

**STATE WATER RESOURCES CONTROL BOARD
BOARD MEETING – DIVISION OF WATER RIGHTS
DECEMBER 9, 2005**

ITEM 2

SUBJECT:

PROPOSED REVOCATION OF WATER RIGHT PERMIT 20247 (APPLICATION 28669) OF MICHAEL L. AND KNOX P. MILLER, POWERHOUSE CANAL THENCE EAST FORK RUSSIAN RIVER THENCE RUSSIAN RIVER, MENDOCINO COUNTY

DISCUSSION:

On August 29, 2005, the State Water Board conducted a hearing to determine whether water right Permit 20247 (Application 28669), assigned to Michael L. and Knox P. Miller, should be revoked for failure to construct the project and apply the authorized water to beneficial use as described in the permit.

Based on the hearing, the proposed water right order concludes:

1. The permittees failed to construct the project and failed to complete beneficial use of the water prior to the deadlines set forth in the permit.
2. The permittees failed to file petitions for extension of time and for changing (adding to) the place of use prior to the deadlines imposed by the State Water Board in the permit.
3. No water was used pursuant to the permit from 1988 to at least 2000. Five years of non-use is sufficient to justify the reversion of water to the public.

POLICY:

Should the State Water Board adopt the proposed order?

FISCAL IMPACT:

This activity is budgeted within existing resources, and no additional fiscal demands will occur as a result of approving this item.

REGIONAL BOARD IMPACT:

None

STAFF RECOMMENDATION:

Staff recommends that the State Water Board adopt the proposed order.

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2005 –

In the Matter of Permit 20247 (Application 28669) of

MICHAEL L. AND KNOX P. MILLER

SOURCE: Powerhouse Canal thence East Fork Russian River thence Russian River

COUNTY: Mendocino

ORDER REVOKING PERMIT 20247

BY THE BOARD:

1.0 BACKGROUND

On July 18, 1988, the Division of Water Rights (Division) of the State Water Resources Control Board (State Water Board) issued Permit 20247 to Walter, Dorothy and Patricia Hammeken. The permit was assigned to Jack and Anne Air on May 13, 1997. On April 6, 2004, the Division was informed that Michael and Knox Miller purchased the property on December 29, 2003.

Permit 20247 authorizes the direct diversion of water at a rate of 0.3 cubic foot per second from January 1 to December 31 of each year, not to exceed 216 acre-feet per year, from a point of diversion located on Powerhouse Canal in Mendocino County. The purposes of use authorized by Permit 20247 are irrigation and stockwatering on twenty acres. Permit 20247 requires that construction work be completed by December 31, 1991, and that the water be applied to the authorized uses by December 31, 1992. (DWR Prosecution Team Exhibit 3.)

On July 12, 2000, Division staff conducted a pre-licensing inspection and found no established point of diversion (POD) and that the irrigated acreage of the Millers' vineyard property exceeds the place of use (POU) allowed in the permit. During the inspection, Jack Air stated that the vineyard was irrigated with water purchased from the Potter Valley Irrigation District. (DWR Prosecution Team Exhibit 21.)

In a letter dated June 18, 2001, the Division informed the permittees, Jack and Anne Air, that they must file a petition for extension of time and do one of the following:

1. File a new application to cover the acreage that exceeds the POU allowed in the permit, or
2. File a petition with the State Water Board to expand the authorized POU if the permittees are able to document the ability to irrigate the entire acreage with the same amount of water allowed under the permit. (DWR Prosecution Team Exhibit 4.)

On August 24, 2001, the then-permittees (the Airs) submitted a petition for extension of time and a petition for change to add to the POU. (DWR Prosecution Team Exhibits 5 and 6.) The petitions did not include the required filing fees and were not accepted for filing by the Division. The Division notified the permittees twice of the deficiencies, requested the required fees, and received no response. (DWR Prosecution Team Exhibits 7 and 8.)

On March 25, 2004, the Division issued a Notice of Proposed Revocation for Permit 20247 to Jack and Anne Air. (DWR Prosecution Team Exhibit 15.) After the Division was advised that the property had been sold to Michael and Knox Miller, the Division re-issued the Notice of Proposed Revocation to the Millers on September 14, 2004.

(DWR Prosecution Team Exhibit 14.) On September 23, 2004, Michael Miller requested a hearing on the proposed revocation. (Miller Exhibit 5.) The hearing was held on August 29, 2005, in accordance with the Notice of Hearing dated June 23, 2005.

2.0 NO USE OF WATER PURSUANT TO PERMIT 20247

Expiration of a permit deadline without completing the required activity subject to that deadline is cause for revocation of the permit. (Wat. Code, § 1410.) As stated above, the time to construct the project authorized by Permit 20247 expired December 31, 1991. The time to complete beneficial use of the water in accordance with Permit 20247 expired December 31, 1992. Construction had not commenced nor had any water been used in accordance with the permit prior to the Division's inspection conducted at the site on July 12, 2000. (DWR Prosecution Team Exhibits 21 and 22.) Testimony at the hearing established that after the inspection on July 12, 2000, but before the Millers bought the property on December 29, 2003, a pump was installed at the authorized point of diversion, and subsequently some water has been diverted and used for irrigation and frost protection. (Reporter's Transcript (R.T.), pp. 38:21-39:20; 43:10-19; 44:15-19; 49:14-25; 50:22-24; Miller Exhibit 2.)

Diversion and use of water that occurs in violation of a permit condition, including a permit condition that imposes a deadline, is unauthorized and subject to enforcement action. (Wat. Code, § 1052.) A petition for extension of time and a petition to add to the place of use should have been filed and approved prior to any construction and/or diversion and use of water in order for that use to be considered an authorized use. In this instance, the permittees did not file the petitions prior to the expiration of the permit and did not receive authorization from the State Water Board to divert water or put it to beneficial use after December 31, 1992.

The evidence shows that there is cause for revoking Permit 20247 because the permittees failed to construct the project and failed to complete beneficial use of the water prior to

the deadlines set forth in the permit. No water was used pursuant to the permit from 1988 to at least 2000. Five years of non-use is enough to justify the reversion of water to the public. (Wat. Code, §§ 1240, 1241.) In addition, the permittees failed to file petitions for extension of time and for changing (adding to) the place of use prior to the deadlines imposed by the State Water Board in the permit. Therefore, Permit 20247 should be revoked.

~~There is evidence upon which the Millers might claim a riparian right. The Millers' property is adjacent to Powerhouse Canal, and their property is in the same watershed as Powerhouse Canal. Powerhouse Canal is a natural channel with some natural flow¹ that is tributary to (upstream of) the East Fork Russian River. However, riparian rights are correlative, meaning that all riparian users must share the amount of water available for riparian diversion. If the Millers can demonstrate that they likely hold a riparian right, the Millers would be entitled to a correlative share of the natural flow of Powerhouse Canal, provided that they make reasonable beneficial use of the natural flow in Powerhouse Canal.~~

~~If the Millers desire to claim a riparian right, they should file a Statement of Water Diversion and Use pursuant to Water Code Section 5100, et seq., to document any water that they may divert and use under riparian right. If the Millers cannot document a riparian right, or if they divert more than their correlative share of the natural flow of Powerhouse Canal, i.e., water that would be available to riparian users, they should cease their diversions from Powerhouse Canal.~~

3.0 CONCLUSION

The State Water Board concludes that Permit 20247 (Application 28669) should be revoked because the permittees have failed to commence, prosecute with due diligence,

¹ Natural flow does not include water imported into a basin, for instance Eel River water imported into the Russian River basin as a result of the Potter Valley project, or water that is stored upstream during wet periods and only exists in a stream as a result of releases of that water during dry periods.

and complete the work necessary to appropriate water under the permit, and have failed to make beneficial use of the water as contemplated in the permit.

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ORDER

IT IS HEREBY ORDERED THAT Permit 20247 (Application 28669) is revoked.

CERTIFICATION

The undersigned, Clerk 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 9, 2005.

AYE:

NO:

ABSENT:

ABSTAIN:

DRAFT

Selica Potter
Acting Clerk to the Board