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STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Applications 24446)
and 24447 of Boyd Trucking Company) Decision 1446
to Appropriate from Unnamed Streams)
in Shasta County.)

DECISION DENYING APPLICATIONS

BY BOARD VICE CHAIRMAN ROBIE:

Boyd Trucking Company having filed Applications 24446 and 24447 for permits to appropriate unappropriated water; a public hearing having been held before the State Water Resources Control Board on February 20, 1974; applicant having appeared and presented evidence; the evidence received at the hearing having been duly considered, the Board finds as follows:

Substance of the Applications

1. Applications 24446 and 24447 are for permits to appropriate 415 acre-feet per annum (afa) and 910 afa, respectively, by storage, to be collected from November 1 of each year to April 1 of the succeeding year for recreation and fish culture purposes from unnamed streams in Shasta County.

Applicant's Project

2. The project covered by the subject applications is essentially the same as the project covered by Applications 23865 and 23943 of the Boyd Trucking Company which were the subject of



1446

a hearing held December 15, 1972, and which were denied by Decision 1425. The only difference in the project covered by the new applications is the elimination of Reservoir No. 4. Reservoirs No. 1 and No. 2 are already constructed and No. 3 (Application 24446) will be constructed within three years (RT 12).

Protests

3. Protests were filed by the U. S. Bureau of Reclamation. They were dismissed prior to the hearing when the applicant agreed to the following permit term which satisfied the protestant:

"State Water Resources Control Board reserves jurisdiction over this permit for the purpose of conforming the season of diversion to later findings of the Board on prior applications involving water in the Sacramento River Basin and Delta and to those periods of time when the unappropriated flow into the Sacramento-San Joaquin Delta is sufficient to meet water quality standards now or hereafter adopted by the Board. Action by the Board will be taken only after notice to interested parties and opportunity for hearing."

Existence of Unappropriated Water

4. Decision 1425 found that "without question" unappropriated water is available to the applicant and the existence of unappropriated water was not an issue in the hearing on Applications 24446 and 24447.

Reasonable and Beneficial Use of Water

5. Decision 1425 found that the applicant's impoundment of a substantial quantity of water for recreation

and aesthetic enjoyment by only a few people, along with enhancement of the value of the property, was not a reasonable and beneficial use of water and was not in the public interest.

6. At the hearing on Applications 24446 and 24447 the applicant submitted additional evidence on the use of water and project benefits.

7. In Decision 1425 the Board stated:

"...we are unable to make a favorable finding required by Water Code Section 1375(c) that the intended use will be beneficial...."

"A fair summary of...[the applicant's] testimony follows:

He has no definite plans at the present for any substantial recreational use of the water impounded; although the reservoirs would make an attractive area for a subdivision, he has no serious intent personally to subdivide (RT 29); he is not sure what may eventually happen to the property (RT 29) but the reservoirs will enhance the value of building sites (RT 30). In the meantime, the public will be excluded from the reservoirs because public use would interfere with the applicant's ability to continue to lease the property for cattle grazing (RT 29); he is the only person living on the property now (RT 27); migratory birds will use the reservoirs for resting ponds (RT 24); and the water will eventually be used for boating and other water contact activities (RT 25). The only plans with regard to fish culture are that some fish will be planted, such as catfish or bass, that would be adapted to the temperature of that type of reservoir (RT 29)."

These facts are essentially the same today (RT 13-15).

8. The reservoir will be used for fishing (RT 7). The Department of Fish and Game has agreed to stock these private reservoirs. In the opinion of Fish and Game, stocking of private

reservoirs is justified in that such reservoirs reduce fishing pressure on sources to which the public has access (letter from Department's Regional Manager, February 28, 1974, to applicant's engineer; file Application 24446). Although the reservoirs will not be open to the public, they will be used for camping, picnicking, and boating. Approximately 100 people (families, friends, and employees) will use the reservoirs for these purposes (RT 11). No detailed recreation development plan is proposed by the applicant. In fact, the facilities constructed include a picnic table and stove (RT 35). A gravel construction road now serves as a boat launching ramp (RT 36).

The applicant's reservoirs overlie the Redding Groundwater Basin (Applicant's Exhibit 2, Plate 9). Seepage from the reservoirs will serve to recharge the groundwater basin. Based on experience with Reservoir No. 1, a total of 132 acre-feet of seepage water will recharge the basin annually (RT 27, 28).

Several public agencies have filed with us virtually identical resolutions terming applicant's project to be in the public interest: These agencies are the Shasta County Recreation Commission, Shasta County Board of Supervisors, Northern California County Supervisors Association, and Shasta County Water Resources Board (County of Shasta, Exhibits 1 through 4).

A suggestion appears in the record that although the reservoirs will not be operated for flood control purposes, they will be of some help in preventing the flooding of county roads

downstream (RT 42). Also, they will, to some extent, improve water quality by sediment retention (RT 30). Since the reservoirs are located within a fly-way for migrating birds, particularly ducks and geese, the reservoirs will be used as resting ponds (RT 8). The reservoirs are located in a region of high fire hazard and may have some value for fire protection (RT 42). Reservoir No. 1 has facilities for filling a 3,200-gallon tank truck in three minutes (RT 46). The applicant has no objection to the use of water in the reservoirs for fire protection but has made no specific arrangements for such use with local fire protection agencies.

We note that several factors cited as beneficial results of the project would be true of any reservoir constructed almost anywhere in the State. The fact that the dam would prevent floods is something that can be said about many dams. Applicant has indicated no intent to operate his project for the purpose of flood control. The fact that seepage from the reservoir would recharge the local groundwater basin is a situation which would occur with the construction of any reservoir overlying such a basin. It appears that if these factors are deemed controlling in the determination of the reasonableness of the beneficial use of water, most reservoirs proposed would automatically meet the criteria.

In approving a water right application the Board must find that the water appropriated will be both reasonably and beneficially used. (Cal.Const., Art. XIV, Sec. 3; Joslin v. Marin Municipal Water District, 67 Cal.2d 132, 60 Cal.Rptr. 377 (1967); Peabody v. City of Vallejo (1935) 2 Cal.2d 351.) The purpose for the reasonable use standard is to ensure that "the highest and greatest duty [is obtained] from the waters of the state". (Tulare Irrigation District v. Lindsay-Strathmore Irrigation District (1935) 45 P.2d 972, 947.) Recognition also exists that water is a scarce resource and must be allocated in a manner to ensure its best and highest use. Further, in acting upon applications to appropriate water, the Board is required to consider the public interest involved and reject an application when, in its judgment, the proposed appropriation would not best conserve the public interest (Water Code Section 1255). After careful consideration of the relevant facts, we believe that to impound large volumes of water (1,300 acre-feet) for the possible use of about 100 people is not a reasonable use of water, nor would it be in the public interest. Had the applicant been able to present a reasonable plan for developing the property in the reasonably near future, with the reservoirs serving as a nucleus of the development, we may have looked upon the applications in a more favorable light.

However, Sections 776 and 777 of Title 23 of the California Administrative Code provide that an application must be denied if the applicant does not intend diligently to place the water to beneficial use. We also quote from 51 Cal.Jur.2d, Waters, Section 350:

"Uses Not Reasonably Beneficial; Future Use.-- One may appropriate all the water in a stream for a beneficial purpose, but a diversion for the purpose of acquiring a title for future use when additional land may be developed for agriculture is not a beneficial use, and no rights accrue by such a diversion. A claim to a water right that has no other basis than its value for possible future use is merely speculative...." (Citing Weaver et al. v. Eureka Lake Company, 15 Cal. 271.)

Esthetic enjoyment is a beneficial use that may be protected against quality degradation under the Porter-Cologne Act (Water Code Section 13050(f)), and esthetic enjoyment of a reservoir located in scenic surroundings is a form of recreation. Recreation is one of the uses covered by these applications and, in any case, is one of the beneficial uses of water to be considered in acting on applications to appropriate water (Water Code Section 1257). But these favorable aspects do not offset the negative features.

An additional factor presented by these applications while not controlling is disturbing. At the time of the hearing on the applications which resulted in Decision 1425, substantial construction on the facilities had already taken place in the applicant's anticipation that the applications would be approved. At that time the dam for Reservoir No. 1 was complete, the dam for Reservoir No. 2 was "about two thirds complete", and the

only construction on the dam for Reservoir No. 3 had been the excavation of the cutoff trench. Subsequent to that hearing, and prior to the hearing in the present proceeding the dam for Reservoir No. 2 was completed.

Unfortunately, it has become commonplace for an applicant to commence and even complete construction of facilities before filing for a permit or receiving final approval from the Board. The applicant then seeks to persuade the Board to consider as factors in favor of his application the expense and hardship of removing existing reservoirs. If the Board were to consider, in applicant's favor, the fact that these reservoirs had been constructed, it would be sanctioning the practice of constructing first and getting permits later. Approval of the permit in this case would give the "green light" to those individuals engaging in the dubious practice of constructing a reservoir and raising as factors of their application expenditures of money and harsh results from denial. The Water Code requires a permit prior to diversion or storage: There is no excuse for dam construction or diversion of water prior to receiving Board approval. The very integrity of the State's permit system is at stake.

However, it should be emphasized that the Board's decision denying this permit is not predicated on the fact of construction without a permit. Rather, we have concluded that

the use of the water anticipated by applicant is not reasonable, and approval of the application will not be in the public interest. For that reason, the application is denied

ORDER

IT IS HEREBY ORDERED that Applications 24446 and 24447 be denied.

Dated: January 16, 1975

RONALD B. ROBIE
Ronald B. Robie, Vice Chairman

W. W. ADAMS
W. W. Adams, Chairman

ROY E. DODSON
Roy E. Dodson, Member

MRS. CARL H. (JEAN) AUER
Mrs. Carl H. (Jean) Auer, Member

"no" *
W. Don Maughan, Member

*See Dissenting Opinion (Attached).

DISSENT OF BOARD MEMBER MAUGHAN

I respectfully dissent from the Board's decision.

The issues involved in this matter are the reasonableness of water use and whether such use would be in the public interest. It is true that the quantity of water stored and evaporated is large when compared to the relatively small number of uses contemplated by the applicant. The reservoirs will not be available to the general public for recreational use. However, the record shows several public benefits, albeit some are incidental such as sediment control, flood control, fire protection, and ground water recharge. The fact that there is unappropriated water available; that the Department of Fish and Game will plant fish; that water fowl will use the water surfaces; that no public group protested; and that the Shasta County Recreation Commission, Shasta County Board of Supervisors, Northern California County Supervisors Association and the Shasta County Water Resources Board all supported the reservoirs in my mind aggregate to tip the scales toward approval of the applications.

This matter involves significant Board policy, and in my mind the pluses and minuses are nearly equal. I personally do not advocate that the precious and limited water resources of this State be used lavishly for a few individuals and the Boyd Trucking applications border on that situation. However, for reasons previously stated and with the permit terms designed to keep uses reasonable and in the public interest, I respectfully disagree with the majority and believe that permits should have been issued for Applications 24446 and 24447.

The permits could have contained terms and conditions which would have protected the public interest. Such terms and conditions would have been as follows:

"1. (a) The water appropriated pursuant to Application 24446 shall be limited to the quantity which can be beneficially used and shall not exceed 415 acre-feet per annum (afa) by storage to be collected from November 1 of each year to April 1 of the succeeding year.

quantity "1. (b) The water appropriated pursuant to Application 24447 shall be limited to the quantity which can be beneficially used and shall not exceed 910 afa by storage to be collected from November 1 of each year to April 1 of the succeeding year.

"This permit does not authorize collection of water to storage outside the specified season to offset evaporation and seepage losses or for any other purpose.

"2. The amount authorized for appropriation may be reduced in the license if investigation warrants.

"3. State Water Resources Control Board reserves jurisdiction over this permit for the purpose of conforming the season of diversion to later findings of the Board on prior applications involving water in the Sacramento River Basin and Delta and to those periods of time when the unappropriated flow into the Sacramento-San Joaquin Delta is sufficient to meet water quality standards now or hereafter adopted by the Board. Action by the Board will be taken only after notice to interested parties and opportunity for hearing.

"4. After the initial filling of the storage reservoir, permittee's right under this permit extends only to water necessary to keep the reservoir full by replacing water beneficially used and water lost by evaporation and seepage, and to refill if emptied for necessary maintenance or repair. Such right shall be exercised only during the authorized diversion season.

"5. The permit issued pursuant to Application 24446 shall contain the following terms:

"Actual construction work shall begin on or before nine months from date of permit and shall thereafter be prosecuted with reasonable diligence, and if not so commenced and prosecuted, this permit may be revoked.

"Said construction work on Reservoir No. 3 shall be completed on or before December 1, 1977.

"6. Complete application of the water to the proposed use shall be made on or before December 1, 1978.

"7. Progress reports shall be submitted promptly by permittee when requested by the State Water Resources Control Board until license is issued.

"8. All rights and privileges under this permit and under any license issued pursuant thereto, including method of diversion, method of use, and quantity of water diverted, are subject to the continuing authority of the State Water Resources Control 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.

"This continuing authority of the Board may be exercised by imposing specific requirements over and above those contained in this permit with a view to minimizing waste of water and to meeting the reasonable water requirements of permittee without unreasonable draft on the source. Permittee may be required to implement such programs as (1) reusing or reclaiming the water allocated; (2) restricting diversions so as to eliminate agricultural tail water or to reduce return flow; (3) suppressing evaporation losses from water surfaces; (4) controlling phreatophytic growth; and (5) installing, maintaining, and operating efficient water measuring devices to assure compliance with the quantity limitations of this permit and to determine accurately water use as against reasonable water requirements for the authorized project. No action will be taken pursuant to this paragraph unless the 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.

"9. The quantity of water diverted under this permit and under any license issued pursuant thereto is subject to modification by the State Water Resources Control Board if, after notice to the permittee and an opportunity for hearing, the 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 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.

"10. Permittee shall allow representatives of the State Water Resources Control Board and other parties, as may be authorized from time to time by said Board, reasonable access to project works to determine compliance with the terms of this permit.

"11. Permittee shall, when required by the State Water Resources Control Board, install and maintain an outlet pipe of adequate capacity in his dam as near as practicable to the bottom of the natural stream channel, or provide other means satisfactory to the State Water Resources Control Board, in order that water entering the reservoir which is not authorized for appropriation under this permit may be released.

"12. In accordance with the requirements of Water Code Section 1393, permittee shall clear the site of the reservoir of all structures, trees, and other vegetation which would interfere with the use of the reservoir for water storage and recreational purposes.

"13. If the storage dams are of such size as to be within the jurisdiction of the Department of Water Resources as to safety, storage of water shall not be commenced until the Department has approved plans and specifications.

"14. The permit issued pursuant to Application 24446 shall contain the following term:

"In order to prevent degradation of the quality of water during and after construction of Reservoir No. 3, prior to commencement of construction permittee shall file a report pursuant to Water Code Section 13260 and shall comply with any waste discharge requirements imposed by the California Regional Water Quality Control Board, Central Valley Region, or by the State Water Resources Control Board.

"15. This permit is subject to the continuing authority of the State Water Resources Control Board to reduce the amount of water named in the permit upon a finding by the Board that the amount is in excess of that reasonably needed to be held in storage for the authorized uses. No action will be taken by the Board without prior notice to the owner and an opportunity for hearing.

"IT IS FURTHER ORDERED that wildlife protection and fire protection be included as purposes of use authorized by this permit."

W. DON MAUGHAN
W. Don Maughan
Board Member