

STATE OF CALIFORNIA
STATE WATER RIGHTS BOARD

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In the Matter of Application 16849)
by Glenn R. Baker to appropriate)
from Crooks Creek and an unnamed) Decision No. D 940
stream in Madera County)
ADOPTED NOV 12 '59

Substance of the Application

The application filed January 29, 1956, is for a permit to appropriate a total of 10.5 acre-feet per annum by storage (7.0 acre-feet from Crooks Creek and 3.5 acre-feet from an unnamed stream) to be collected between November 1 and May 31 of each season for irrigation and stockwatering purposes. Storage is to be effected by means of two earthfill dams located within the SE $\frac{1}{4}$ of Section 23, T6S, R20E, MDB&M. Both dams are constructed. According to the application the dam on Crooks Creek is 21 feet high, 198 feet long, and creates a reservoir of 7.0 acre-feet capacity. The dam on the unnamed stream is 20 feet high, 175 feet long and creates a reservoir of 3.5 acre-feet capacity. Some 17 acres of land are to be irrigated.

Protests and Hearing

Application 16849 was completed and advertised in accordance with the provisions of the Water Code and applicable rules and regulations, protests were received from Leland J. and Dorothy M. Davis and from Madera Irrigation District. A public

hearing was held on August 11, 1959, in Madera, California, before Kent Silverthorne, Chairman, and Ralph J. McGill, Member, of the State Water Rights Board. The applicant, protestants and other interested parties were duly notified of the hearing. The applicant appeared on behalf of himself, protestants Davis were represented by Attorney William H. Haupt, and Madera Irrigation District was represented by Attorney Denver C. Peckinpah. The protest of Madera Irrigation District was withdrawn at the commencement of the hearing (RT p. 9).

The application was heard under a common record with Applications 17208, 17425, and 18273. These latter applications will be considered by separate decisions and orders.

Sources

The sources are the two forks which form the main stem of Crooks Creek and each storage dam receives the runoff from about 1.25 square miles of drainage area. Crooks Creek is a tributary from the north and joins Fresno River in Section 2, T7S, R20E, MDB&M, at a point about three miles downstream from the applicant's points of diversion. Protestants Davis' property (Ahwahnee Meadow Ranch) is located on Crooks Creek extending from the north line of the S $\frac{1}{2}$ of S $\frac{1}{2}$ of Section 26, T6S, R20E, to the south line of the N $\frac{1}{2}$ of Section 1, T7S, R20E, MDB&M, immediately downstream from the applicant.

The Issues

The protest of Leland J. and Dorothy M. Davis is based upon the contention that the appropriation contemplated under Application 16849 will interfere with their use of water from

Crooks Creek under an appropriative right initiated prior to the effective date of the Water Commission Act in 1914 and by virtue of riparian ownership. The only issue involved is whether unappropriated water exists in sufficient quantity to justify approval of the application.

Discussion of the Evidence

The Davis Ahwahnee Meadow Ranch was originally owned and developed by William H. Crooks. In the 1850's Mr. Crooks constructed a log diversion dam about four feet high (RT p. 51) in Crooks Creek for the purpose of diverting water onto a meadow and for the irrigation of some crops on the west side of the Creek (RT pp. 39, 40). The dam was used in this manner until the death of Mr. Crooks in 1912 (RT pp. 40, 41). From 1912 to 1950 diversion was made intermittently during wet years (RT p. 51) and water was used continuously direct from the creek for stock water (RT p. 44). In 1950 the then owners of the ranch, Gellhardt and Cox, constructed a storage dam on the creek under the supervision of the Soil Conservation Service (RT p. 45). There is no evidence as to the capacity of the reservoir. However, testimony is to the effect that the dam is 24 feet high and forms a lake 1100 feet long with a width of 600 feet (RT p. 52). A second dam was built on the Davis property in 1954 by a Mr. Tharalson who owned the ranch at that time (RT p. 53). Water from both reservoirs is used for stockwatering and for irrigation purposes.

The applicant's property was homesteaded by the Baker family in 1910 (RT p. 10). Except in an exceptionally wet year

Crooks Creek ceases flowing in June and has always been dry by the first of July within the Baker property (RT pp. 11, 49) which is adjacent to and upstream from the Davis property.

The applicant's dam on Crooks Creek was built in 1942, the dam on the unnamed stream was built in 1956 (RT pp. 11, 12). According to Mr. George H. Crooks, a former owner of the Davis property, and also Mr. Davis, there has been no substantial change in the flow conditions of the creek during the summer months since the construction of the applicant's dams (RT pp. 50, 103). Also, there is no question as to the adequacy of runoff during the winter months (RT pp. 112, 114). In fact, Mr. Davis does not attempt to completely fill his reservoirs (by placing flashboards in the spillway) until most of the winter flow has passed in order to avoid possible flood damage to his works (RT p. 114).

Under Application 16849 water will be collected to storage during the period of November 1 to May 31. The primary concern of the protestants is that with the existence of the applicant's upstream reservoirs the runoff after about March 15 will not be adequate to meet their requirements. Protestants' problem then is obviously not one of adequate total seasonal runoff but of correctly predicting the occurrence of flow during the spring months. Under these circumstances it must be concluded that there is unappropriated water available to supply the applicant without material injury to protestants and that approval of the application will permit greater conservation of the water resources involved.

The discussion thus far has assumed that protestants produced satisfactory evidence of their prior right to impound

water of Crooks Creek during the season covered by Application 16849 for use later in the year. In fact, they did not do so, since there is no evidence that water was stored by them or their predecessors until 1950, and they have not received a permit authorizing storage. Prior to that time all use of water on the Ahwahnee Meadow Ranch from Crooks Creek was by direct diversion of the natural flow. A right to appropriate water acquired by beneficial use prior to the effective date of the Water Commission Act (December 19, 1914) is measured and limited by actual beneficial use, both as to quantity and time. Although there are no California court decisions directly in point, it follows logically that a right to divert natural flow at a stated rate for irrigation use during the irrigation season cannot be converted into a right to divert at a greater rate during the winter season and to hold the water over for use during the irrigation season. Such change would constitute a new appropriation of water for which, since 1914, a permit from the State has been required. A direct diversion right can be converted to a storage right only to the extent there is no change in rate of diversion from the stream or in the period of the year during which the water is diverted.

As to the protestants' alleged riparian right, the courts have held (Seneca Consol. Gold Mines Co. v. Great Western Power Co., 209 Cal. 206, 287 P. 93; Colorado Power Co. v. Pacific Gas and Electric Co., 218 Cal. 559, 24 P. 2d 495; and Moore v. California-Oregon Power Co., 22 Cal. 2d 725, 140 P. 2d 798) that

water cannot be stored and withheld for a deferred use under a claim of riparian right. "... the right of storage may be exercised only pursuant to appropriations lawfully made."

(Meridian, Ltd. v. San Francisco, 13 Cal. 2d 424)

A further factor which casts doubt upon the present validity of protestants' alleged prior water right, and consequently upon their standing objection to Application 16849, is the apparent intermittent use of water by protestants' predecessors between 1912 and 1950, since, generally speaking, non-use of water for a continuous period of five years results in loss of a pre-1914 appropriative water right.

Conclusions

The evidence indicates and the Board finds that unappropriated water exists at times in the sources named in Application 16849 and that such water may be taken and used in the manner proposed by the applicant during such times without injury to downstream water users holding prior vested rights. It is therefore the conclusion of the Board that Application 16849 should be approved and that a permit should be issued to the applicant subject to the usual terms and conditions.

Order

Application 16849 for a permit to appropriate unappropriated water having been filed with the former Division of Water Resources, jurisdiction of water rights including the subject

application having been subsequently transferred to the State Water Rights Board, protests having been received, a public hearing having been held, evidence having been received and considered by the Board, and said Board now being fully informed in the premises:

IT IS HEREBY ORDERED that Application 16849 be, and the same is, hereby approved, and it is ordered that a permit be issued to the applicant subject to vested rights and to the following terms and conditions, to wit:

1. The amount of water appropriated shall be limited to the amount which can be beneficially used and shall not exceed 10.5 acre-feet per annum by storage, from about November 1 of each year to about May 31 of the succeeding year, all as more explicitly set forth in Paragraph 2 of the approved application.

2. The maximum amount herein stated may be reduced in the license if investigation so warrants.

3. Complete application of the water to the proposed use shall be made on or before December 1, 1960.

4. Progress reports shall be filed promptly by permittee on forms to be provided annually by the State Water Rights Board.

5. All rights and privileges under this permit including method of diversion, method of use and quantity of water diverted are subject to the continuing authority of the State Water Rights Board in

accordance with law and in the interest of the public welfare to prevent waste, unreasonable use, unreasonable method of use or unreasonable method of diversion of said water.

Adopted as the decision and order of the State Water Rights Board at a meeting duly called and held at _____, California, on this ____ day of _____, 1959.

Kent Silverthorne, Chairman

W. P. Rowe, Member

Ralph J. McGill, Member