B. Dunlap, Member


F. K. Aljibury, Member