

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Application 26039)

JAMES S. AND JUNE A. STARR )

Applicant )

DEAN T. AND SHIELA K. MILLER )

Protestant )

Decision: 1592

Source: Unnamed Stream  
(aka Calhouse Creek)

County: Butte

DECISION APPROVING APPLICATION 26039

BY THE BOARD:

James S. and June A. Starr having filed Application 26039 for a permit to appropriate unappropriated water; protests having been received; a pre-hearing field investigation having been conducted; a public hearing having been held on October 23, 1980; applicant and protestant having appeared and presented evidence; all evidence in the record having been duly considered; the Board finds as follows:

Substance of the Application

1. Application 26039 is for a permit to appropriate from Calhouse Creek by direct diversion. The application requests 0.025 cubic foot per second from May 1 to November 1 of each year for irrigation purposes and 38 gallons per day year-round for stockwatering purposes. The maximum amount of water to be diverted will not exceed 7.8 acre-feet per year. The point of diversion and place of use are within the NE $\frac{1}{4}$  of SW $\frac{1}{4}$  of Section 28, T22N, R3E, MDB&M.\*

\* All references to township and range refer to Mount Diablo Base and Meridian (MDB&M).

Applicant's Project

2. The applicant currently purchases water from Paradise Irrigation District for stockwatering purposes and for irrigation of about 3½ acres of pasture, fruit trees and grapes on a four acre parcel adjacent to Calhouse Creek. The applicant proposes to substitute water pumped from Calhouse Creek for the water currently purchased from Paradise Irrigation District.

3. The proposed diversion will be made at a small regulating dam that has been in existence since about 1885 (See "Protestant Miller's Project" below). The applicant's stock drink from the small pond created by the regulating dam.

4. Calhouse Creek is tributary to Hamlin Canyon thence Hamlin Slough thence Butte Creek thence the Sacramento River.

Protests

5. The application was protested by the U. S. Bureau of Reclamation and by downstream diverters Dean and Sheila Miller (hereinafter referred to as "Miller").

6. The Bureau of Reclamation protest was dismissed on the basis that any permit issued contain certain applicable Board standard permit terms, including a term prohibiting diversion if hydraulic continuity exists between the proposed point of diversion and Hamlin Canyon from June 16 to September 1.

7. Protestant Miller alleges injury to a vested pre-1914 right, and claims that a previous owner of the applicant's property, by agreement of March 17, 1885, subordinated any claim of riparian or appropriative right to the waters of Cold Springs and Calhouse Creek in favor of a previous owner of the protestant's property and diversion system. Protestant Miller claims a right to all of the water flowing in Calhouse Creek from about May 1 to October 30 of each year.

8. The applicant claims that there is considerable flow in Calhouse Creek during the winter. The applicant also claims that much of the summer flow is return flow from upstream development over the years in the town of Paradise and therefore is not subject to old rights.

#### Protestant Miller's Project

9. Protestant Miller owns about  $5\frac{1}{2}$  acres located in Section 33, T22N, R3E, somewhat more than a  $\frac{1}{4}$ -mile away from Calhouse Creek.

10. Protestant Miller claims that the existing earth ditch, about  $\frac{1}{2}$ -mile long, between Calhouse Creek and a small terminal pond on his property was constructed in 1885. The original point of diversion into the ditch was the regulating pond from which the applicant herein proposes to divert. The point of diversion was subsequently changed to its current location about 50 feet downstream. The water was used for cattle and horse teams, and for irrigation of grain crops.

11. Protestant Miller irrigates approximately two acres, consisting of fruit trees and about 7,000 square feet of garden. Another  $3\frac{1}{2}$  acres could be planted if a dependable supply of water was assured. The terminal pond on the protestant's property generally becomes dry toward the end of July or in August. Any additional irrigation is accomplished by use of a domestic well.

12. Protestant Miller's property is just outside the boundaries of Paradise Irrigation District. The protestant has unsuccessfully attempted to be annexed to the District.

#### Butte Creek Adjudication

13. In 1939, the Board's predecessor granted a petition for a statutory adjudication of Butte Creek Stream System above Western Dam (within Section 26, T20N, R1E). The Report on Water Supply and Use of Water, published

in March 1940, describes the area to be covered by the adjudication on pages 3 and 4. In describing Hamlin Slough, the report states: "Hamlin Slough heads southwest of Paradise....The natural flow from this watershed is limited to the period covered by the rainy season." The map accompanying the report shows the streams included in the adjudication, the irrigated acreages and the diversion systems. The map shows lands irrigated within Paradise Irrigation District, including Section 28, T23N, R3E, where the Starr property is located and terminates at the southern Section line of Section 28, which is the southern boundary of the District. Protestant Miller's point of diversion is within Section 28, but is not identified on the map. Commencing with Section 33 where the Miller property is located and continuing downstream for about six miles, Hamlin Canyon is not shown and no land use features are delineated.

14. Ella Wayland Evers, a predecessor in interest to Miller, filed a proof of claim for a water right for other property she owned in the adjudication area. She did not file a proof of claim for use of water on the Miller property under the 1885 right. The Butte Creek Adjudication Decree, entered on June 22, 1942, makes no reference to a water right or use of water on the Miller property.

15. Section 2774 of the Water Code provides:

"When a decree has been entered, any claimant who has failed to appear and submit proof of his claim as provided in this chapter shall be barred and estopped from subsequently asserting any rights theretofore acquired upon the stream system embraced in the proceedings and shall be held to have forfeited all rights to water theretofore claimed by him on the stream system, other than as provided in the decree, unless entitled to relief under the laws of this State."

16. Since Protestant Miller's point of diversion is within the area of the Butte Creek adjudication, Miller's use of water is assumed to have been subject to the adjudication decree. Under Water Code Section 2774, the absence of a proof of claim for use of water on the Miller property, indicates that the pre-1914 appropriative right attaching to the property was extinguished by the adjudication unless the claimant is "entitled to relief under the laws of this state." Protestant Miller has submitted a legal memorandum discussing the Butte Creek Adjudication which argues that the adjudication was not intended to apply to use of water in the area of Calhouse Creek. The facts discussed in paragraph 13 above indicate that Miller's predecessor in interest could reasonably have had some confusion about the applicability of the Butte Creek Adjudication to the Miller property. Such uncertainty may provide a basis for concluding that Miller is "entitled to relief under the laws of this State" from the presumption that his water right was extinguished by the adjudication (Water Code Section 2774).

#### Availability of Unappropriated Water

17. In acting upon Application 26039, the Board is required to determine if water is available for appropriation. Although to determine if water is available for appropriation requires examination of other water rights which may be affected, it does not ordinarily require an adjudication of such rights. In and of itself, Board action on Application 26039 can neither establish nor eliminate other water rights or alleged water rights in the area of Hamlin Slough. Due to the uncertainty surrounding the status of Millers' pre-1914 appropriative claim, the Board's analysis of the availability of unappropriated water is made on the assumption that Miller's alleged right was not extinguished by the adjudication. As with all water rights, however, Miller's alleged right is subject to the constitutional limitations of

reasonableness, including a reasonable method of diversion (California Const., Article 10, Section 2; Water Code Section 100).

18. At the time of the staff field investigation for Application 26039 on October 6, 1980, Protestant Miller was diverting nearly the entire flow of Calhouse Creek into a half-mile long unlined ditch leading to a small reservoir. There was no water flowing in the last one-quarter of the ditch and no water was reaching the reservoir.

19. In determining the availability of unappropriated water for satisfaction of Application 26039, Protestant Miller is assumed to have an appropriative right with a priority of about 1885 to irrigate two acres of orchard and garden. The measure of this water right is the amount of water actually applied to beneficial use and not the quantity diverted, Haight v. Costanich (1920) 184 Cal. 426, 194 Pac. 26. Tulare Irrigation District v. Lindsay-Strathmore Irrigation District (1935) 3 Cal. 489, 45 Pac. 2d 972. In view of the limited quantity of water in Calhouse Creek and the competing demands for such water, a reasonable method of diversion requires that water diverted to the Miller property be conveyed by a method which prevents loss. Usual duty of water allowances for irrigation of the type involved are one cubic foot per second to 80 acres. On this basis, Protestant Miller will be assumed to have a right for a continuous diversion from Calhouse Creek of 0.025 cfs.

20. During the winter months, sufficient water is available in Calhouse Creek to provide for the 38 gallons per day for stockwatering purposes requested under Application 26039.

21. Availability of water during the spring and summer irrigation period is dependent on whether valid downstream claims to the flow in Calhouse Creek at the applicant's requested point of diversion exist. Protestant Miller's alleged right is discussed in paragraph 19 above. The Bureau of

Reclamation's rights, based on previous Board decisions concerning the availability of water in the Sacramento River, would be protected by including a term in any new permit that would prevent diversion between June 16 and September 1 if there is hydraulic continuity from the requested point of diversion to Hamlin Canyon, a distance of approximately 1½ miles. The only other known downstream rights are those from Hamlin Slough, many miles downstream, as set forth in the Butte Creek Decree:

22. Previous Board decisions for appropriation within the area under the Butte Creek Adjudication generally found that water was not available, under normal conditions, from about June to October. However, none of the decisions specifically addressed the Hamlin Slough watershed.

23. The Butte Creek Watermaster since 1972 has indicated that the Hamlin Slough rights defined in Decree 18917 have not been satisfied during the months of July, August, and early September, and usually not satisfied during April, May, and June.

24. Based on the above, we find that there is no unappropriated water available in the Hamlin Slough watershed from about April through September for locations that have hydraulic continuity with Hamlin Slough, and for water that is subject to downstream prior rights.

25. Although there was testimony that the town of Paradise has grown considerably in recent years, no quantitative data was entered into the record in support of applicant's claim that the water applied for is new water resulting from upstream development in Paradise. Any new water which may be present would go to firm up old appropriative rights rather than being available for new appropriators. New water could be appropriated pursuant to Application 26039, however, provided hydraulic continuity does not exist in the stream down to the prior right diversion points.

26. Summer flow in Calhouse Creek results from spring seepage and a storm drain discharge located approximately one mile upstream from the applicant's point of diversion. The storm drain serves most of the commercial area of the town of Paradise, and may also collect seepage infiltration. On October 6, 1980, 31 gallons per minute (gpm) were flowing from the storm drain, 36 gpm were flowing in Calhouse Creek at the applicants' diversion facility. There was no surface flow in the creek a short distance downstream of Protestant Miller's diversion. On July 15, 1980, water was flowing in Calhouse Creek just upstream of the applicant's point of diversion, but there was no flow in the creek about one-half mile downstream.

27. The evidence indicates that, during the summer months, surface flow does not generally exist in Calhouse Creek further than about one-half mile downstream of the applicant's point of diversion. Even without Protestant Miller's diversion, hydraulic continuity would not exist between the proposed diversion under Application 26039 and Hamlin Slough, about eight miles downstream. Approval of Application 26039 would not infringe on the rights determined in the Butte Creek Decree if a term were included in the permit prohibiting diversion from Calhouse Creek when hydraulic continuity existed with Hamlin Slough.

28. Based on the flows measured in Calhouse Creek on October 6, 1980, sufficient water is available for Protestant Miller to divert 0.025 cfs (11.2 gpm) and Applicant Starr to divert 0.025 cfs during the summer months. A condition will be included in the permit to prohibit diversion from May 1 to October 1 if, in the absence of the requested diversion, hydraulic continuity would exist between the point of diversion and Hamlin Slough. When diversion is not

authorized under the permit, water can be purchased from the Paradise Irrigation District which is the applicant's present source.

29. Sufficient water is available to provide for the requested diversions during the month of November.

30. The proposed uses of water as requested are beneficial.

#### Other Matters

31. A private wildlife sanctuary, known as the Rivendell Wildlife Sanctuary, was established in 1977 on several properties along Calhouse Creek immediately downstream of the applicant herein. One such property owner claims that the wildlife and plant life in the area would be adversely affected if Calhouse Creek were to become dry for long periods of time. The context of that claim is in relation to diversion by Protestant Miller rather than as a protest to the application. Our findings and actions herein assume diversion of about two-thirds of the late summer flow in Calhouse Creek. The remaining water should flow downstream to the wildlife sanctuary or until it naturally percolates into the streambed.

#### Environmental Considerations

32. This Board decision authorizes a project which constitutes only a minor modification to land, water, and vegetation, and such projects are thereby exempt from the provisions of the California Environmental Quality Act (Public Resources Code, Section 21000, et seq.) in accordance with Section 15104, Chapter 3, Title 14, California Administrative Code.

Conclusions

33. From the foregoing findings, the Board concludes that water can be diverted as requested, and that Application 26039 should be approved and a permit issued to the applicant subject to the terms and conditions set forth in the following order.

ORDER

IT IS HEREBY ORDERED that Application 26039 be approved and a permit issued to the applicant subject to prior rights. The permit shall contain all applicable mandatory standard permit terms (6 through 13)\* in addition to the following conditions:

1. The water appropriated shall be limited to the quantity which can be beneficially used and shall not exceed:

- (a) 0.025 cubic foot per second by direct diversion from May 1 to November 1 of each year for irrigation, and
- (b) 38 gallons per day by direct diversion from January 1 to December 31 of each year for stockwatering.

The maximum amount diverted under this permit for all uses shall not exceed 7.8 acre-feet per year.

2. To the extent that water available for use under this permit is return flow, imported water, or wastewater, this permit shall not be construed as giving any assurance that such supply will continue.

3. The State Water Resources Control Board reserves jurisdiction over this permit to change the season of diversion to conform to the results of a comprehensive analysis of the availability of unappropriated water in the Sacramento River Basin. Action to change the season of diversion will be taken only after notice to interested parties and opportunity for hearing.

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\* A copy of the Board's mandatory standard permit terms is available upon request.

4. This permit is subject to prior rights. Permittee is put on notice that during some years water will not be available for diversion during portions or all of the season authorized herein. The annual variations in demands and hydrologic conditions in the Sacramento River Basin are such that in any year of water scarcity the season of diversion authorized herein may be reduced or completely eliminated on order of this Board made after notice to interested parties and opportunity for hearing.

5. No diversion is authorized by this permit when satisfaction of inbasin entitlements requires release of supplemental Project water by the Central Valley Project or the State Water Project.

A. Inbasin entitlements are defined as all rights to divert water from stream tributary to the Sacramento-San Joaquin Delta or the Delta for use within the respective basins of origin or the legal Delta, unavoidable natural requirements for riparian habitat and conveyance losses and flows required by the Board for maintenance of water quality and fish and wildlife. Export diversions and Project carriage water are specifically excluded from the definition of inbasin entitlements.

B. Supplemental Project water is defined as water imported to the basin by the project, and water released from Project storage, which is in excess of export diversions, Project carriage water, and Project inbasin deliveries.

The Board shall notify the permittee of curtailment of diversion under this term after it finds that supplemental Project water has been released or will be released. The Board will advise the permittee of the probability of imminent curtailment of diversion as far in advance as practicable based on anticipated requirements for supplemental Project water provided by the

Project operators. This term shall not apply in the absence of hydraulic continuity between the permittee's point of diversion and the Sacramento River.

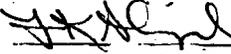
6. Rights under this permit are, and shall be, subject to rights determined by the Butte Creek Adjudication, Superior Court, Butte County, No. 18917 and any decrees supplementary thereto insofar as said adjudicated rights are maintained and such other rights as may presently exist.

7. During the period between May 1 and October 1, if in the absence of permittee's diversion, hydraulic continuity would exist between permittee's diversion point and Hamlin Slough, permittee shall not divert water but shall allow the water to flow undiminished downstream.

Dated: June 16, 1983

  
Carole A. Onorato, Chairwoman

  
Warren D. Noteware, Vice Chairman

  
F. K. Aljibury, Member

  
Kenneth W. Willis, Member