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

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In the Matter of Application 6126 of Aller Placer Mines
to Appropriate from East Fork of East Fork of
Illinois River in Del Norte County
for Mining Purposes.

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DECISION NO. A 6126 D 247

Decided

January 13, 1930.

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APPEARANCES AT HEARING HELD at Crescent City, Calif., December 2, 1929.

For Applicant

Aller Placer Mines

L. E. Aller

For Protestants

Oscar Beer

Fred L. Merrill

J. N. Johnson

J. N. Johnson

J. H. Billingslea, Supervisor Siskiyou National Forest was in attendance at invitation of Division of Water Resources.

EXAMINER: Everett N. Bryan, Hydraulic Engineer, for Harold Conkling, Deputy in Charge of Water Rights, Division of Water Resources, Department of Public Works, State of California.

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O P I N I O N

This is an application by Aller Placer Mines to appropriate three cubic feet per second from East Fork of East Fork of Illinois River in Del Norte County, California for placer mining purposes. The point of diversion is located in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ Section 34, T 19 N, R 5 E, H.B. & M., and approximately 3/8 mile south of the Oregon-California line. The application was protested by Oscar Beer and Fred L. Merrill, but the latter at the time of

hearing on December 2, 1929, withdrew his protest upon stipulation of applicant that diversions under the application would be limited to the period from about October 1st to about April 1st of each season.

APPLICATION REGULARLY COMPLETED

This application was completed in accordance with the Water Commission Act and the Rules and Regulations of this office. It was regularly advertised and being protested was set for hearing as required by law. The hearing was held at Crescent City, California on December 2, 1929. Of this hearing applicant and protestants were duly notified and action may proceed upon the evidence adduced at that time.

PROTEST OF OSCAR BEER

The protest of Oscar Beer is based upon two grounds: (1) that the project of applicant involves a trespass upon the physical properties of protestant (i.e. use of his dam site, removal of his diversion works and flume, and use of the land which he has heretofore both mined and farmed), and (2) that the diversion proposed will deprive him of water to which he is rightfully entitled by long continuous use.

As to the claim which Mr. Beer has upon the land whereon the diversion works are situated and which applicant would mine with the water which he seeks to appropriate it may be stated that the evidence shows Mr. Beer purchased certain rights therein and thereto from the Ellwood Mining Company in 1897. This Company apparently held no title to the property however except that of a mining claimant. And after his acquisition of whatever rights the Ellwood Mining Company possessed Mr. Beer continued to hold the property in the same way. He apparently also claimed and continues to claim a group of other surrounding mining properties. He admitted however in the course of

his testimony that he discovered as far back as 1914 that this particular property was valueless for mining purposes because it cost many times the value of any ore to recover it.

He never patented the land and such work as has been done upon it in recent years appears to have been done upon the theory that it was one of a group of mining claims (the Ellwood and Bee Placer and Bee or White Fish). In support of this contention he filed affidavits of assessment work for the years 1915 and 1927, but without any showing as to legal grouping or true location of any of said claims.

His claim upon the property was so tenuous that when Siskiyou National Forest was created Mr. Beer was at once in difficulty with the U. S. Forest Service over his occupancy of this particular land upon which there is an area of some 5 to 10 acres of tillable irrigable land adapted to the growing of forage crops. In order to hold the land he took out a special use permit from the U. S. Forest Service and for some years irrigated and farmed a portion of this small area under special use permit. In 1927 the U. S. Forest Service permitted Mr. Beer to continue his use for the remainder of that year with the advice that they would then cancel the permit because the ground was held under mining claim by the Aller Placer Mines. The permit was so cancelled. Mr. Billingslea, Supervisor of Trinity National Forest stated that because of the existence of the Aller Placer Mines Claim he could not, without the mining claimant's consent, renew Mr. Beer's special use permit.

During the years 1928 and 1929 the Aller Placer Mines Company were in complete possession of the property. They tore out the remnants of the existing Beer dam, and when he attempted to rebuild they tore out the new construction and forbade him to trespass further upon the premises. They

have now completed a rather substantial crib dam, headgate and some 200 feet of diversion flume. Mr. Beer denies their right to occupy the property but he has offered no physical resistance thereto, and has brought no action in the court to either enjoin them from molesting his property or to eject them.

It is not a function of the Division to adjudicate their respective rights to the property. The courts are open to the contestants for this purpose. And we are obliged to accept the situation as we find it. Applicant Aller Placer Mines is in physical possession of the point of diversion, the route which the diversion canal would traverse, and the land which is to be mined, and has maintained such possession for a period of some two years or more. If there is unappropriated water available no reason is apparent why permit should not issue to them.

In the matter of availability of unappropriated water it may be said that Protestant Beer posted a notice of appropriation on May 1, 1902, claiming the waters of this source to the extent of 1,000 miners inches for mining, agriculture and domestic purposes. On May 26, 1902 he filed a copy of this notice in the office of the County Recorder (Book A Page 34, Records of Del Norte County). Thereafter he constructed a diverting dam, flume and ditch and diverted the water in sufficient quantity to irrigate a portion of the 5 to 10 acres of irrigable land above described situated on what is now the Aller Placer Mines claim. The amount diverted to beneficial uses could not at most ~~have~~ exceed one quarter second foot continuous flow. There is some doubt as to when he last used this water but clearly it could not have been later than the irrigation season of 1927 as the land was in the possession of Aller Placer Mines during the years 1928 and 1929.

Testimony of a witness called by protestant would indicate that the normal flow of East Fork of Illinois River at the proposed point of diversion exceeds 5 second feet during the month of October and exceeds 200 second feet from November 1st to April 1st. There would therefore appear to be a surplus over and above the maximum of what might be claimed by protestant even if he were irrigating during this season of the year, which would be unusual. But be that as it may, protestant has set up no claim to land below the applicant's point of diversion except to the land now in possession of the Aller Placer Mines Company. Until protestant repossesses himself of this property he can have no use for the water which arrives at applicant's point of diversion, and the appropriation proposed can be of no injury to him. If he now holds any rightful claim upon the water which in previous years he has diverted at this same point he is free to divert it at points above where it appears he now holds some land and none of the water will become available to applicant until after it has passed the lowest point at which he can divert it.

CONCLUSION

Applicant is in possession of the land whereon his point of diversion is situated and which he would mine with the water which he seeks to appropriate. He has ejected protestant who formerly held the property under special use permit from the U. S. Forest Service and the Forest Service advises it will not renew the special use permit so long as there is an objection thereto by any rightful mining claimant. There appears to be surplus water over and above that which can rightfully be claimed by protestant, and in times of shortage--if such occasions ever arise--protestant is free to divert the water which is his at points upstream where he now holds property.

He has advanced no claim to land downstream. The use proposed by applicant is a beneficial one and it is therefore in order to approve the application.

O R D E R

Application 6126 for permit to appropriate water having been filed with the Division of Water Resources as above stated, protests thereto having been filed, a hearing having been held and the Division of Water Resources now being fully advised in the premises:

IT IS HEREBY ORDERED that said Application 6126 be approved subject to the usual terms and conditions.

WITNESS my hand and the seal of the Department of Public Works, of the State of California, this *13* day of *January*, 1930.

Harold P. ...
Deputy in Charge of Water Rights

ENB:MP