

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

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IN THE MATTER OF APPLICATIONS NUMBERS 1847, 1890 AND 2187 FOR
PERMITS TO USE THE WATERS OF THE KLAMATH RIVER FOR THE
DEVELOPMENT OF HYDRO-ELECTRIC ENERGY.

DECISION NO. A 1847, 1890, 2187- D 5
Decided April 20 th, 1924.

APPEARANCES AT HEARING, NOVEMBER 13, 1923:

F. J. Solinsky for Applicant Electro Metals Company
Chickering and Gregory by W.C. Fox for Applicant H.L. Jackman
R.D. Duke for Protestants Fish and Game Commission of the
State of California and Klamath River Packers Association
C. F. Holland for Protestant Klamath River Packers Association

APPEARANCES AT HEARING, JANUARY 4, 1924:

W. G. Devereux for Applicant Electro Metals Company
Chickering and Gregory by W.C. Fox for Applicant H.L. Jackman
R.D. Duke for Protestants Fish and Game Commission of the
State of California and Klamath River Packers Association.

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

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O P I N I O N

The above numbered applications have been grouped for the purposes of this opinion for the reason that the main points and protestants are the same in each case.

All three applications are to develop hydro-electric energy by power plants located below dams in the Klamath River. The head for power development is obtained by a high dam and the water used is allowed

to flow on down the river without diminution in amount of flow.

Application No. 1847 was filed May 27, 1920 by H. L. Jackman. The site of this proposed development is in the Klamath River Canyon about forty miles from the ocean and a few miles below the mouth of the Trinity River. The application contemplates the erection of a 90 foot dam, the use of a maximum flow of 9,000 second feet, and the development of 92,045 horsepower for sale. The estimated project cost is \$9,100,000.

Application No. 1890 was filed July 2, 1920 by A. P. Seybold and assigned May 11, 1923 to the Electro Metals Company. The site of this proposed development is in the Klamath River Canyon about fifty miles from the ocean and a few miles above the mouth of the Trinity River. The application contemplates the erection of a 75 foot dam, the use of 3,000 second feet of the Klamath River and 75 second feet diverted from Bluff Creek into Slate Creek and thence into the reservoir to be created by the dam. The dam will be constructed just below the entrance of Slate Creek and a short distance above the entrance of Bluff Creek. The purpose will be the development of 32,400 horsepower for mining, metallurgical and commercial purposes. The estimated project cost is \$2,500,000. This project is commonly referred to as the Slate Creek project.

Application No. 2187 was filed February 1, 1921 by the Electro Metals Company. The site of this proposed development is in the Klamath River Canyon about 65 miles from the ocean and just above the mouth of the Salmon River. The application contemplates the erection of a 250 foot dam, the use of 3,000 second feet of water, and the development

of 102,270 horsepower for electro metallurgy and possible sale of surplus to public utility companies. The estimated project cost is \$8,000,000. This project is commonly referred to as the Ishi Pishi Falls project.

The following have protested all three applications:

Fish and Game Commission of the State of California
Klamath River Packers Association
Roy E. Swigart, as Trustee for Proposed Klamath-Shasta
Valley Irrigation District
Board of Trustees, City of Crescent City
Chamber of Commerce of Del Norte County
Board of Supervisors of Del Norte County
Siskiyou County Pomona Grange No. 6.

Also, Application No. 1890 has been jointly protested by Milo Young and James Young.

Also, Application No. 2187 has been protested by Edward L. Mann.

Before entering into a consideration of these protests it should be noted that the dam sites involved in Applications Numbers 1890 and 2187 are located in a National Forest and owned by the Federal Government. Hence the passage of the Federal Power Commission Act in 1920 made it necessary for the applicants to secure permits for use and occupancy from the Federal Power Commission. Applications were therefore filed with said Commission and in May, 1921, two hearings were held before said Commission, one in Yreka and one in Requa. Much testimony was taken at these hearings and it was stipulated at the hearing before the Division of Water Rights in November, 1923, that this testimony might be considered part of the record before this Division with the exception of that testimony relative to the interests of the Klamath Shasta Valley Irrigation District.

The Federal Power Commission has made no decision and takes the attitude that action by the Division of Water Rights should precede

its action.

The same protestants who appeared at the hearings before the Division of Water Rights were represented at the Federal Power Commission hearings.

Coming now to a consideration of the protests it is to be observed that the only active protestants before the Division of Water Rights are the Fish and Game Commission and the Klamath River Packers Association and that the crux of the whole controversy concerns the erection of high dams which it is claimed will be impassable to the fish and not the use of water or the infringement of anyone's water right.

The protest of Roy E. Swigart in behalf of the Klamath-Shasta Valley Irrigation District is no longer of any moment for the reason that said projected irrigation scheme has been declared not feasible by the State Engineer and the applications filed in its behalf to divert the waters of the Klamath into Shasta Valley have been abandoned and canceled. It was upon these applications that the protest was based.

The protests of the Board of Trustees of the City of Crescent City, the Board of Supervisors of Del Norte County, and the Chamber of Commerce of Del Norte County are identical in substance and are based upon the idea that the proposed dams will destroy the fish. The resolutions by said bodies opposing the granting of permits and their ground of protest is fully covered in the protests of the Klamath River Packers Association and the Fish and Game Commission and a disposition of said protests necessarily disposes of any points raised by these bodies. It should be noted, however, that said resolutions were filed prior to the hearing at Requa before the Federal Power Commission, that Mr. A. D. Lee, Chairman

of the Fish and Game Committee of the Chamber of Commerce of Del Norte County, appeared and volunteered a statement and gave testimony at the Requa hearing and favored the development of these power projects, and that no further representations have been made by said Del Norte organizations.

Also, in this connection it is proper to note that the Eureka Chamber of Commerce filed a resolution of indorsement of these proposed developments with the Division of Water Rights, March 1, 1923.

As to the protest of Siskiyou County Pomona Grange No. 6 it is a one page resolution in opposition to these power developments. It adds no considerations in addition to those urged by the Packers Association and the Fish and Game Commission.

As to the protest of Milo Young and James Young against Application No. 1890, said protest was filed in April, 1921, and although duly notified of all proceedings taken said parties have never made an appearance in support of said protest or in any manner evinced any further interest in the matter. As to the protest itself it is very meager, the relative location of the diversion points involved is not stated and just how the alleged injury will come about is not made to appear. In a word the protest is defective and the protestant has not assumed the burden of proof which devolves upon each and every protestant. Furthermore, the granting clause of each and every permit "subject to vested rights" affords protection to said protestant.

As to the protest of Edward L. Mann against Application No. 2187, protestant's letter of November 7, 1923, clearly states his ground of protest. It is that he possesses mining claims which will lie within

the reservoir created by the dam and that he uses water from Runnels Creek to work these claims. The applicant will, of course, have to obtain the right to flood the lands within the reservoir site but the procural of that right is not a matter within the jurisdiction of this office and inasmuch as this office cannot authorize the flooding of privately owned lands or even mineral claims and inasmuch as the procural of that right will eliminate the injury to protestant, it does not appear that the protest is relevant. As to the right of use claimed in and to the waters of Runnels Creek, the protestant is in the position of an upper and prior user and is sufficiently protected by the granting clause of each and every permit "subject to vested rights".

It remains to consider the protests of the Fish and Game Commission and the Klamath River Packers Association.

The Klamath River Packers Association maintains a packing plant near the mouth of the Klamath River, it claims that the proposed dams will prevent the passage of the salmon upstream to their spawning grounds. The same contention is made by the Fish and Game Commission which maintains an egg taking station and hatchery at Klamathon far above the dams. It is also contended that the small fry would be destroyed in passing down stream.

Hence the injury alleged will be a destruction of the salmon run in the river with the consequent uselessness of the packing plant and the egg taking station and hatchery.

In addition to the destruction of the run of salmon the Fish and Game Commission is concerned over the steelhead trout which also run up the river to spawn and the destruction of which run is claimed as a result of any dams that may be built.

These protestants have vigorously presented their case, have contended that the dams would be impassable, that fish ladders would be futile, that if the fish could be passed over the dams the small fry would be destroyed in descending through the turbines and could not be passed around the turbines and that the planting of fish above or below the dams or the erection of a hatchery below the dams would be of no avail.

In taking action upon these applications it is the purpose of the Division of Water Rights to act in accordance with law. If the statutes of this state govern the case presented they must be adhered to. In our judgment the Legislature has enacted laws which control this very situation and make it the manifest duty of the Division of Water Rights to issue these applicants the permits which they seek.

In the first place, the Water Commission Act provides for the appropriation to beneficial use of unappropriated water. The applicants have applied to appropriate to beneficial use unappropriated water and have complied with the provisions of the Water Commission Act and the Rules and Regulations of the Division of Water Rights.

In the second place, Section 636c and 637 of the Penal Code contemplate the erection of a dam which may prove an impassable barrier to fish. In those sections the Legislature has plainly specified alternatives which may be adopted "whenever in the opinion of the State Fish and Game Commission it shall be impracticable because of the height of any dam or other artificial obstruction or other conditions, to construct a fishway over or around said dam or other artificial obstruction." Said alternatives are to require the erection and equipment of a fish hatchery or to require

the planting of fish. A power of regulation is conferred not a power to prohibit. No other alternative is given and the Fish and Game Commission is not authorized to prohibit any dam if in its judgment said alternatives are insufficient. Having specified and enumerated the alternatives the doctrine "expressio unius est exclusio alterius" (express mention and implied exclusion) applies.

An alleged interference with fish by means of high and impassable dams is the basis of denial urged upon the Division of Water Rights but nowhere in the Constitution or in the statutes or in the decisions of the courts of this state has it ever been established, to our knowledge, that the erection of dams to make a beneficial use of unappropriated water may be prohibited if they interfere with the passage of fish nor have protestants cited any such decision, statute or constitutional provision. Instead we find that the legislature has expressed itself as above stated and upon that statement of the legislature we are led to conclude that dam construction is permissible in so far as fish interference is concerned but is subject to the provisions of Sections 636q and 637 and that the enforcement of these sections rests with the Fish and Game Commission.

It but remains to consider two very technical and immaterial points raised by the Fish and Game Commission, to wit, that an application to appropriate is non-assignable and that the water applied for is already appropriated under notice of appropriation posted by Carl and Frank Langford in 1908 and under a certificate which was issued in August, 1923 to the Electro Metals Company by the Division of Water Rights upon application under Section 12 of the Water Commission Act.

As to the contention that an application to appropriate is non-assignable, we call attention to Section 17 of the Water Commission Act wherein it is stated that an application shall give a priority of right as of the date of filing and also to Section 655 of the Civil Code.

As to the contention that there is no unappropriated water, that contention is based upon the assumption that the Electro Metals Company already possesses a valid water right to use 3,000 second feet at Ishi Pishi Falls by virtue of a right initiated in 1908 and acquired by it. But no harm is apparent if such should be the case, for applicant 2187 is the Electro-Metals Company and there is no conflict of claimants over any use at Ishi Pishi Falls. It is largely as a matter of precaution that Application 2187 has been made and in this connection witness the frequency with which successive notices of appropriation have been posted in years past by the same parties for the same water. Furthermore, this contention is obviously futile as against Applications 1890 and 1847 as there is nothing to prevent the use of water released at Ishi Pishi Falls and allowed to flow down to power developments below.

As to the certificate issued the Electro-Metals Company under Section 12 of the Water Commission Act, it may be pertinent to call attention to the recent opinion of Mr. Justice Hart in the case of Department of Public Works vs. Superior Court, 43 California Appellate Decisions 828, wherein the issuance of this very certificate was involved.

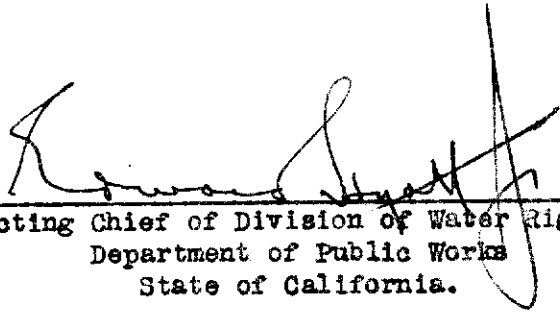
O R D E R

Applications 1847, 1890 and 2187 for permits to appropriate water having been filed as above stated, protests and answers having been received, hearings having been held as provided by law, briefs having been

submitted, and the Division of Water Rights now being fully informed in the premises and being of opinion that there is ample unappropriated water available to supply said applicants and that the protests are insufficient for the reasons above stated:

IT IS HEREBY ORDERED, that said applications be approved and that permits be granted said applicants subject to such of the usual terms and conditions as may be appropriate.

Dated at Sacramento, this 20th day of April, 1924.



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