

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

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In the Matter of Application 8310 of Arthur J. Fry to Appropriate
from Mahogany Creek, Tributary to Reversed Creek in Mono County,
for domestic purposes.

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Decision A. 8310 D-393

Decided *September 23, 1936*

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APPEARANCES AT HEARING HELD JUNE 5, 1936, AT LOS ANGELES

For Applicant

Arthur J. Fry

H. A. Chamberlain

For Protestants

Division of Fish and Game
Department of Water & Power,
City of Los Angeles

Warner I. Praul

Carl A. Davis

EXAMINER: 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

GENERAL DESCRIPTION OF PROJECT

Under Application 8310, filed with the Division of Water Resources
on April 8, 1935, it is proposed to appropriate an amount of water not to ex-
ceed 1 cubic foot per second to be diverted throughout the year from Mahogany
Creek at a point within the NE $\frac{1}{4}$ of SE $\frac{1}{4}$ Section 21, T 2 S, R 26 E, M.D.B.&M.
for domestic purposes within the following described property:

NE $\frac{1}{4}$ NW $\frac{1}{4}$ Section 14, T 2 S, R 26 E, M.D.B.&M.
NW $\frac{1}{4}$ NE $\frac{1}{4}$ " " " "
SE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 17, " " " "

	NE	NW	Section 21, T 2 S, R 26 E, M.D.B.&M.
	NW	NE	" " " "
W	NE	NE	" " " "
NW	NW	Section 22,	" " " "

It is applicant's intention to form a mutual water company to supply a summer resort and about 152 cabins, 300 of which have already been constructed, with water for domestic purposes.

Application 8310 was protested by the following parties:

- (1) The Division of Fish and Game, Department of Natural Resources, State of California
- (2) The Department of Water and Power of the City of Los Angeles

PROTESTS

The Department of Natural Resources, Division of Fish and Game, under its Application 5831, Permit 3039, License 1094 has the right to appropriate a total of 1 cubic foot per second from Reversed Creek to which Mahogany Creek is tributary, which amount is diverted within the SW $\frac{1}{4}$ NE $\frac{1}{4}$ Section 21, T 2 S, R 26 E, M.D.B.&M. or from Fern Creek a tributary of Reversed Creek at a point within SE $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 21, or the diversion may be made from both sources, from about March 1st to about December 1st of each season for the propagation of fish and for domestic purposes at the Fern Creek Hatchery within the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 21, T 2 S, R 26 E, M.D.B.&M. In its protest against the approval of Application 8310, the Division of Fish and Game alleges in effect that should water be appropriated as proposed, it would result in reducing the flow of Reversed Creek during the months of June to September to such an extent that there would be insufficient water at its intake on Reversed Creek to operate the Fern Creek Hatchery.

The Department of Water and Power of the City of Los Angeles bases its claim of right to the waters of Reversed Creek upon its Applications 3211, 3212, 7055, 8042 and 8043 now pending before the Division of Water Resources to appropriate from Rush Creek and other sources. Protestant alleges in effect that should Application 8310 be approved it would result in depriving the City of water flowing from Mahogany Creek into Reversed Creek, thence into Rush Creek and Grant Lake Reservoir for transportation through the Los Angeles aqueduct to the City of Los Angeles.

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

Application 8310 was completed in accordance with the Water Commission Act and the Rules and Regulations of the Division of Water Resources and being protested was set for public hearing in accordance with Section 1a of the Water Commission Act on Friday, May 8, 1936, at 10:00 o'clock A.M. in Room 803 California State Building, Los Angeles, California, which hearing was postponed to, and convened on June 5, 1936, at the same hour and place. Of this hearing applicant and protestants were duly notified.

SOURCES INVOLVED

Mahogany Creek, the source of the proposed appropriation in Application 8310 rises in Section 34, T 2 S, R 26 E, M.D.B.&M. at an elevation of approximately 10,000 feet above sea level, flows northerly a distance of about $1\frac{1}{2}$ miles and then northwesterly about 2 miles to its junction with Reversed Creek at an elevation of about 7400 feet above sea level. It has a drainage area of approximately 2.7 square miles.

Fern Creek one of the sources of appropriation described in Appli-

cation 5831, Permit 3039, License 1094 of the Division of Fish and Game rises in Section 33, T 2 S, R 26 E, M.D.B.M. at an elevation of approximately 10,500 feet above sea level and flows northerly a distance of about 2½ miles to its junction with Reversed Creek at an elevation of about 7350 feet above sea level. It has a drainage area of approximately 2.2 square miles.

Reversed Creek, the other source of appropriation described in Application 5831, Permit 3039, License 1094 of the Division of Fish and Game and one of the principal tributaries of Rush Creek, rises in the northeastern part of T 2 S, R 26 E, M.D.B.M. in June Lake at an altitude of about 7826 feet above sea level, flows irregularly southwestward 2½ miles, then northward half a mile to its junction with Rush Creek at a point about one-half mile south of Silver Lake at an elevation of about 7300 feet above sea level. It has a drainage area of approximately 15.3 square miles. The watershed of Reversed Creek above the point of diversion described in Application 5831, Permit 3039, License 1094 of the Division of Fish and Game contains approximately 12.0 square miles of which 2.7 square miles as stated above are within the Mahogany Creek watershed.

Rush Creek from which the City of Los Angeles seeks to appropriate, rises on the east slope of Mount Lyell (altitude 13,090 feet), flows in general northeastward into Mono Lake. The creek is fed by melting snow in hundreds of rock-enclosed tarns high up on the eastern slope of the Sierra between Mt. Lyell and Mt. Dana. Lakes are numerous in the basin, the most important being Marie, Gem, Silver, Gull, June, Alger and Grant. Principal tributaries are Reversed, Parker and Walker creeks. Rush creek itself is about 22 miles long and its total fall about 5100 feet. The total drainage

area is about 135 square miles of which approximately 38 square miles are above Silver Lake.

PROTEST OF DIVISION OF FISH AND GAME

The record indicates that whenever water is available in Fern and Reversed Creeks, the protestant Division of Fish and Game diverts water from both sources, the hatchery requiring about 1.25 cubic feet per second when operating at full capacity. Under Application 5831, Permit 3039, License 1094 however the right of the protestant was limited to 1.00 cubic feet per second and as this office was advised at the time Application 5831 was filed that the Division of Fish and Game had no other water right or source of supply for the Fern Creek Hatchery, it would appear that as against the approval of Application 8310, protestant can only claim a right to 1.0 cubic feet per second.

Testimony presented at the hearing indicates that during years of deficient runoff the flow in Fern Creek is so small during the months of July to October, inclusive, that little reliance can be placed upon it as a source of supply and the Division of Fish and Game obtains its supply from Reversed Creek at a point about one-half mile below its junction with Mahogany Creek. The record also indicates that the flow in Mahogany Creek is similar to that in Fern Creek and when Fern Creek is dry or nearly so, Mahogany Creek is also.

While there are no records of flow available for Fern and Mahogany Creeks, the Southern Sierras Power Company installed a weir on Reversed Creek about one-half mile above its junction with Rush Creek and about the same distance below its junction with Fern Creek by means of which weir a contin-

uous record of daily runoff of Reversed Creek has been kept extending from May 17, 1920, to December 31, 1934. This record was introduced at the hearing by the Division of Fish and Game as an exhibit.

With the exception of a negligible amount of water consumed at the Fish Hatchery for domestic purposes all water diverted for use at the hatchery is returned to Fern Creek and thence to Reversed Creek. The flow at the weir therefore represents the entire flow of Reversed Creek and its tributaries above the points of diversion of the Division of Fish and Game plus any accretions which may augment the flow of Reversed Creek between the points of diversion of the Division of Fish and Game and the weir. These accretions, according to the testimony of Mr. Elliger, assistant hydraulic engineer for the Division of Fish and Game, were estimated to be approximately one-half of a second foot.

Assuming that the accretions not available for diversion by the Division of Fish and Game have been correctly estimated by protestant's engineer, and deducting this amount from the daily flow of Reversed Creek at the weir, it appears that with the exception of 8 days in 1931 the flow of water in Reversed Creek was in excess of protestant's right under its Application 5831, License 1094, namely 1.0 cubic foot per second.

Even should an additional 1.0 cubic foot per second be deducted from the recorded flow at the weir upon the assumption that this amount was diverted by the applicant under his Application 8310, the records indicate that with the exception of 8 days in 1925, 18 days in 1928, 23 days in 1929, 37 days in 1930 and 101 days in 1931, there would have been sufficient water available in Reversed Creek to fully satisfy protestant's rights under Application 5831, License 1094 during the fourteen years of

record. This latter assumption is obviously in error however as the record indicates that during periods of exceptionally low flow in Reversed Creek, Mahogany Creek is practically dry and contributes little if any water to the flow in Reversed Creek to which it is tributary.

It may be concluded therefore that, so far as this protestant is concerned, during years of normal runoff there is sufficient water in Reversed Creek to enable applicant to divert water from Mahogany Creek and during seasons of deficient runoff Mahogany Creek is practically dry and little or no water would be available for diversion by applicant anyhow. In the event that there should be some water in Mahogany Creek which if diverted by the applicant would cause the flow in Reversed Creek to fall below the amount which protestant is entitled to divert, a condition which apparently would not exist, it would then be incumbent upon the applicant to so govern his diversion as not to interfere with the prior vested right of the protestant.

PROTEST OF DEPARTMENT OF WATER AND POWER
OF THE CITY OF LOS ANGELES

The protest of the Department of Water and Power of the City of Los Angeles is based upon possible future interference with its rights to appropriate from Rush Creek initiated under its prior Applications 3211, 3212, 7055, 8042 and 8043. These applications have not yet been approved by this office, action having been delayed in view of the fact that the City has not yet perfected Applications 7055, 8042 and 8043 and it is understood that Applications 3211 and 3212 are to be withdrawn if and when the later applications are approved.

It appears from the record that the City has no objection to an

appropriation for domestic purposes such as proposed by the applicant provided that it be understood that in times of emergency when the City needs all of its water, the subsequent appropriator will cease diverting and allow the water to be taken and used by the City. In other words, the City is apparently willing to allow others to appropriate and use the waters, a right to which has been initiated by its earlier filings, provided that such appropriation and use is made subject to whatever rights may vest in the City by virtue of these earlier filings, and provided further that the subsequent appropriator does not get the idea that he has acquired a permanent right by prescription or otherwise by which he can refuse to allow the water to pass on down to the City's intake whenever it is necessary to meet an emergency.

That there is at the present time unappropriated water in Rush Creek and its tributaries is a matter of common knowledge. While it is possible that under the City's present applications it may acquire the right to such an amount of water that ultimately during a season of drouth, it may require all water available including the amount sought to be appropriated under Application 8310 of Mr. Fry, this condition will probably not obtain for many years to come if ever, and the applicant should be allowed to appropriate the water from Mahogany Creek which otherwise would be wasted. A permit issued to Mr. Fry subject to vested rights should adequately protect the City from any possible interference with whatever rights it may acquire under its earlier applications. While it is true that the applicant would be in a position to acquire a prescriptive right through trespass, such a right may be acquired whether or not permit is issued in approval of Application 8310, and the mere fact that applicant may be in a position to use water illegally does not in itself furnish a sufficient basis for denying the permit.

PROPOSED MUTUAL WATER COMPANY

On May 12, 1936, a contract and agreement was entered into between Arthur J. Fry, party of the first part and certain owners all of June Lake, Gull Lake and (south end) Silver Lake, parties of the second part, wherein Arthur J. Fry has agreed to assign any permit which he may receive in approval of Application 8310 to the parties of the second part provided the parties of the second part will form a water district or a mutual water company for the benefit of all parties thereto, construction work to be done by parties of the second part. A copy of this agreement was filed at the hearing as Applicant's Exhibit No. 1.

SUMMARY AND CONCLUSIONS

The use proposed by applicant is a useful and beneficial one, the need for water in this locality is apparent and plans are being formulated for the formation of a water district or mutual water company should Application 8310 be approved.

It has been shown that under normal conditions of runoff there is unappropriated water in Mahogany Creek available for appropriation by applicant and it is therefore the opinion of the Division that Application 8310 be approved subject to the usual terms and conditions.

ORDER

Application 8310 for a permit to appropriate water having been filed with the Division of Water Resources as above stated, protests having been filed, a public hearing having been held and the Division of Water Resources now being fully informed in the premises:

IT IS HEREBY ORDERED that Application 8310 be approved and that a permit be granted to the applicant subject to such of the usual terms and conditions as may be appropriate.

WITNESS my hand and the seal of the Department of Public Works of the State of California, this *23rd* day of *September*, 1936.

EDWARD HYATT, State Engineer

BY MAROLD CONKLING

Deputy

WES:MP