

BEFORE THE DIVISION OF WATER RIGHTS
Department of Public Works
State of California

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IN THE MATTER OF APPLICATION NUMBER 2750 OF THE PACIFIC GAS
AND ELECTRIC COMPANY FOR A PERMIT TO APPROPRIATE WATER FROM
FORDYCE CREEK, IN ~~SIERRA COUNTY~~, FOR POWER DEVELOPMENT

DECISION NO. A-2750 - H 2 a.
Decided March 13th, 1924.

APPEARANCES AT HEARING, NOVEMBER 23, 1923:

Leo H. Susman, P. M. Downing, G. M. Hunt, for Applicant
Fred H. Tibbitts, A. L. Wisker, for Nevada Irrigation
District, Protestant.
C. W. Fariss, Dr. C. P. Whitney, for Yuba River Power
Company and The Yuba River Mining and Development Company.

NO APPEARANCE - Olaf J. Hansen, Protestant.

Edward Hyatt, Jr., Acting Chief of Division of Water Rights.

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O P I N I O N

On February 9, 1922, the Pacific Gas and Electric Company
filed its application No. 2750 for a permit to appropriate unappro-
priated water from Fordyce Creek, in Nevada County, for use for power
development. Thereafter protests were separately filed by the Nevada
Irrigation District and one Olaf J. Hansen and in due course the matter
of this application came on for hearing before the Division of Water
Rights.

Protestant Hansen did not appear at the hearing and has not

indicated any further objection since an answer to his protest alleged that his use was of waters derived from another watershed. It appears that said protestant has abandoned his protest and it is so found. The allegations of the answer are deemed admitted and the protest is dismissed.

As to the appearance in behalf of the Yuba River Power Company and the Yuba River Mining and Development Company, the transcript of the hearing shows that said companies were of uncertain attitude towards this application and that they were appearing rather for the purpose of inserting into the record their claim to paramount rights below than for the purpose of protesting - all upon the theory that they should not be held in any wise derelict should, at some future time for any cause, the use of applicant under a permit as applied for cause injury to them. Inasmuch as these parties did not file protests, nor briefs, and took the attitude above stated, it is held that they have not entered a protest and that, in any case, they are amply protected by the granting clause of each and every permit issued by this Division which includes the limitation "subject to vested rights".

As to the case of the only real protestant involved, the Nevada Irrigation District, said District claims that issuance of a permit to applicant will infringe its right for agricultural use initiated under Application No. 1270 now pending before this Division.

Application No. 1270 of the protestant district was filed long prior to application No. 2750. It specified a point of diversion by a dam which would enable diversion from the South Fork of the Yuba River opposite the mouth of Canyon Creek and from Canyon Creek at its mouth. By amended application filed subsequent to application No. 2750 protestant proposes to abandon the point of diversion at the junction of Canyon Creek

and the South Fork of the Yuba and to divert at a point on Canyon Creek several miles upstream from said junction and to also divert at a point on the South Fork of the Yuba, several miles upstream from said junction, and to build a ditch from the amended point of diversion on Canyon Creek across country to the amended point of diversion on the South Fork of the Yuba River, intercepting some of the drainage tributary to said ditch. The situation is that the original point of diversion specified in Application No. 1270 made available as a source of supply unappropriated waters of the entire South Fork of the Yuba and its tributaries above said point, whereas by the amended application certain waters draining into said stream system below the points of diversion proposed in said amended application and above the original point of diversion were rendered unavailable.

It also appears that applicant possesses certain water rights of long standing both upon Fordyce Creek at the existing Fordyce dam and upon the South Yuba River at Lake Spaulding, which points of diversion and use are many miles upstream from the mouth of Canyon Creek. The present application No. 2750 is for the use of water in addition to that under applicant's existing rights and it is applicant's contention that in general, when water will be available for storage under Application No. 2750, there will be, - due to characteristics of the stream flow, - sufficient water also available to supply protestant with the water it has applied for, either at the original or amended points of diversion upon South Yuba.

Applicant submits the following tabulation in support of this contention:

Total Spill Over Spaulding Dam				26,670 a.f. Fordyce Storage deducted		
Year	Period	Days Duration	Total Ac Ft	Remaining Sp Ac Ft	Average Rate of Spill A.F. Daily	C. F. S.
1921	May 10-July 3	55	108,094	81,424	1,480	746
1922	" 18-June 30	44	131,191	104,521	2,380	1198
1923	" 14-July 3	51	62,850	36,180	710	358

Relative to this data applicant makes the following statement

in its opening brief:

"The above table demonstrates conclusively that even with the additional storage of 26,670 acre feet above Lake Spaulding deducted, the amount of water spilling over the Spaulding Dam would be itself ample to satisfy the 250 cubic feet of water per second required by the Nevada Irrigation District pursuant to its Application No. 1270 from the South Yuba River at its confluence with Canyon Creek, without including the natural flow into the South Yuba River from the watershed between Spaulding Dam and the proposed point of appropriation by the District."

There was no denial or refutation offered by protestant as to the tabulation above referred to, and in fact the protestant has himself said, "It is conceded without argument that an abundance of water is available during years of approximately normal yield."

It is the finding of this Division that whenever there is water available for use in excess of that required under the long standing prior rights of applicant at Fordyce Dam and Lake Spaulding, heretofore referred to, that according to stream flow characteristics, there will usually be ample water available not only to supply the entire amount applied for by protestant and this at its proposed upstream point of diversion on the South Yuba, but also the applicant's proposed use under Application No. 2750.

The improbability of injury to the protestant must be apparent in that it is evidence from stream flow records of the past three years that there is ample water, whenever there is any water, to supply both applicant and protestant from that source alone from which applicant has applied to take water; and in that protestant can only claim priority as against applicant as an appropriator at the originally proposed point of diversion and as against applicant must subtract from its full amount applied for that additional amount which would have been available to it had it not made amendment to its application.

It has long been well established law that changes in points of diversion may only be made subject to the condition that no other appropriator is thereby injured. (Section 16 of the Water Commission Act reaffirms the law upon this point). Intervening appropriators are protected and when applicant filed its application the protestant's plan was to divert at the junction of the main stream and Canyon Creek and applicant had a right to rely upon the use of water available above that point and not necessary to supply protestant, such waters were unappropriated and applicant was prior in filing therefor. Hence the protestant district as against applicant may not now cut itself off from a supply otherwise available (the full watershed tributary to the stream system at the mouth of Canyon Creek) and expect applicant to suffer the loss of supply it thereby occasions by its own action.

It is therefore concluded that there is an adequate water supply available to justify the issuance of a permit to applicant; that protestant's rights under Application No. 1270 are adequately protected by the granting clause of each and every permit issued "subject to vested rights";

and that it would be unreasonable and unwarranted to refuse applicant a permit upon the ground that there might be occasional periods of short duration during which there would not be sufficient water to supply both Applications 1270 and 2750.

O R D E R

Application No. 2750 for a permit to appropriate water having been filed with the Division of Water Rights as above stated, protests having been filed, a public hearing having been held, briefs having been submitted, and the Division of Water Rights now being fully informed in the premises:

IT IS HEREBY ORDERED, that Application No. 2750 be approved and that a permit be granted the applicant subject to such of the usual terms and conditions as may be appropriate.

Dated at Sacramento, this 13th day of March, 1924.

Acting Chief of Division of Water Rights
Department of Public Works
State of California.

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BEFORE THE DIVISION OF WATER RIGHTS
Department of Public Works
State of California

IN THE MATTER OF APPLICATION NUMBER 2753 OF THE PACIFIC
GAS AND ELECTRIC COMPANY FOR A PERMIT TO APPROPRIATE WATER
FROM BEAR RIVER FOR POWER DEVELOPMENT, WHICH WATER IS
STORED IN FORDYCE LAKE UNDER APPLICATION NUMBER 2750, PER-
MIT NUMBER 1682, AND TURNED INTO BEAR RIVER.

DECISION NO. A2753 - H 2 b.
Decided March 13th, 1924.

APPEARANCE AT HEARING, NOVEMBER 23, 1923:
Leo H. Susman, P. E. Downing, G. M. Hunt for Applicant
Fred H. Tibbitts, A. L. Wisker for Nevada Irrigation
District, Protestant.
C. W. Faries, Dr. C. P. Whitney, for Yuba River Power
Company and The Yuba River Mining and Development Company.

NO APPEARANCE - Olaf J. Hansen, Protestant.

Edward Hyatt, Jr., Acting Chief of Division of Water Rights.

O P I N I O N

On February 9, 1922, the Pacific Gas and Electric Company
filed this application No. 2753 which is related to and dependent upon
its application No. 2750 filed the same date and to appropriate the same
amount of water from Fordyce Creek. Application No. 2753 is for power
use of the same stored water conveyed from Fordyce Creek under Applica-
tion No. 2750, used for power, and released into Bear River from whence it
is proposed to be picked up under this application No. 2753 with a point
of diversion from Bear River. Application No. 2753 is thus to reclaim waters

appropriated and released under Application No. 2750 and as against protestants on the Yuba River system it stands or falls with Application No. 2750 and the opinion this date rendered as to Application No. 2750 is applicable.

As to protestants located on the Bear River, it appears that one Olaf Hansen is a protestant; that protest is dismissed from consideration for the reason that said protestant has apparently abandoned his protest and for the further reason that even if a lower claimant diverting from the Bear River, said protestant could not have acquired any right to foreign waters not yet emptied into the Bear River and could not prevent applicant from using foreign waters made available by applicant and never suffered to flow down to protestant.

ORDER

Application No. 2753 for a permit to appropriate water having been filed with the Division of Water Rights as above stated, protests having been filed, a public hearing having been held, briefs having been submitted, and the Division of Water Rights now being fully informed in the premises;

IT IS HEREBY ORDERED, that Application No. 2753 be approved and that a permit be granted the applicant subject to such of the usual terms and conditions as may be appropriate, and subject to the further conditions as follows:

"The amount of water appropriated shall be limited to the amount which can be beneficially used, and shall not exceed one hundred (100) cubic feet per second from about June 30th to about November 1st of each season, as made available by the storage and use of water from Lake Fordyce under Application Number 2750, Permit Number 1682 of per-

mitted herein. This permit does not authorize the use of any waters originating in the Bear River watershed."

Dated at Sacramento, this 13th day of March, 1924.

Acting Chief of Division of Water Rights
Department of Public Works
State of California.

BEFORE THE DIVISION OF WATER RIGHTS
Department of Public Works
State of California

IN THE MATTER OF APPLICATION NUMBER 3550 OF THE PACIFIC GAS
AND ELECTRIC COMPANY FOR A PERMIT TO APPROPRIATE WATER FOR
AGRICULTURAL USE FROM FORDYCE CREEK, WITH A SECONDARY POINT
OF DIVERSION FROM BEAR RIVER.

DECISION NO. A-3550 - H 2 c.
Decided March 13th, 1924.

APPEARANCES AT HEARING, NOVEMBER 23, 1923:

Leo H. Susman, P. M. Downing, G. M. Hunt, for Applicant.
Fred H. Tibbitts, A. L. Wicker, for Nevada Irrigation
District, Protestant.
C. W. Faries, Dr. O. P. Whitney, for Yuba River Power
Company and The Yuba River Mining and Development Company.

NO APPEARANCES:

Olaf J. Hansen, Protestant.
S. M. Katzer, Protestant.

Edward Hyatt, Jr., Acting Chief of Division of Water Rights

O P I N I O N

Application No. 3550 filed by the Pacific Gas and Electric Compa-
ny July 26, 1923, is to make agricultural use of that water appropriated
under Application No. 2750 at a point beyond its place of use under Appli-
cation No. 2750.

The opinion this date rendered relative to Application No. 2750
is pertinent. Inasmuch as the applicant may divert under Application 2750

and by so doing renders the return water therefrom unavailable to protestant district under Application No. 1270, the physical situation is such that diversion and use under Application 3550 at such times and while use is being made under Application No. 2750 constitutes no additional burden upon the stream and cannot be in itself detrimental to protestant district or infringe its rights.

Should applicant in the future cease to make use of water under Application No. 2750 and continue to make use under Application No. 3550 it appears from the facts found in the case of Application No. 2750 that whenever there would be any water there would usually be plenty of water for both protestant district at its proposed new point of diversion and for applicant under Application No. 3550. Hence it appears that it is immaterial as regards issuance of a permit that Application No. 3550 was filed subsequent to application by protestant district to move upstream its originally proposed point of diversion under Application No. 1270. Of course, as against applicant claiming solely under Application No. 3550 the protestant district is a prior appropriator as of the new point of diversion proposed by it.

It therefore appears that the facts warrant issuance of a permit to applicant under Application No. 3550 not only by reason of that application as related to Application No. 2750, but even as standing alone. Adequate protection is afforded the protestant district under the granting clause employed in each and every permit "subject to vested rights", and it would be a policy harmful to the welfare and development of the state to refuse permits upon the hypothesis that there might occasionally be lean years during which a subsequent appropriator might under color of a permit wrongfully divert water which should be permitted to flow down to a prior appropriator.

As to protestant's Hansen and Katzer they are in no position to protest the use of foreign water made available by applicant, never allowed to run down to them, and hence never appropriated by them.

O R D E R

Application Number 3550 for a permit to appropriate water having been filed with the Division of Water Rights as above stated, protests having been filed, a public hearing having been held, briefs having been submitted, and the Division of Water Rights now being fully informed in the premises:

IT IS HEREBY ORDERED, that Application No. 3550 be approved and that a permit be granted the applicant subject to such of the usual terms and conditions as may be appropriate.

Dated at Sacramento, this 13th day of March, 1924.

Acting Chief of Division of Water Rights
Department of Public Works
State of California.

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