

Before the Division of Water Resources
Department of Public Works
State of California

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In the Matter of Application 10765 of Everett Fountain
to Appropriate Water from Sharper Creek and Branch of
Sharper Creek (Huckleberry Creek) in Trinity County
for Domestic and Irrigation Purposes

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Decision A. 10765 D. 521

Decided February 20, 1945

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APPEARANCES AT INVESTIGATION CONDUCTED AT THE SITE OF THE PROPOSED
APPROPRIATION ON SEPTEMBER 22, 1944

For Applicant

Everett Fountain

In propria persona

For Protestants

John W. Card and John Hewitt

John W. Card

For Division of Water Resources

A. S. Wheeler, Assistant Hydraulic Engineer for Harold Conkling,
Deputy State Engineer in Charge of Water Rights,
Division of Water Resources, Department of Public Works,
State of California

O P I N I O N

General Description of the Proposed Development

Application 10765 was filed by Everett Fountain on February 10,
1944. It proposes an appropriation of an amount of water not to exceed
3 c.f.s. from either Sharper Creek or its tributary (Huckleberry Creek) or
from both sources combined to be diverted from about May 15 to about
October 15 of each season for the irrigation of 130 acres within Section 14,

T. 6 N. R. 5 E. H. B. & M. and throughout the year as required for domestic purposes at a residence and for the watering of about 40 head of cattle and about 100 head of sheep. The points of diversion are both located within the SE $\frac{1}{4}$ of NW $\frac{1}{2}$ of Section 12 T. 6 N. R. 5 E. H. B. & M.

Although the application specifies "Sharper Creek" and a "branch of Sharper Creek" as the sources of proposed appropriation, it appears that the names of these streams should be "Sharber Creek" (so shown upon the China Flat Quadrangle Sheet of the U. S. Geological Survey) and "Huckleberry Creek" and will be so designated in this opinion.

Protest

John Card and John Hewitt, in a joint protest, claim riparian rights to the use of water from Sharber Creek. They claim that some years ago water was diverted from this creek for mining purposes on their property which is within the N $\frac{1}{2}$ of SW $\frac{1}{2}$ of Section 12 T. 6 N. R. 5 E., H. B. & M., and just below the applicant's proposed intakes and that this mining use will be resumed after the war. They also propose to use the water for irrigation and domestic purposes.

They allege, in effect, that the amount of water which applicant seeks to appropriate is greatly in excess of the amount which will be required, that this amount is not present in Sharber Creek in the summer months or during dry seasons, and that the proposed appropriation, if approved, would result in depriving them of water required for use upon lands recently acquired by them for mining purposes. They were willing to dismiss their protest provided sufficient water was allowed to pass downstream during dry seasons for domestic purposes for at least two

families, for the irrigation of at least 4 acres and for the operation of a No. 1 Giant in hydraulic mining. The point on Sharber Creek where they propose to divert the water was described as being at the proposed point of diversion of the applicant.

Field Investigation

Stipulation to an informal hearing under Regulation 12 B of the Rules and Regulations of the Division of Water Resources having been signed by the applicant and protestants and having been approved by this office, an investigation was conducted at the site of the proposed appropriation by an engineer of the Division on September 22, 1944, accompanied by the applicant Everett Fountain and by John W. Card, one of the protestants. Subsequent to the investigation protestants' attorney, Irwin T. Quinn, was interviewed at Eureka.

In arriving at a decision in the matter reliance is placed on the entire files in connection with Application 10765, of Everett Fountain, and Application 10874, of John W. Card and John Hewitt.

General Discussion

Prior to the field investigation protestants John W. Card and John Hewitt filed Application 10874 with the Division on September 5, 1944, to appropriate $1\frac{1}{2}$ cubic feet per second of the waters of Sharber Creek to be diverted from about May 1 to about November 30 of each season for the irrigation of 5 acres of land and throughout the entire year as required for domestic purposes. The proposed point of diversion is within the SE $\frac{1}{4}$ of NW $\frac{1}{4}$ of Section 12 T. 6 N. R. 5 E. H. B. & M. just below the point of diversion proposed by Everett Fountain. On October 2, 1944, an amended

Application 10874 was filed in which the amount of water applied for was reduced to 0.05 cubic foot per second, which was the estimated capacity of the pipe line.

At the time of the field investigation on September 22, 1944, the flow in Sharber Creek was estimated to be 0.25 c.f.s and that in Huckleberry Creek to be 0.15 c.f.s., which flows were below normal according to both applicant and protestant Card. They were also of the opinion that from about October 15 to May 15 of a year of normal run-off there was sufficient water in Sharber Creek for all concerned. As to the period from about May 15 to October 15, which is the critical period, Mr. Fountain agreed to let sufficient water flow down to the protestants' point of diversion for their domestic use and on being informed that any permit which might be issued in approval of Application 10765 would be issued subject to any existing rights which protestants might have, Mr. Card stated that he would instruct his attorney to withdraw the protest.

The attorney for the protestants, however, instead of withdrawing the protest submitted a statement agreeing to withdraw the protest under certain conditions set forth therein, which applicant refused to agree to. One of the conditions provided that applicant would agree to allow the protestants at least 20 miners inches of water for mining purposes from December 1 to May 1 of each season; the other condition provided that during the summer months sufficient water would be allowed to flow through to insure to the protestants 0.05 c.f.s. to be used under their Application 10874.

There has been no use of water on protestants' property for a number of years, and while it appears that as riparian owners they may be

in a position to demand that water be released for their use, protestants are not legally in a position to demand that water be allowed to pass down to satisfy their proposed appropriation under their Application 10874 which was filed nearly seven months subsequent to Application 10765 of Mr. Fountain.

Moreover, according to the report of the investigating engineer, it appeared that only about 0.5 acre out of the 5 acres named as the place of use in Application 10874 was susceptible of irrigation, as the lower portion of protestants' place of use is largely a swamp requiring drainage for the successful growing of crops rather than irrigation.

While the 3 cubic feet per second appears to be somewhat in excess of the amount of water necessary for applicant's proposed use, the investigating engineer reported that the duty of water was low in that locality. This is a matter, however, which can be adjusted at time of license action.

Although protestants claim riparian rights the fact remains that these rights are not now being exercised and this office has consistently held that an objection to the approval of an application based on prospective riparian use cannot be urged as a logical basis upon which to deny an application.

The fact that protestants themselves filed Application 10874 to appropriate "unappropriated water" of Sharber Creek would appear to indicate that they were of the opinion that there is unappropriated water in the source from which applicant proposes to appropriate.

In view of the above, it is the opinion of this office that Application 10765 should be approved subject to the usual terms and conditions.

O R D E R

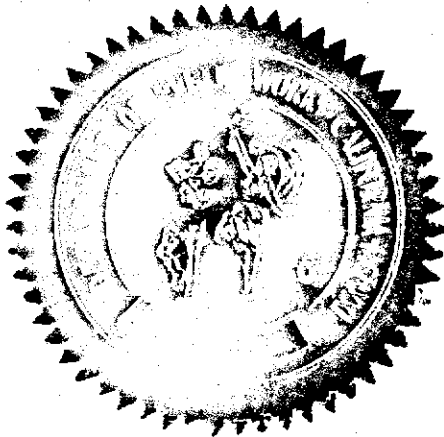
Application 10765 for a permit to appropriate water having been filed with the Division of Water Resources as above stated, a protest having been received, a field investigation having been made, a stipulated informal hearing having been held in accordance with Regulation 12 B of the Rules and Regulations of the Division, and the Division of Water Resources now being fully informed in the premises:

IT IS HEREBY ORDERED that Application 10765 be approved subject to 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 20 day of February 1945.

EDWARD HYATT, STATE ENGINEER

By Harold Conkling
Deputy State Engineer



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