

Mr. Stoddard

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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 Applications 7386 and 8607 by H. L. Apollonio
To appropriate from an unnamed creek or ravine tributary
to Brush Creek and South Fork of American River
in El Dorado County.

DECISION A 7386 - 8607 D-392

Decided *September 4, 1936*

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APPEARANCES AT HEARING CALLED AUGUST 24, 1936.

For Applicant

None

For Proponent

None

EXAMINER: Everett N. Bryan, Supervising Hydraulic Engineer, for Harold
Conkling, Deputy in Charge of Water Rights.

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Q E I N I Q E

GENERAL DESCRIPTION OF PROJECT

Application 7386 is to appropriate 0.025 cubic feet per second of "waste
and seepage waters" in an unnamed ravine for domestic purposes, the diversion
and use to be made on lands of the applicant within the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 4,
Township 10 North, Range 12 East, M.D.B. & M., diversion to be throughout the
year.

Application 8607 is to appropriate nine acre feet per annum for irrigation
and domestic purposes by means of storage to be collected within the period from
about November 1st to about April 30th of each season, diversion, storage and
use likewise to be made on lands of the applicant within the aforesaid NE $\frac{1}{4}$ SE $\frac{1}{4}$
Section 4, Township 10 North, Range 12 East, M.D.B. & M.

These applications are both protested by Emil E. Larsen upon the grounds of interference with prior and existing rights at points downstream as defined and substantiated by court decree as will be more fully set forth later.

HEARING SET IN ACCORDANCE WITH SECTION 1a
OF THE WATER COMMISSION ACT

These applications having been completed and duly noticed as prescribed by the Water Commission Act and the rules and regulations of the Division of Water Resources and the said applications having been protested a hearing was called with due notice to the parties.

DISCUSSION

Mr. Apollonio has at the present time a permit under Application 6891 which was filed with the office on February 9, 1931, allowing the diversion of 0.025 cubic foot per second for domestic purposes from about November 1st to about May 15 of each season from this same source and at the same point of diversion as described in Application 7386. This earlier application was likewise protested by Mr. Larsen and after hearing was approved on July 28, 1932, with the restricted season as shown above, it appearing to the Division that there was a lack of surplus or unappropriated water during the months from about May 15 to about November 1st.

Mr. Larsen appealed to the courts in connection with this matter and on January 19, 1934, decision was rendered by the Superior Court of El Dorado County wherein "defendant (i. e. Apollonio) and all his agents, servants and attorneys, successors and assigns, and all persons acting through, or under him, are enjoined and restrained from in any way taking, diverting, or interfering with the surface or subsurface flow of water of the tributary herein described (i. e., the source described in Applications 6891, 7306 and 8607), so as in any way to inter-

fers with the plaintiff's (Loren's) right to take the full flow of the stream during the dry season of each year, to-wit: from the month of May to the month of October, the months of May and October being included in the said dry season, said full flow not to exceed 15 inches, standard miners measure, or the plaintiffs use of the same," etc., etc. the parenthesis and underscoring being our own.

Defendant appealed and judgment was affirmed by the Supreme Court of California on February 28, 1926, so we find the judgment of the Division in the case of Application 6891 fully vindicated, and that it is the order of the court that Apollonio shall not divert from this source during the months from about May 1st to about November 1st.

It will be observed that Application 7386 is to appropriate 'waste and seepage water' and Mr. Apollonio has stressed this fact to members of the staff informally, it being his view that there is waste and seepage water in the source which does not come within the scope of the injunction. However, the language of the decree is to the effect that he is "enjoined and restrained from in any way taking, diverting, or interfering with the surface or sub-surface flow" and his position is, we believe untenable. Furthermore Mr. Apollonio has already been allowed 0.025 cubic feet per second for domestic purposes from this source under Application 6891, Permit 3944, during the period when the provisions of the decree will permit him to appropriate therefrom, which amount is deemed sufficient for domestic uses at a single place of residence such as is here involved. We therefore feel that no purpose would be served by approving Application 7386 for diversion during any portion of the year and are of the opinion the application should be denied.

Application 8607 is of a different status. It is to appropriate by means of storage to be collected during those months of the year when by the terms of

the court decree Mr. Apollonie is free to divert. It is of course true that the construction and maintenance of a dam across the stream channel will place him in a position to interfere with the flow of this source during the months May 1st to October 31st when he is under injunction not to in any way interfere with either the surface or subsurface flow. While this is not in itself sufficient cause to deny Application 6607, and there is a plain, speedy and adequate remedy at law should he interfere with such flow, we are of the opinion that from a practical standpoint there is only one way to avoid contention and possibly strife between applicant and protestant, if applicant is to proceed with the project proposed, and that is for him to provide facilities whereby the low flow in this source will be by-passed around his reservoir during the months of May to October, both inclusive. There is apparently no contention that surplus during the remaining months is normally inadequate to supply the full nine acre feet applied for.

CONCLUSION

Applicant is under injunction by the court not to in any way interfere with the surface and subsurface flow in the source named in Application 7386 during the period from about May 1st to about October 31st whenever the flow is below 15 miners inches. It is doubted that the source normally exceeds this amount. As for the remaining months applicant has already been allowed a sufficient amount under Applications 6691, Permit 3944, to satisfy any normal requirements for beneficial uses such as described in these two applications. Application 7386 should therefore be denied.

In the absence of any showing to the contrary we are of the opinion that there is normally surplus or unappropriated water in this source during the months November to April, inclusive, sufficient to fill a reservoir of nine acre feet capacity, such as is proposed in Application 6607. The physical conditions, and

the personal relations between applicant and protestant, however, are such that unless facilities are provided to by-pass the low flow from about May 1st to about October 31st there would probably be contention, litigation and possibly strife between applicant and protestant. Responsibility rests properly upon the applicant to provide these facilities. Application 8607 may therefore be approved but the permit should include a requirement that applicant shall provide maintain and operate the necessary facilities to by-pass around his reservoir whatever flow is available in the source at that point during the months of May to October, both inclusive.

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Applications 7386 and 8607 having been completed and duly noticed as required by the Water Commission Act and the rules and regulations of the Division of Water Resources, and having been protested, and the matter having been set down for hearing with due notice to the parties, and the Division being now fully advised in the premises:

IT IS HEREBY ORDERED that Application 7386 be rejected and cancelled upon the records of the Division, and

IT IS HEREBY FURTHER ORDERED that Application 8607 be approved subject to the usual terms and conditions and subject to the following special terms or conditions:

"Permittee shall construct and maintain the necessary facilities and at all times during the period May 1st to October 31st shall by-pass and divert around the reservoir herein provided for whatever flow up to a maximum of 15 standard miners inches occurs in the source or stream channel which is here involved."

WITNESS my hand and the seal of the Department of Public Works of the State of California this 4th day of September, 1936.

EDWARD HYATT, State Engineer

BY HAROLD JONKLING

Deputy