

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

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In the Matter of Application 6353 of T. J. Yerby to
Appropriate from Rock Creek in Mono County for
Domestic Purposes,

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Decision A. 6353 D --- 404

Decided *June 21, 1937*

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APPEARANCE AT HEARING HELD AT BISHOP APRIL 27, 1937

For Applicant

T. J. Yerby

Glenn E. Tinder

For Protestants

F. H. Arcularius
Department of Water and Power of the
City of Los Angeles

No appearance
Carl 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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OPINION

General Description of Project

Under Application 6169, Permit 5245, License 1157, T. J. Yerby now has the right to appropriate 3,000 gallons per day from Rock Creek for domestic purposes at the "Rock Creek Resort" within the $\frac{W}{2}$ of NW $\frac{1}{4}$ of Section 35, T. 4 S., R. 30 E., M.D.B. & M. With the gradual increase of population and housing facilities at his resort, Mr. Yerby now contemplates the appropriation of a larger quantity of water from Rock Creek and to meet future demands, Application 6353 was filed on June 8, 1935, for the appropriation of 15,000 gallons per day which is the total

estimated requirement for domestic purposes at the resort. It is proposed to divert this water from Rock Creek at a point within the NE₁, SE₁, Section 32, T. 4 S., R. 20 E., M.D.B. & M. for use at resort described above.

It is understood that if and when permit is issued in approval of Application 8353, Application 6169, License 1137 may be revoked.

Application 8353 was protested by F. H. Arcularius and the Department of Water and Power of the City of Los Angeles.

PROTESTS

F. H. Arcularius claims a right to the use of water from Rock Creek for irrigation, domestic and stock watering purposes on 240 acres of land which right is based upon riparian ownership and appropriative rights initiated prior to the effective date of the Water Commission Act and use.

His point of diversion is located within Section 5, T. 6 S., R. 31 E., M.D.B. & M., approximately ten miles below applicant's proposed point of diversion and about 2 miles above the junction of Rock Creek with Owens River.

Protestant claims that water has been used on his property from about March 1 to about December 1 of each year for the past 40 years or more and alleges in effect that during recent years the flow of water in Rock Creek has been such that he has had scarcely enough for the irrigation of his lands and that should Application 8353 be approved, a large portion of his property could not be placed under cultivation.

The Department of Water and Power of the City of Los Angeles claims rights to the waters of Rock Creek by virtue of lands bordering upon Rock Creek and Owens River and also appropriative rights initiated by the filing of Application 531 to appropriate from Owens River and Application 5850 to appropriate from Rock Creek which two applications are now pending before the office.

Protestant claims that the City has made use of water from Rock Creek and the Owens River to which Rock Creek is tributary for municipal purposes within the City of Los Angeles and should Application 8353 be approved, it would result in decreasing the flow and volume of water available for use by the City under prior and existing rights.

Hearing Set in Accordance with Section 1^a of the Water Commission Act

Application 8353 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 1^a of the Water Commission Act on April 27, 1967 at 2:00 o'clock P.M. in Meeting Room, City Hall, Bishop, California. Of this hearing, applicant and protestants were duly notified.

Source of Appropriation

Rock Creek, the source of the proposed appropriation rises on the east slope of the Sierra north of Bear Spine in Inyo County at an altitude of approximately 12,200 feet above sea level, flows northerly into the southern part of Mono County; then turns and flows easterly and southeasterly to its junction with the Owens River in Inyo County in the north central part of T. 6 S., R. 21 E., N.D.M. & M. The creek is more than 20 miles in length and has a fall of about 7,700 feet. About 2/3 of a mile above its junction with Pine Creek there has been a gaging station installed and records of stream discharge during the twenty seasons, 1903-04 to 1922-23 inclusive, were maintained and published by the United States Geological Survey. These records indicate that the mean annual runoff for the 20 years of record from a watershed of 46 square miles was 50,825 acre-feet exclusive of some water which was diverted above the gaging station for irrigation purposes.

Protest of F. H. Arcularius

The point of diversion of protestant Arcularius is located on Rock Creek about one mile above the Rock Creek gaging station described above and although no recent discharge records of Rock Creek are available, the record of discharge maintained in the past would appear to indicate that there is, at all times, water flowing in Rock Creek over and above protestants needs. Furthermore, this protestant failed to appear at the hearing, has not shown good cause for failure to appear and has, therefore, failed to support the burden of proof appropriate to a moving party. His protest may therefore be dismissed.

Protest of the City of Los Angeles

As the point of diversion described in the City's Application 3650 to appropriate from Rock Creek is above the proposed point of diversion described in Application 6353, and the points of diversion described in the City's Application 531 are on Owens River above its junction with Rock Creek, the applicant is not in a position legally or physically to interfere with any rights initiated by the City under these applications which are pending before this office for power purposes.

The City does, however, claim a superior right to all the flow of Rock Creek for municipal purposes aside from the claims of two other riparian owners on the stream and has a well established right to divert water from Owens River at the intake of the Owens River aqueduct and under Application 2020, License 579, the right thereunder having been confined to 4.58 cubic feet per second to be diverted at a point on Owens River about 22 miles below the intake of the Owens River Aqueduct. These rights although well established, were not particularly emphasized at the hearing.

It has apparently been the practice of the City in the past to ignore applications to appropriate small amounts of water from Rock Creek but as these appropriations have steadily increased in number, it has apparently become concerned with the possibility that considerable water may be diverted from the creek in the aggregate and filed Exhibit 1 at the hearing indicating that appropriations aggregating 4.371 cubic feet per second were before this office to appropriate from Rock Creek. An inspection of the record, however, reveals that of this amount, 4.3 cubic feet per second was for power purposes, a non-consumptive use, and the water is to be returned to Rock Creek where it will be made available for protestants use and only 0.071 cubic foot per second remained for domestic purposes. As a matter of fact, however, due to reductions at time of license, cancellations etc., the actual amount of water now appropriated together with the amount sought to be appropriated from Rock Creek for consumptive use including the amount which applicant now seeks to appropriate under Application 8353, is less than 0.05 cubic foot per second.

While the City claims a prior, paramount and superior right to the waters of Rock Creek, the attitude of its representative at the hearing was such as would indicate that the City does not wish to go on record as preventing any legitimate development on the Creek which does not unduly infringe upon its water supply but feels that once applications to appropriate from Rock Creek are approved the users of water thereunder will not surrender voluntarily whatever use may have been made no matter how much the City may need the water. The City for this reason claims the right to the flow in Rock Creek for municipal purposes and the right to take it whenever the same may be required.

The amount of water which applicant proposes to appropriate is 15,000 gallons per day or less than 0.024 of a cubic foot per second, which is relatively small. The water is to be used for domestic purposes at a resort which is located on the banks of the creek from which applicant seeks to appropriate and no doubt there will be a considerable portion of the water returned to the stream after use. It is, therefore, our opinion that the appropriation will have a negligible effect on the City's water supply. Moreover, the use proposed is of the highest type and it is to the public interest that such use be allowed by property owners within the watershed of the stream from which it is proposed to appropriate. It is, therefore, our opinion that Application 8353 should be approved.

At the hearing the City requested that in the event Application 8353 were approved, the permit would be granted in such form that it would embody notice to the applicant that whatever rights were granted would be subject to any prior or superior rights that protestant might have and the examiner agreed that this would be done. Every permit issued by this office is issued subject to vested rights and it is our opinion that the condition requested by protestant will be amply taken care of without incorporating any special term or condition in the permit. However, when permit is issued, the letter of transmittal to the permittee should direct special attention to the fact that the permit is issued subject to vested rights and that the existing and vested rights of the City of Los Angeles can not legally be diminished by the issuance of the permit.

ORDER

Application 8353 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 now being fully informed in the premises:

IT IS HEREBY ORDERED that Application 8353 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 21 day of *June* 1937.

EDWARD HYATT, State Engineer

By HAROLD COMKLE
Deputy

(Seal)
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