

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Permit 17500)
Issued Pursuant to)
Application 25510)
JAMES L. WAIT)
Permittee)

ORDER: WR 82-1
Source: Unnamed Stream
County: Amador

ORDER DECIDING NOT TO ISSUE A PRELIMINARY
CEASE AND DESIST ORDER AND DECIDING TO
AMEND A PERMIT CONDITION

BY BOARD MEMBER DUNLAP AND VICE-CHAIRMAN MITCHELL:

A hearing having been held on January 8, 1982 by the State Water Resources Control Board (Board) pursuant to Section 1834(b) of the Water Code for the purpose of allowing Eldon Wait, representing James L. Wait (Permittee), to show cause why a Preliminary Cease and Desist Order should not be issued and to present evidence as to whether Permit 17500 should be revised; permittee and other interested persons having appeared and presented evidence; the evidence received at the hearing having been duly considered; the Board finds as follows:

Substance of Permit

1. Permit 17500 authorizes storage of 12.4 acre-feet of water per year in a reservoir constructed during the 1940's on an unnamed stream tributary to Willow Creek. Water can be collected to storage from November 1 of each year to April 30 of the succeeding year for the purposes of irrigating seven acres of pasture, stockwatering, and for recreation. The dam and place of use are within the SW $\frac{1}{4}$ of NE $\frac{1}{4}$ of Section 18, T7N, R10E, MDB&M.

Background

2. Application 25510 was filed on September 26, 1977. The application was protested by Mr. Weindel, an upstream property owner, on the basis that the reservoir ponds water on his property. Mr. Weindel's protest was dismissed when it appeared that an agreement had been reached with Mr. Wait that would prevent water from ponding on Mr. Weindel's property.

3. In reliance upon the agreement, the Board issued Permit 17500 to James L. Wait on December 21, 1978. The permit includes condition 12 as follows:

"Permittee shall place earthfill in a manner so as to prevent water from ponding on the land of his neighbors Mr. and Mrs. Hubert Weindel."

4. On April 15, 1981, Mr. Weindel complained that Mr. Wait had not complied with term 12 of the permit.

5. On May 14, 1981, the Division of Water Rights advised Mr. Wait that the permit was subject to a specific condition requiring earthwork to prevent ponding on the Weindel property; that said earthwork, had not been accomplished and that compliance with the conditions of the permit was requested by diking the upper end of the reservoir or by lowering the reservoir spillway. Failing to obtain voluntary compliance, the Division, in accordance with Water Code Section 1834, issued a Notice of Violation and a Proposed Preliminary Cease and Desist Order to permittee on October 28, 1981. Mr. Wait requested a hearing on the matter.

Discussion

6. Mr. Wait and Mr. Weindel did not reach a common understanding concerning the work Mr. Wait would perform to stop ponding on Mr. Weindel's property in accordance with condition 12 of Permit 17500. Mr. Wait understood the agreement to mean that he would deposit earth fill on Mr. Weindel's property raising the level of the ground above the maximum water level in the downstream reservoir. Mr. Weindel understood that an earth dike would be placed at the upper end of permittee's reservoir to keep stored water from ponding on his land. Mr. Wait pointed out that such a dike was not practical because the dike would also pond water on Mr. Weindel's property. Mr. Weindel stated that he can tolerate that amount of water, but that he would not permit Mr. Wait to come on his land and deposit earth fill.

7. Mr. Wait claims that when the reservoir was constructed in the 1940's, the upstream landowner at that time had acquiesced in the location of the reservoir. The following statement signed by Mary M. Baxter and dated March 8, 1978, was submitted in support of this contention:

"Dear Mr. Wait:

This is to confirm that at the time your dam, on the north side of your ranch, was built, we were the owners, and that the dam was built with our full knowledge and approval."

Mr. Wait further claims that Mr. Weindel is the first owner of the upstream property to object to the ponding caused by the reservoir.

8. The circumstances present in this matter raise the question of whether permittee has a right to pond water on upstream property, and if so, whether it would be appropriate for the Board to enforce condition 12 of Permit 17500.

9. A covenant is a promise respecting the use of land. Where a covenant does not run with the land due to a legal deficiency, the judiciary will sometimes enforce the obligation against the successors of the covenantor as an equitable servitude. (Summary of California Law, Witkin Vol.3 Real Property, Section 393.) The chief requirement is that the successive landowner against whom enforcement is sought, must have had notice of the covenant at the time of the grant. Mr. Weindel indicated that he was not aware of the existence of the water on his land until after he acquired the property. More specifically, he testified that he did not realize permittee's reservoir ponded water on his property until after he had the land cleared of heavy brush and undergrowth, and that an examination of recorded documents did not disclose that permittee's reservoir was on his property. Mr. Wait did not contest Mr. Weindel's testimony.

10. Equitable estoppel is a judicial doctrine holding (1) that where a person has knowingly made representations to another and (2) the other person is induced to rely upon the representations, the first person can be stopped from changing his position if the second person would be injured by the change. The Baxter's having indicated that the reservoir could be constructed in a manner that would cause it to back water on their land, could not have required modification of the reservoir at a later date. The courts would probably have held the Baxters to their approval because modifications of the reservoir would have caused an injury to the reservoir owner. The courts would, in effect, hold the Baxters to an implied promise (covenant) respecting the use of land.

11. It may be contended that Mr. Weindel is charged with constructive notice of physical features impinging upon his land at the time of purchase and that he was under an obligation to make inquiry concerning the Wait reservoir. While it does not appear that anyone other than Mr. Wait could

have offered him an explanation, such an inquiry should have led to Mr. Wait and then to the Baxters. Given the circumstances present in this matter, it appears that Mr. Weindel's property could be the subject of an equitable servitude respecting permittee's reservoir.

12. The Board is not empowered to make decisions concerning the right to the use of property. Only a court of competent jurisdiction is empowered to resolve the dispute between permittee and Mr. Weindel. Because the Board cannot resolve the property dispute in this matter, it would be inappropriate to enforce a permit condition intended to protect the property right in question.

13. The Board did not reserve jurisdiction to amend Permit 17500 pursuant to Water Code, Section 1394. Failing to reserve jurisdiction, the Board may not, ordinarily, amend permit conditions. In this instance, however, Mr. Wait, the permittee's representative, requested that the Board re-examine the appropriateness of condition 12. The notice of hearing indicated that modifications to the conditions of Permit 17500 was a key issue. During the hearing, testimony was received from Mr. Wait concerning the modification of permit conditions. It is concluded, therefore, that the permittee has waived his right to object to the Board taking further action to modify the conditions of Permit 17500.

Conclusions

14. A Preliminary Cease and Desist Order should not be issued to James L. Wait.

15. Condition 12 should be amended to indicate that permittee can store water only on property upon which he has a legal right to store water.

ORDER

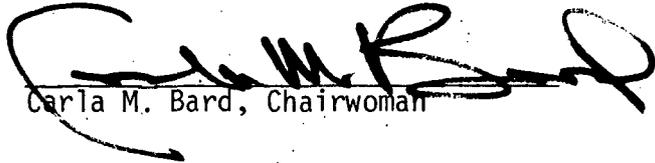
NOW, THEREFORE, IT IS ORDERED that condition 12 of Permit 17500 be amended to read as follows:

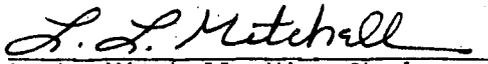
"This permit confers the right to store water only on property on which the permittee has a legal right to store water".

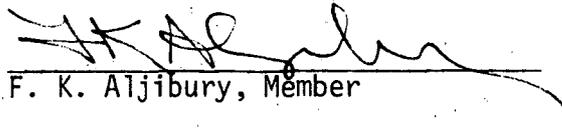
Dated: March 18, 1982

We Concur:


Jill B. Dunlap, Member


Carla M. Bard, Chairwoman


L. L. Mitchell, Vice-Chairman


F. K. Atjibury, Member