

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

Decision
file

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IN THE MATTER OF APPLICATION NUMBER 3945 of CHRISTIAN
BOLLHORN TO APPROPRIATE FROM UNNAMED TRIBUTARY OF SOUTH
BRANCH OF TEN EYCK CREEK AND FROM DONAHUE FLAT CREEK, IN
SISKIYOU COUNTY FOR AGRICULTURAL PURPOSES

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DECISION NO. 3945 D-88

Decided January 18, 1926.

APPEARANCES AT HEARING HELD August 16, 1924

For Applicant: Christian Bollhorn in Propria Persona and
H. C. Nelson, Attorney at Law

For Protestants: F. H. Bartlett for Ten Eyck Mines, Inc. and
for Luther Hickox
W. F. Clyborne, Attorney at Law for L. J. Nelson

Examiner: Edward Hyatt, Jr.
Chief of Division of Water Rights

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O P I N I O N

On April 8, 1924, Christian Bollhorn filed his application Number 3945 for a permit to appropriate 0.5 cubic feet from an Unnamed Tributary of South Ten Eyck Creek and 0.25 cubic feet per second from Donahue Flat Creek, in Siskiyou County, for agricultural and domestic purposes. This application was protested by L. J. Nelson, Ten Eyck Mines, Incorporated, and Luther Hickox.

This application was completed in accordance with the Water Commission Act and the requirements of the Rules and Regulations of the Division of Water Rights, and being protested was set for a public hearing at the Court House in Eureka at 9:00 o'clock A.M. on August 16, 1924. Of this hearing applicant and protestants were duly notified. The applicant and all protestants of record made appearances as noted above.

There was some dispute at the hearing concerning the names of the creeks involved in this matter, but there was no conflict in the location of the streams depicted diagrammatically on the accompanying sketch. The nomenclature of the streams is discussed below.

As to the appearance in behalf of the Ten Eyck Mines, Incorporated, and Luther Hickox, the transcript of hearing shows that said protestants appeared for the purpose of inserting into the record their claims to paramount rights on the entire watershed of Ten Eyck Creek rather than to set forth that the use of applicant under a permit as applied for would cause injury to them. The use of water by these protestants is for mining purposes largely during the winter and spring seasons of heavy run-off. These protestants admit that mining is unimportant during the dry weather season, but if occasion did arise when use of applicant under a permit as applied for would cause injury to them, they desired to be in a position of asserting a right to use the water.

L. J. Nelson in his protest to this application lays claim to all of the water in the sources in question during the period for which applicant seeks water, by virtue of two court decrees dated August 7, 1922 and October 24, 1923 of the Superior Court of the State of California, in and for the County of Humboldt, and by virtue of long use for many years prior to the passage of the Water Commission Act.

Applicant sets forth the claim that protestant Nelson's right to waters of Notuck or Notucket Creek specified in the deed from Newman in 1882 referred to a stream in Humboldt County indicated as Mud Creek on the accompanying map which flows nearby what is known as Joe's Garden rather than a stream in Siskiyou County tributary to Ten Eyck Creek, and that Nelson's claim to this latter stream was an afterthought subsequent to 1917.

Applicant maintained that protestant, Nelson, had forfeited his right, if any he had, to water in the tributary of Ten Eyck Creek by virtue of non-use and abandonment.

Applicant further maintains that the use of water by protestant Nelson is wasteful and uneconomical, and that by reasonable effort on the part of the latter, water that is now being wasted could be utilized and a sufficient amount would remain for the needs of applicant.

The evidence shows that protestant Nelson was using water from the tributary of Ten Eyck Creek in about 1900 because of a dispute over this stream with the Ten Eyck Mines. In an arbitration of this dispute it appears that the flow of the tributary of Ten Eyck Creek was awarded to this protestant. The above mentioned court decree dated August 7, 1922 definitely tied Notuck or Notucket Creek in as a tributary of Ten Eyck Creek and awarded the entire flow to protestant as against applicant. This clearly indicates that protestant has claimed rights in this tributary of Ten Eyck Creek for 24 years or more.

The evidence does not show any interruption in the use of water from the two sources in question by protestant Nelson between 1902 and 1917. Subsequent to 1917, applicant interrupted the use of protestant, which resulted in litigation and the two court decrees mentioned above. These decrees award the entire flows of Donahue Flat Creek and Notuck or Notucket Creek, a tributary of Ten Eyck Creek to protestant and further state that applicant cannot take any water from protestant's ditch. Since 1921 protestant has reconstructed and repaired his entire flume system. In view of these facts, applicant failed to establish his claims as to the abandonment and forfeiture of the rights of protestant in the sources in question.

The Nelson conduit system was in poor condition on July 10, 1920 with a total measured conveyance loss of 56 per cent. The old flumes have since been largely replaced with new lumber. The examiner and engineer of the Division of Water Rights inspected the Nelson conduit system on August 13, 1924, prior to the hearing and found same in good condition and as having only reasonable conveyance losses with two exceptions as noted below.

Protestant Nelson has two reservoirs which are supplied with water from the two sources in question and a third reservoir on Rosalina Creek which make it possible to mine during the extreme dry weather season, whereas the continuous flow supply would be insufficient to operate the mine during the summer as a minimum of approximately 11 cubic feet per second is required for this purpose. In addition to the mining, water has been used for domestic purposes and for irrigation of approximately 5 acres by protestant. Protestant has sufficient water requirements to utilize the entire available dry weather flow of the sources from which applicant seeks permit, since the total flow of all the streams in which rights are claimed by protestant was 2.7 cubic feet per second on July 10, 1920. The preponderance of evidence indicates that protestant has operated his mines throughout the dry weather season in a spasmodic fashion on account of the necessity of resorting to regulatory storage to give an operating head of water.

As to securing water by salvage of unreasonable and unusual loss in transit there appears to be but two possibilities. These possibilities are to be considered in the light of the evidence and in the light of an examination on the ground by the examiner and an engineer of the division. Since the reconstruction of the conduit system by protestant there appears to be little opportunity of salvaging losses in the flumes and ditches as these losses are merely nominal and not unreasonable. We will first consider

the alleged loss in the channel of Mud Creek and then the loss in Donahue Flat Swamp on applicant's homestead.

The water diverted from the tributary of Ten Eyck Creek by protestant Nelson is commingled with the flow of Donahue Flat Creek, which at some time in the past was evidently directly tributary to the Klamath River. A land slide caused the channel to change and take the course of the old Newman Ditch so that it is now tributary to a branch of Mud Creek immediately below what is known as Joe's Garden. Between this point and the Nelson Reservoir on Mud Creek there is a more recent landslide into the channel. The flow of the stream percolates through this slide and entirely disappears for a short distance. By clearing out this impediment to flow there may be an opportunity for diminishing deep percolation losses.

Little information is available concerning the difference if any, in the flow of the stream above the earth slide, mentioned above, and the flow of the stream below same. On August 13, 1924 the difference was not perceptible. The geological formations and the topography make it improbable that deep percolation in the channel of Mud Creek in the vicinity of the slide is appreciable.

From the above it is concluded that there is no unappropriated water in Donahue Flat Creek.

As to the possibility of salvage of loss in Donahue Flat Swamp it appears that by draining the swamp, evaporation and plant transpiration losses could doubtless be decreased and at the same time a tendency would be created to increase the flow of the natural springs in the swamp by virtue of the decreased pressure on their outlets.

In considering the evaporation from the swamp on Donahue Flat reference is made to a report on "Water Resources of Clear Lake, Cache Creek and Putah Creek Watersheds, and their Utilization" by Ray L. Allin dated March

1924. The total average annual loss on Clear Lake was determined as 3.75 feet in depth of which about 83 percent were lost in the period May 1st to October 31st during which applicant seeks water under this application. The minimum monthly loss occurs in January and is about 0.08 feet. Assuming that the seepage loss in Clear Lake is 0.06 feet per month uniformly throughout the year, the annual evaporation loss is 3.03 feet in depth on the exposed water surface. This compares closely with measured evaporation losses on Lake Tahoe. With 83 percent loss during the six month period in which applicant seeks water the evaporation loss on the swamp in Donahue Flat is deduced as about 2.5 acre feet per acre of water surface or saturated land surface. The area over which the water spreads on Donahue Flat after leaving the Nelson Ditch plus the area included in the swamp is between 6 and 8 acres. The calculated evaporation loss is therefore equal to approximately 0.05 cubic feet per second continuous flow between May 1st and October 31st. The spreading of the water over this large area rather than confining it to a ditch exposes it to a much larger loss through plant transpiration and deep percolation. The measured loss on Donahue Flat between the terminal of the Nelson Ditch and the outlet of the swamp was 0.1 cubic foot per second on July 10, 1920 with the accretion of natural springs within the swamp not being taken into consideration.

The flow of the tributary to the South Branch of Ten Eyck appears to be fairly constant during the dry weather season and equal to approximately 0.4 cubic feet per second. The loss in the Nelson Conduit between the creek and Donahue Flat was about 50 percent prior to the reconstruction of the flume. The new flume has materially reduced this loss, but the correspondingly greater amount of water being conveyed on to Donahue Flat will have little effect on the loss that occurs on the flat and swamp because the area over which the water spreads has not been appreciably increased. It therefore appears that at

least 0.1 cubic foot per second of water could be salvaged on the flat and in the swamp by draining the swamp and constructing a ditch about one quarter mile through the flat and swamp from the terminal of the Nelson Ditch to the ravine below the swamp. Possibly an amount greater than 0.1 cubic foot per second could be salvaged in this manner when the accretion from the natural springs in the swamp is taken into consideration.

The loss between the terminal of the Nelson Ditch and the point where the water gathers and flows off of Donahue Flat is more than 0.1 cubic foot per second and such a loss is not an ordinary and usual loss but is occasioned by the lack of a conduit or the ordinary and usual means of conducting water and is an excessive and unreasonable loss. Hence all the water diverted by protestant from the unnamed or Notuck Creek is not by him appropriated but he is entitled to an amount that has in the past been conveyed off of Donahue Flat plus an amount which would constitute a reasonable loss by evaporation and seepage from a usual and ordinary means of conducting water in the locality involved, due consideration being given to natural conditions such as soil traversed, etc.

In this connection it should be noted that the swamp into which the Donahue Flat Marsh drains is a natural swamp occasioned by springs arising therein. This natural swamp has been augmented in area by the waters diverted from Notuck Creek by protestant Nelson which waters have spread out at the terminal of the ditch on applicant's land and after dissipating themselves upon and over the flat and causing the marsh thereon have drained into the swamp, the overflow from which has drained into the ravine below and thence

into Donahue Flat Creek.

The conditions above described have existed for many years and such being the case there is apparently no authority under which the protestant could of his own volition enter upon the premises of applicant and construct a ditch thru said premises in lieu of the marsh and swamp as a source of supply. Such a proceeding might well be resisted by applicant as the creation of a new and different servitude and might also be opposed by him as an alteration of conditions beneficial to and desired by him. And in so far as the swamp is concerned it is a natural body of water and could not therefore be lawfully drained by an entrance upon the applicant's lands for that purpose. Hence it is manifestly beyond the legal ability of the protestant Nelson to change or alter the conveyance of Notuck Creek water thru the premises of applicant and said protestant having therefore repaired and placed his conveyance system in good and reasonable condition in so far as he is in a position to do so as against the applicant, it appears that the burden of changing such conditions is upon the applicant if by so doing he can avail himself of Notuck Creek waters without injury to the protestants long continued use and desires to do so.

The findings being that one tenth of a cubic foot per second is lost in the marsh and swamp over and above what would be reasonably lost by evaporation and seepage were the swamp drained and ^a ditch constructed thru the marsh and swamp to the ravine below the swamp, it is concluded that the applicant may divert such an amount of water from Notuck Creek provided he shall first and as a condition precedent to such a diversion drain the

swamp on his premises and construct a ditch across the marsh and swamp on his premises to the ravine below the swamp, said ditch to be of a capacity sufficient to convey the maximum amount diverted by protestant from Kotuck Creek.

Two cases recently decided by the Supreme Court of Utah are worthy of note as regards the above condition imposed on applicant. In United States v. Caldwell, 231 Pac. 434 a permit to appropriate was issued by the State Engineer subject to the condition that the applicant should construct a canal from another source as a supply to protestant United States as a trustee for the Indians in lieu of that supply to be taken by applicant. This permit was upheld by the Supreme Court. In Big Cottonwood Tanner Ditch Co. v. Shurtliff, 189 Pac. 587, the court upheld the right of the water company to substitute a pipe line for an open ditch thru which the Shurtliffs had obtained their water and the company was allowed to use a great quantity of water which was thereby saved from loss by seepage and evaporation in transit to the Shurtliffs. Also, in Wiggins v. Muscupiabe L. & W. Co., 113 Cal. 182 our own Supreme Court in a case wherein defendant had placed a pipe in the channel of a stream flowing thru his lands onto those of plaintiff and had thereby saved 100 inches from loss, held that as long as plaintiff continued to receive the same amount as he had received from the stream in its natural condition he had no cause of action against the defendant. It therefore appears that the protestant Nelson's interest is in the receipt of his accustomed supply and that as

long as said accustomed supply is not impaired the changes authorized are not violative of said protestant's right of use.

As to the two court decrees relied upon by protestant Nelson, the same are of no force or effect as against an after acquired title from the State of California. The decrees in question adjudicated the respective and vested rights of the parties to the action but did not include the state of California or decree that the State had no title, interest, or control over any unappropriated water in the sources involved. The applicant having, since the rendition of said decrees, applied to appropriate unappropriated water and the Division of Water Rights having found that there is unappropriated water in one of the sources in question, the applicant is therefore entitled to appropriate and use said water in such manner and subject to such conditions as will not infringe the prior rights of others and will enable a beneficial use by him. The amount of water involved is so small that in order for applicant to benefit therefrom it will be necessary for him to employ a water tight conduit.

ORDER

Application Number 3945 for a permit to appropriate water having been filed with the Division of Water Rights as above stated, protests having been filed, a public hearing having been held, and the Division of Water Rights now being fully informed in the premises:

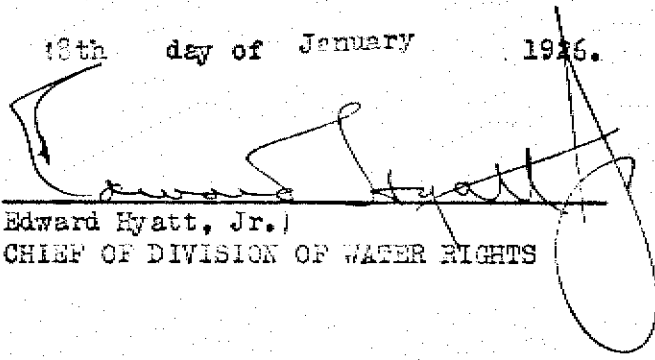
IT IS HEREBY ORDERED THAT said Application Number 3945 be approved and that a permit be granted to applicant for an amount of water not to exceed 0.10 cubic foot per second from the unnamed tributary of the South Branch of Ten Eyck Creek, subject to such of the usual terms and conditions as may be appropriate and the following special terms and conditions, to-wit:

"Diversion from Donahue Flat Creek is denied due to lack of unappropriated water."

"No water shall be diverted under this permit except through a water tight conduit".

"As a condition precedent to diversion under this permit, Donahue Flat Swamp shall be drained and a ditch constructed across said swamp and marsh to the ravine below said swamp, said ditch to be of a capacity sufficient to convey the maximum amount of water heretofore diverted by protestant Nelson from Notuck Creek."

Dated at Sacramento, this 18th day of January 1916.



(Edward Hyatt, Jr.)
CHIEF OF DIVISION OF WATER RIGHTS

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