

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Application 24170 )  
of John W. Scott to Appropriate )  
from an Unnamed Stream in Nevada )  
County. )

Decision 1433

DECISION DENYING APPLICATION

BY THE BOARD:

John W. Scott having filed Application 24170 for a permit to appropriate unappropriated water; protests having been received; the applicant 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 stipulation; the Board, having considered all available information, finds as follows:

Substance of the Application

1. Application 24170 is for a permit to appropriate .05 cubic foot per second (cfs) by direct diversion from April 1 to September 1 of each year for irrigation, reforestation and fire protection purposes from an unnamed stream tributary to Rock Creek in Nevada County. The point of diversion is to be located within the NE $\frac{1}{4}$  of SE $\frac{1}{4}$ , Section 27, T17N, R9E, MDB&M.

### Applicant's Project

2. The applicant proposes to irrigate two pastures of approximately two acres each by pumping from a diversion sump to be constructed on the unnamed stream tributary to Rock Creek. He also proposes to use water from the unnamed stream for reforestation on the remainder of his 40-acre tract. His reforestation program is being carried out with the cooperation of the U. S. Soil Conservation Service.

### Protestants' Project

3. A small cobble dam diverts water from the unnamed stream into a contour ditch. Approximately one-quarter mile down the ditch a turnout structure diverts water into a pipeline which serves protestants Lawrence R. and Mary C. Brewer. The theoretical capacity of the pipeline is approximately 40 gallons per minute (gpm). The Brewers irrigate approximately 3 acres of pasture and a Christmas tree farm. They plant approximately 1,000 trees a year which are watered only during the first year. The ditch also supplies two houses on the Brewer property during the winter months. The Brewers hold License 8127 (Application 1658) covering a recreational pond which has a capacity of approximately 4 acre-feet. On October 29, 1973, the date of the field investigation on Application 21470, the reservoir was spilling an estimated 50 gpm.

4. The ditch which serves protestants Brewer continues a short distance in a southerly direction to terminate in a distribution box. From the distribution box 6-inch, 3-inch and 2½-inch pipelines convey the water directly to protestant Berle Holt's

place of use and also to a reservoir which has a capacity of approximately 8 acre-feet. He irrigates approximately 6 acres of pasture and an apple orchard containing approximately 180 trees.

5. Protestant Lake Vera Mutual Water Company holds License 781 (Application 4494) for storage of 70 afa in a reservoir (Lake Vera) on Rock Creek approximately 4 miles below protestants Holt and Brewer, from October 1 to April 1. The company also holds License 782 (Application 5719) for 2 cfs by direct diversion from April 1 to October 1 to offset evaporation and seepage losses at the reservoir. The reservoir is used for recreational purposes at a Campfire Girls' summer camp and stays full in most years. An estimated 100 gpm was flowing through the reservoirs' outlet at the time of the field investigation.

#### Water Supply and Uses

6. There are no streamflow records for the unnamed stream. It is in the Sierra foothills and the stream's drainage area at the applicant's point of diversion is approximately 400 acres. The elevation at that point is approximately 3,300 feet. An additional approximately 60 acres contributes to the flow of the unnamed stream between the applicant's and the protestants Holt and Brewer points of diversion.

7. Protestants Holt and Brewer divert the entire flow of the unnamed stream during the summer months. At the time of the field investigation the flow of the unnamed stream at the applicant's point of diversion was 50 gpm and all but approximately 5 gpm was going into the Holt-Brewer ditch. No water was being diverted at the Brewer turnout. The entire flow, less ditch losses,

was being piped into the Holt reservoir. Only about one-quarter of the amount diverted into the ditch was reaching the reservoir. Rainfall records of the U. S. Weather Bureau for its station at Nevada City, approximately  $4\frac{1}{2}$  miles southwest of the applicant's project, indicate that the flow of the unnamed stream was higher than average at the time of the field investigation.

8. The diversion of water from the unnamed stream as proposed by Application 24170 will not have any substantial effect on Lake Vera. Lake Vera is at the junction of Brush and Rock Creeks and receives substantial flows from Brush Creek.

#### Water Rights of Protestants Holt and Brewer

9. Protestants Holt and Brewer claim water rights based on an 1876 notice to appropriate 30 miner's inches from Rock Creek. Reasonable allowances for uses under these early rights are estimated to be as follows: Holt pasture .04 cfs, Brewer pasture .02 cfs, Holt orchard and Brewer reforestation .005; for a total water use of .065. Adding a reasonable ditch loss of .016 cfs gives a gross allocation of .08 cfs for these prior rights.

The applicant questions the validity of these claimed early rights contending that the place of use designated in the 1876 notice was west of protestants' present place of use, the notice covered Rock Creek rather than an unnamed stream tributary to Rock Creek, and that the protestants' excessive ditch losses constitute an unreasonable method of diverting water. It is not clear from the notice and an inspection of the protestants' projects whether changes have been made in the place of use or point

of diversion since the original filing. However, assuming that changes have been made by the protestants or their predecessors, a holder of a pre-1914 appropriative right may change the point of diversion and place of use and character of use provided the rights of others are not impaired (see Byers, et al. v. Colonial Irrigation Co. (1901) 134 Cal. 553, 66 P. 732, and Water Code Section 1706). Protestants have established a prima facie right based upon the 1876 notice and evidence of continued use since then which is entitled to recognition by this Board. Of course, a court of law alone has authority to make the final determination of the validity of such claimed rights.

The record indicates that the measured flow at the time of the investigation (0.11 cfs) was greater than the usual flow during the irrigation season. It appears likely that the usual summer flow does not exceed the reasonable needs of the prior right holders, as contended by the protestants. Therefore, even if the presently excessive ditch losses being sustained by the protestants were reduced to a satisfactory level, there would be insufficient water to satisfy the Scott application.

The fact that the established needs of the protestants equal or exceed the entire summer supply, even with the ditch in a state of good repair, plus the fact that relatively little work would be required to repair the ditch, indicates that the present condition of the ditch has not endured for long. It appears unlikely, therefore, that any of protestants' rights have been forfeited. Again, only a court has the authority to make that determination.

10. Unappropriated water is not available to supply the applicant.

From the foregoing findings, the Board concludes that Application 24170 should be denied.

The records, documents, and other data relied upon in determining the matter are: Application 24170 and all relevant information on file therewith, particularly the report of field investigation made on October 29, 1973.

ORDER

IT IS HEREBY ORDERED that Application 24170 be denied.

Dated: April 18, 1974

W. W. ADAMS

W. W. Adams, Chairman

RONALD B. ROBIE

Ronald B. Robie, Vice Chairman

**ABSENT**

Roy E. Dodson, Member

MRS. CARL H. (JEAN) AUER

Mrs. Carl H. (Jean) Auer, Member

W. DON MAUGHAN

W. Don Maughan, Member