

STATE OF CALIFORNIA
STATE WATER RIGHTS BOARD

In the Matter of Application 10752)
by Francis Dlouhy to Appropriate)
from Kings River and Tributaries)
in Fresno County for Power Purposes)

Decision No. D 958

ADOPTED MAR 7 '60

Substance of Application and Hearing

Application 10752 was filed by Francis Dlouhy on January 18, 1944. As subsequently amended, the application is for a permit to appropriate a total of 3,770 cubic feet per second (cfs) by direct diversion and 282,700 acre-feet per annum (afa) by storage year-round from Kings River and tributaries. The application describes 15 separate points of diversion. The water is to be used for power and incidental domestic purposes at four power plants--Kings Canyon, Ten-Mile Creek, Eagle Spur, and Blue Canyon.

Protests having been filed, a public hearing was held before Kent Silverthorne, Chairman, and Ralph J. McGill, Member, of the State Water Rights Board on August 27 and 28, 1959, in Fresno, California. The applicant and all protestants of record were duly notified of the hearing.

Applicant and a number of protestants appeared at the hearing. Applicant introduced evidence and rested, at which time motion was made by certain of the protestants that Application 10752 be dismissed or denied without taking further

evidence upon the ground that the applicant had failed to make an adequate showing in support of the application (R.T. 175). The motion was taken under submission by the Board, and the hearing was adjourned pending action thereon.

Summary of the Evidence

Right of Access

The project under Application 10752 envisions, in addition to direct diversion from numerous streams within Kings River watershed, a storage reservoir of some 120,000 acre-feet capacity on the Middle Fork Kings River at the Simpson Meadow site within Kings Canyon National Park and a storage reservoir of some 156,000 acre-feet capacity on the South Fork Kings River in the Cedar Grove area (Cedar Grove Reservoir) within the Sierra National Forest (Staff Exh. 1 and R.T. 32).

In 1948 the Secretary of Agriculture and Secretary of the Interior approved a joint agreement whereby jurisdiction of the Cedar Grove area was transferred to the Secretary of the Interior acting through the National Park Service for recreational development (R.T. 38). The National Park Service is opposed to the development proposed under Application 10752 of the Middle and South Forks of Kings River as it "is incompatible with the fundamental purposes for which national parks and monuments are established, and...would result in permanent damage to Kings Canyon National Park". (R.T. 30). The Board will take official notice that under existing law there is no legal means by which the applicant could obtain authority to enter Kings Canyon National Park

for the purpose of constructing the proposed Simpson Meadow Reservoir. No application is pending before the Federal Power Commission for authority to construct either the Simpson Meadow Reservoir or a reservoir in the Cedar Grove area.

Financial Feasibility and Ability to Proceed

The applicant concedes that, although the elimination of storage in the areas controlled by the National Park Service at the Simpson Meadow site and in the Cedar Grove area is not fatal to the project below the junction of the Middle and South Forks (R.T. 113), it would be seriously affected to the extent that without the storage afforded by the upstream reservoirs the project could operate only a few months of each year (R.T. 99).

The record is silent as to the total estimated cost of all features described under Application 10752. The proposed Cedar Grove Dam would cost between \$20,000,000 and \$25,000,000 (R.T. 162). The applicant's project as described in his application to the Federal Power Commission (Project No. 1990) would cost some \$48,000,000, including necessary power transmission lines (R.T. 115, 116). Inasmuch as that project covers only those features at and below the junction of South and Middle Forks of Kings River, the \$48,000,000 figure does not include the cost of either Simpson Meadow or Cedar Grove Dams and Reservoirs, which sites are located within areas administered by the National Park Service (R.T. 113, 115).

According to the applicant a financial analysis of the project as described in his application to the Federal Power

Commission indicates that a return of 3.78 per cent on the investment could be expected (R.T. 115). No supporting data was submitted for this estimate. He stated that although some financial enterprises have been required to pay interest on bonds and obligations in excess of 5 per cent, he considers the situation only temporary, as interest levels always fluctuate in cycles, that such rates are not uniform depending upon "Publicity and the manner of approach" (R.T. 116) and that he believes he could obtain a loan and issue bonds for the project at an interest rate lower than the general interest level (R.T. 117).

The applicant testified that much unfavorable publicity has been generated against his project on the basis of its purported detraction from the Kings River recreational potential and admitted that such publicity tends to make it difficult to finance a project (R.T. 116, 120, 170).

Although no bonding or investment houses have solicited the applicant relative to a bond issue on his project, the applicant conceded that "one famous Chicago investment house" had advised that the applicant would find it impossible to finance his project at the interest level proposed by the applicant (R.T. 168, 169).

The applicant testified that he is able to finance some of the initial construction expenditures from his personal funds, but that financing from other sources would be essential as construction of the project progressed (R.T. 166).

Potential Market

The applicant stated that he has no plans as to how the power developed under the project will be ultimately

disposed of (R.T. 123, 125). He claims that the present rate of increase in demand for power is spectacular and that he believes there is a possibility of selling power to the Southern California Edison Company or Pacific Gas and Electric Company within a period of five years (R.T. 125). The only other potential market for power is, according to the applicant, the City of Los Angeles, but he declined to disclose any information with reference to any negotiations he may have had with officials of that City in this regard (R.T. 130).

Discussion

Data enabling the calculation of the amount of power that would be developed by applicant's project, either with or without those features within areas administered by the National Park Service, are not available in the hearing record. However, based upon the quantities of water applied for and the description of proposed features set forth in the application, correlated with information contained in Bulletin No. 3 of the Department of Water Resources (Staff Exh. 2), it appears that the greater portion of the remaining hydroelectric potential upon Kings River would be committed (although not necessarily developed) by the project.

Before discussing further the merits of Application 10752, it is desirable to refer to the effects of its approval. Permits issued by the Board are required to specify the respective periods of time within which construction work must be

commenced and completed and water applied to beneficial use (Water Code Sections 1395, 1397). For determining the length of time to be allowed, the particular conditions surrounding each case govern. The guiding criterion is due diligence commensurate with the size of the project and the obstacles to be overcome (23 Cal. Adm. Code 776). If a permit were to be issued to this applicant, the many contingencies and obstacles which must be overcome would require that a substantial period of time be allowed within which to commence construction and that further substantial time covering a period of several years be granted for completion of construction and full use of water.

A permit, once issued, remains valid until revoked in the manner prescribed by the Water Code. The permittee acquires a right to appropriate water to the extent stated in the permit with a priority as of the date of filing the application. During the term of the permit and until it is revoked, no one else is entitled to receive a permit (except on a temporary basis), and if another application is filed, it must be denied unless there is water in addition to that covered by the outstanding permit (See Eaton v. State Water Rights Board (1959), (171 A.C.A. 437, 340 P. 2d 722)).

In view of the foregoing principles, it follows that approval of Application 10752 would serve to withdraw from appropriation by others substantially all remaining undeveloped water flowing in Kings River upstream from Pine Flat Dam for a long period of time without regard to the ultimate success or failure of the project.

It follows from what has been said that in order to justify a determination by the Board that the proposed appropriation would best conserve the public interest, without which the application cannot be approved (Water Code Section 1255), applicant cannot remain passive and ask that he be granted a permit on the strength of his application alone. While not required to establish with certainty that his undertaking will be successful, he must at least offer a reasonable basis for solution of the problems confronting him. He should indicate some reasonable prospect that he has the ability, as well as the intent, to proceed promptly and diligently with the appropriation proposed and that approval of his application will not have the effect of placing in "cold storage" rights to large quantities of Kings River water. He must also show either that his project would, to a substantial extent, fully develop the water resources of the river or that it would not prevent such development by others.

The applicant presented no evidence concerning the extent to which the potential development of the stream would be accomplished or tending to prove the soundness of his project and his ability to proceed with it, although he was reminded repeatedly that such proof is an important link in establishing his right to a permit.

On the contrary, substantially all of the relevant testimony offered by the applicant was adverse to favorable findings on these matters. The applicant admitted that he had no plans for marketing the power that would be developed by his

project. Apparently his only contact with competent financial authority resulted in his being advised by, according to his own terminology, the head of a famous Chicago investment house that it would not be possible to finance his proposed project on the basis proposed by him.

Although we do not intend, nor are we required to inquire into the merits of the adverse publicity that has been encountered by the applicant in his efforts to move forward with this project, it is clear, as he has admitted, that such adverse publicity can only act to make financing of his project the more difficult. Clearly, this may be an obstacle as retarding as any that may be encountered, be the adverse publicity with or without merit.

Summary and Conclusions

An analysis of the record shows that applicant:

- (1) has no corporate or other organization capable of carrying on his proposed project in the event of his personal incapacity;
- (2) has no contract for the operation of his project by any other party;
- (3) has no contract for the sale of power to be developed by his project;
- (4) declined even to discuss his negotiations for the possible sale of power to a municipal corporation;
- (5) because of the National Park Service elimination of two large storage reservoirs, would have left a project costing about \$48,000,000 but with sufficient water to operate for only a few months a year;
- (6) failed to introduce reasonably detailed evidence as to just what his remaining project would

consist of, how it would operate, or how much power would be developed; (7) failed to introduce any evidence that he had ever financed or operated any hydroelectric project; and (8) failed to introduce any evidence, direct or indirect, on which the Board could make a finding or even draw the inference that he will be able to finance, construct, and operate the project. Upon the basis of this record the Board finds that approval of Application 10752 and issuance of a permit thereon would not best conserve the public interest.

Accordingly, inasmuch as the applicant stated that he had no further evidence to offer (R.T. 164, 165), the application must be denied.

ORDER

Application 10752 for a permit to appropriate unappropriated water having been filed with the former Division of Water Resources, jurisdiction of the administration of water rights, including the subject application, having been subsequently transferred to the State Water Rights Board, a public hearing having been held by the Board at which the applicant completed presentation of his case and rested, a motion having been made by counsel for several protestants that the application be dismissed or denied without further proceedings upon the ground that the applicant failed to make an adequate showing in support of the application, said motion having been duly considered and said Board now being fully informed in the premises:

IT IS HEREBY ORDERED that said Application 10752 be,
and the same is, hereby denied.

Adopted as the decision and order of the State Water
Rights Board at a meeting duly called and held at Sacramento,
California, on this 7th day of March, 1960.

/s/ Kent Silverthorne

Kent Silverthorne, Chairman

/s/ Ralph J. McGill

Ralph J. McGill, Member