

BEFORE THE DIVISION OF WATER RIGHTS
DEPARTMENT OF PUBLIC WORKS
STATE OF CALIFORNIA

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In the matter of Applications 5470 and 5471 of H. W. Pantler
to appropriate water from Whaler Creek in Eldorado County
for mining and power purposes, respectively.

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DECISION NO. A 5470-5471 D 186

Decided March 16, 1928

APPEARANCES AT HEARING HELD AT SACRAMENTO, JANUARY 24, 1928.

For Applicant;

Thos. Maul, Attorney and
Joseph E. Spink, Engr.
Abe Darlington and
Henry S. Lyon, Attorneys

For protestants;

EXAMINER: Everett H. Bryan, Deputy Chief of the Division of Water Rights

O P I N I O N

Application 5470 proposes the use of 0.01 second foot for use in a stamp mill and Application 5471 proposes the use of 6.25 second feet in generating power to operate the stamp mill. Both diversions would be from Whaler Creek, a tributary of the South Fork of the American River and all water would be returned to Mill Ravine, tributary to Whaler Creek some three miles below the point of diversion. Applicant is securing necessary rights of way by purchase and by application to the Federal Power Commission except as hereinafter mentioned.

These applications were filed May 16, 1927, completed in accordance with the Water Commission Act and the requirements of the Rules and Regulations of the Division of Water Rights. Being protested by Ida W. Askley, et al, they were set for a public hearing in Room 707 Forum Building, Sacramento at 10:30 o'clock a.m. on Tuesday, January 24, 1928. Applicant

and protestants were duly notified of this hearing and appearances thereat were made on behalf of both parties.

The protest by Ida Ackley, Flora B. Laine and Emma B. Schuts alleges that protestants own the "Rip Van Winkle Ditch" and a right appurtenant thereto to use 600 inches of water from Whaler Creek for general purposes at their Rip Van Winkle mine. It has been established that this ditch is identical with the "Slate Mountain Ditch" which applicant desires to use in making his appropriation.

At the hearing it developed that applicant has or will secure a ditch right of way the minimum width of which is 30 feet extending from the point of diversion to the place of use and that the existing ditch is approximately only three feet wide. The center line of applicants right of way is identical with the existing ditch as surveyed by applicant. It is therefore manifest that if applicants proposed use of the existing ditch is denied he can construct a separate ditch on either side. If necessary he intends to do so and has given assurance that he will secure any additional right of way thus necessitated. It therefore appears that control of the existing ditch is not imperative as prerequisite to consummation of the applications.

Protestants Rip Van Winkle Mine is not riparian to Whaler Creek and any right to use water from the source thereon, being appropriative in nature, would in accordance with Section 20a of the Water Commission Act lapse if not exercised for a period of three consecutive years. Applicant's engineer testified that except for the upper two thousand feet the condition of the conduit showed no evidence of having been used for ten years or more and no question was raised by protestants as to the correctness of this engineer's opinion.

The question of control of the ditch is the subject of litigation now before the Superior Court in and for Eldorado County. The pleadings in this action do not, however, refer directly to water rights and no adjudication thereof is sought. In view of the circumstances hereinbefore set out it is the attitude of the Division of Water Rights that applicant has shown he has or can secure a right of way and that protestants cannot be heard to complain against interference with an appropriative right to use water which has evidently not been exercised for ten years or more.

Engineer for applicant testified that so far as he knew no one was now, or for some years in the past had been, using the water of Whaler Creek. There are no records of stream flow on the creek but it was his estimate that in times of flood the discharge might run as high as 45 second feet, that "during certain seasons there will be sufficient water to maintain the flow set forth in the applications the year round", that in other seasons undoubtedly the flow will be practically nil, and that probably in normal years there will even be some water there in the summer time.

The proposed use is a beneficial one and no reason has been advanced why permit should not issue.

O R D E R

Applications 5470 and 5471 to appropriate water having been filed with the Division of Water Rights as above stated, protest having been filed, a public hearing having been held and the Division of Water Rights now being fully informed in the premises:

IT IS HEREBY ORDERED that said applications 5470 and 5471 be approved and that permits be granted to the applicant subject to such of the usual terms and conditions as may be appropriate.

Dated at Sacramento this 16th day of March, 1928.

Harold Conkling
(Harold Conkling)