

STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

In the Matter of License 2109)
Issued on Application 7651,)
ROBERT H. WATERMAN and)
TERRENCE WALLER,)
Licensees.)
ORDER: WR 88-25
SOURCE: Mule Creek
COUNTY: Trinity

ORDER REVOKING LICENSE

BY THE BOARD:

1.0 INTRODUCTION

License 2109 having been issued for appropriation of water from Mule Creek on October 22, 1940; the reports of licensee having indicated a period of **nonuse** of water under the license for a period in excess of five years; the licensees having been sent a Notice of Proposed Revocation of the license; the licensees having requested a hearing on the proposed revocation; a public hearing having been held on September 17, 1986; licensee Terrence Waller and staff from the Division of Water Rights having appeared and presented evidence; the evidence in the record having been duly considered; the Board finds as follows:

2.0 BACKGROUND

Application 7651 was filed on August 21, 1933 for **year-**round direct diversion of water from Mule Creek for

hydroelectric power production. Following issuance of a permit and completion of the project, License 2109 was issued on October 22, 1940 confirming the right to divert 0.85 cubic feet per second for hydroelectric power production; The Reports of Licensee submitted on License 2109 report no use of water for the licensed purpose of use after 1970. As a result, the Division of Water Rights sent a notice of proposed revocation to the licensees. At the request of licensee Terrence Waller, the Board held a public hearing on the proposed revocation on September 17, 1986.

3.0

LEGAL PROVISIONS REGARDING NONUSE OF WATER UNDER AN APPROPRIATIVE WATER RIGHT

A critical requirement of establishing and maintaining an appropriative water right is that water must be applied to a beneficial use. Water Code Section 1240 states:

"The appropriation must be for some useful or beneficial purpose and when- the appropriator or his successor in interest ceases to use it for such a purpose the right ceased." (Emphasis added:)

The period of nonuse which may result in loss of a license is defined by Water' Code Section 1241 which states in part:

"When the person entitled to the use of water fails to use beneficially all or any part of the water claimed by him for which

a right of use has vested, for the purpose of which it was appropriated or adjudicated, for a period of five years, such unused water may revert to the public and shall, if reverted, be regarded as unappropriated public water."

Water Code Section 1675 provides that the Board may revoke a license for **nonuse** of water following notice and a hearing, if requested by the licensee. The procedural requirements of notice and a hearing regarding the proposed revocation of License 2109 have been met. The Board's findings on the issue of **nonuse** are set forth below.

4.0 **NONUSE OF WATER UNDER LICENSE 2109**

There is no dispute regarding the fact that there has been no use of water for hydroelectric power generation under License 2109 for a period in excess of five years. The Reports of Licensee report no use of water for the licensed purpose of use between 1971 and 1979. (SWRCB 1, 1.1, 1.2 and 1.3.)" The Reports of Licensee show that the licensees used water for irrigation and domestic use on a regular basis, but those uses are authorized only under License 1046 (Application 5303) which is not at issue in this proceeding. In addition, licensee Terrence **Waller** stipulated that water has not been used under License 2109 since 1978. (T, 9:10-18.)

* Citations to exhibits in the record are indicated by the abbreviated designation of the party submitting the exhibit followed by the exhibit number. Citations to the hearing transcript are indicated by a "T" followed by the beginning page and line number and the ending page and line number.

One reason for the **nonuse** of water for power production between 1973 and the present is that the **Pelton** wheel and accessories used for the project were stolen in 1973. (T, 32:6-18.) In addition, there was a dispute with the upstream landowner regarding an easement for the ditch which served the project. The dispute was resolved through a suit by the upstream landowner which resulted in a judgment denying the licensees' claim of a prescriptive right to maintain the diversion ditch over the upstream property. (T, 30:9-22.)

Mr. Waller testified that, up until approximately 1984, water flowed through the diversion ditch every year. Mr. Waller also testified that if there had been a generator in place, there was no reason that the licensees could not have generated power under the license up until 1984 even though there was a dispute over the ditch easement... (T, 37:8-38:18.) Buying power generated off the property, however, would be less expensive than reestablishing on-site generating facilities. (T, 26:22-27:1.)

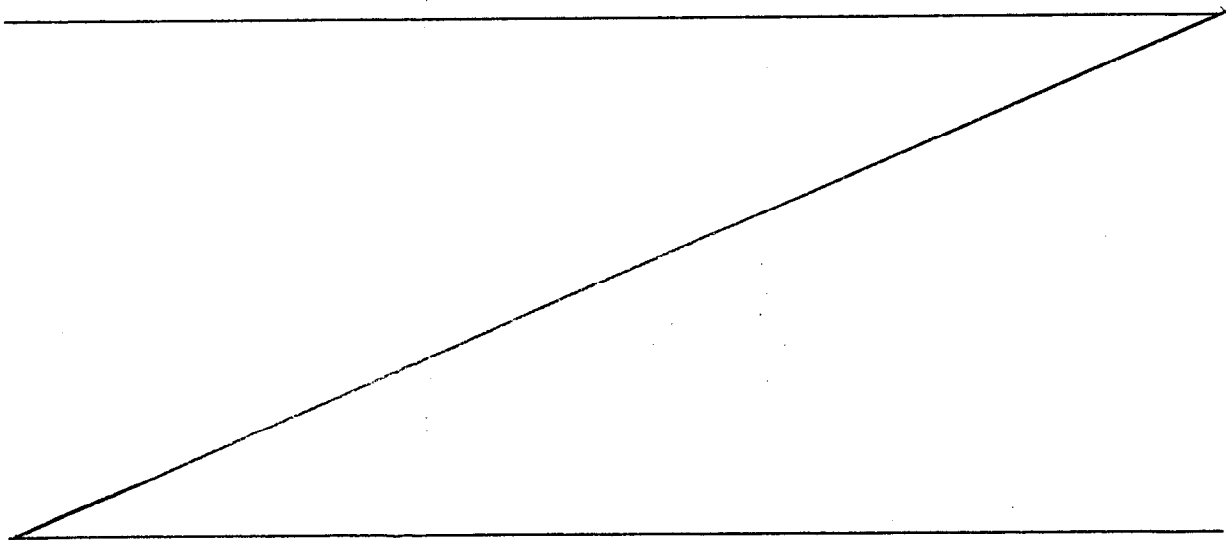
In summary, the **evidence** establishes that there has been no use of water under License 2109 since **at least** 1973, **if** not earlier. Following the theft of the

licensees' **Pelton** wheel in 1973 up until 1984, water was flowing in the ditch which served the licensed project, but no hydroelectric power was produced. Since 1984, the licensees have not had an easement or other right of access for the diversion ditch crossing the upstream landowner's property nor have the licensees established a reasonable probability that a right of access will be restored.

5.0

CONCLUSION

The law provides for loss of an appropriative water right license when there has been five years or more of **nonuse**. In this instance, there has been no use of water under License 2109 for a period well in excess of five years and the Board concludes that the license should be revoked.



ORDER

IT IS HEREBY ORDERED that License 2109 is revoked.

CERTIFICATION

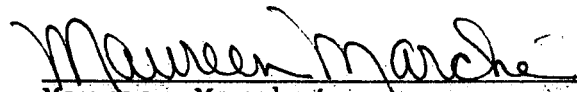
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on December 15, 1988.

AYE: W. Don Maughan
Darlene E. Ruiz
Edwin H. Finster

NO: None

ABSENT: Eliseo M. Samaniego
Danny Walsh

ABSTAIN: None



Maureen Marche
Administrative Assistant to
the Board