

State of California
Department of Public Works
Division of Water Resources

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In the Matter of Application 7977 by Ralph J. and Lelia M. Fenili
to appropriate from McKinney Creek and Water Gulch, Tributaries
of Klamath River, in Siskiyou County for Irrigation and
Domestic Purposes.

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DECISION A. 7977 D-381

Decided *January 28, 1936*

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APPEARANCES AT HEARING HELD AT YREKA, JANUARY 20, 1936.

For Applicants

Ralph J. and Lelia M. Fenili

James D. Fairchild

For Protestants

Christian A. and Fred C. Jensen

Carter, Barrett & Finley

EXAMINER: Everett N. Bryan, Supervising Hydraulic Engineer, Division of Water Resources, Department of Public Works, State of California.

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O P I N I O N

Application 7977 is to appropriate 0.5 cubic foot per second from McKinney Creek in the $NE\frac{1}{4}$ $SE\frac{1}{4}$ Section 4, T 45 N, R 9 W, M.D.B.&M. and 0.05 cubic foot per second from Water Gulch in the $NW\frac{1}{4}$ $SE\frac{1}{4}$ of same section for irrigation and domestic use in the $SW\frac{1}{4}$ $SW\frac{1}{4}$ Section 34, T 46 N, R 9 W, M.D.B.&M. and in Lots 3 and 4 of Section 4 of T 45 N, R 9 W. It was protested by Christian A. and Fred C. Jensen who divert from McKinney Creek approximately one and one-half miles downstream for mining, domestic and irrigation uses.

The application having been completed and duly noticed, and having been protested, the matter was set down for hearing in the City Council Chamber, Yreka, at 2:00 o'clock P.M. on Monday, January 20, 1936, of which hearing the parties in interest were given due notice.

Water Gulch is a tributary of McKinney Creek on the Fenili property at a point approximately one and a half miles above the Jensen property. Both streams flow through the Fenili property which therefore is apparently riparian. Testimony given by applicants themselves and by witnesses called in their behalf was to the effect that water had been used upon their property from these two streams for many years by diversion as proposed under Application 7977, and beginning prior to the passage of the Water Commission Act. It was further their testimony, and uncontroverted that they had taken from the two streams and used whatever water was available during the summer months and whatever water was desirable and necessary during the remainder of the year in the belief that they had both a riparian right and a right by use. They were prompted to file Application 7977 because it was suggested to them when applying for a bank loan that their right would be improved by the filing of an application and receipt of a permit from the Division of Water Resources.

McKinney Creek is apparently a losing stream beginning at a point some distance above the Fenili intake on McKinney Creek and disappears entirely beneath the surface during periods of low flow for a distance of approximately one-fourth mile between the Fenili and Jensen property. The Fenilis were of the opinion that the stream would disappear at this point during periods of low flow whether or not they diverted and that therefore their diversion would not interfere with use by the Jensens at such times. Mr. Jensen on the other hand testified that it was his opinion the stream would not dis-

appear during periods of low flow if the Fenilis did not divert, and the evidence on neither side was convincing.

Water Gulch apparently does not flow through to McKinney Creek in periods of low flow and in recent years has not flowed through to a point where it could be picked up in the Fenili ditch leading from McKinney Creek, and therefore some two years ago Mr. Fenili constructed a ditch which leads from certain springs in Water Gulch above his property, to the ditch from McKinney Creek. Mr. Jensen does not oppose the diversion from this source but has at times objected to the Fenili diversion from McKinney Creek and has apparently from time to time broken the Fenili ditch from that stream in order to maintain his right.

Mr. Fred C. Jensen testified, and it was not controverted, that beginning as early as March in a normal year and continuing throughout the remainder of the irrigation season he diverts the whole flow of McKinney Creek on his own property and uses the same for irrigation, domestic and mining purposes. The Fenilis were not familiar with the extent of his use and admitted that they did not know whether or not Mr. Jensen diverted and used beneficially all of the flow of McKinney Creek during the months March to October of a normal year, or whether there was any waste or surplus water passing the intakes of the Jensen ditches. Under the circumstances we are obliged to accept the testimony of Mr. Jensen therefore that there is no surplus or unappropriated water in McKinney Creek during these months.

SUMMARY AND CONCLUSION

It appears that under claim of riparian right and use beginning prior to December 19, 1914, water has been used on the Fenili property from

McKinney Creek and Water Gulch as contemplated under Application 7977 and that were anyone else to have attempted, at the time Application 7977 was filed, to initiate and acquire an appropriative right on these streams, as contemplated in said application, the Division should, upon the showing at the hearing on January 20, 1936, deny the same upon the ground of lack of unappropriated water. The evidence is that the available water in these sources during the major portion of the irrigation season at the points of diversion named in Application 7977 is and has been in use under valid claim of riparian right and appropriative right initiated prior to passage of the Water Commission Act.

On the other hand, it appears that under similar claim the Jensens have made a similar use of the waters of McKinney Creek upon their property, diverting and using beneficially the entire normal available flow during the irrigation period named in Application 7977, and on occasion they have asserted a claim to a portion of the water diverted from McKinney Creek onto the Fenili property but the conflict between the two has never come to an open issue so far as the record shows and it may well be that a decision of the court will be required to determine their respective rights in and to the available flow if they are unable to adjust the matter informally between themselves.

Under the circumstances we are forced to the conclusion that Application 7977 should be denied upon the ground that the full amount of water sought to be appropriated thereunder, insofar as available, has been and is already in use under claim of prior and existing right and the approval of the application could but lend color of right to a trespass upon valid rights of protestants.

O R D E R

Application 7977 having been filed and completed, having been duly noticed, and being protested, and a hearing having been held after due notice as required by the Water Commission Act and the rules and regulations of the Division of Water Resources, and the Division now being fully advised in the premises:

IT IS HEREBY ORDERED that Application 7977 be cancelled and denied upon the grounds of lack of unappropriated water.

WITNESS my hand and the seal of the Department of Public Works of the State of California this *28th* day of *January*, 1936.

EDWARD HYATT, State Engineer

BY *Donald Corblum*
Deputy

