

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

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In the matter of Applications 5409 and 5841 of A. Kempky, (later assigned to Utility and Service, Inc.) to appropriate from Conn Creek in Napa County, Tributary of Napa River for Municipal and Domestic purposes and for Irrigation purposes respectively.

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DECISION A 5409 and 5841 D *215*

Decided: *February 9, 1929*

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APPEARANCES AT HEARING HELD January 22, 1929

For Applicant

A. Kempkey

Nathan L. Coombs

For Protestants

Eugene S. Sheffield

William F. Humphrey and
Robert M. Searles
By Edw. Fitzpatrick

Scott S. Southworth et al

Edson Abel

California Water Service Co.

No appearance.

Bernice S. Parker

No appearance

EXAMINER: Everett N. Bryan, Deputy Chief for Harold Conkling, Chief of the Division of Water Rights, Department of Public Works State of California.

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O P I N I O N

GENERAL FEATURES OF APPLICATION

Application 5409 was filed by A. Kempkey on April 8, 1927.

It proposes an appropriation of $15\frac{1}{2}$ cubic feet per second of direct diversion and 50,000 acre feet per annum of diversion to storage from Conn Creek, tributary to the Napa River in Napa County. The period of direct diversion is from January 1 to May 31 of each season and the period of diversion to storage is from September 1 to May 1 of each season. The point of diversion is described as being within the SW $\frac{1}{2}$ of SW $\frac{1}{4}$ of Section 1, T 7 N, R 5 W, M.D.B. & M.

Water is to be used for municipal and domestic purposes to supply prospective consumers in Napa Valley and along route of pipe line as shown on map filed with the Division of Water Rights on February 16, 1928. A supplement to the application states as follows:

"This project is proposed and if a permit be granted will be carried out to supply water for domestic and industrial purposes along the route of the proposed pipe line as shown, and more particularly to consumers on the north and south sides of Carquinez straits."

"There is at present no water supply available for the territory north of the straits, and a marked deficiency of suitable water for the territory south of the straits."

"It will also be possible to supply water to four State Institutions: the hospital at Napa, the Veteran's Home at Yountville, the State Game Farm and the Napa State Farm."

"The demand for water for irrigation in Napa Valley can also be supplied by this project. The rate at which the demand will increase is almost impossible of prediction, but it seems very probable that the capacity of the project as measured by the requests contained in the application will have been reached within about seven years."

Application 5409 was assigned to Utility and Service, Incorporated on January 25, 1929.

Application 5841 was filed by A. Kempkey on February 23, 1928.

It proposes an appropriation of 10 cubic feet per second of direct diversion and 10,000 acre feet per annum of diversion to storage from Conn

Creek, tributary to the Napa River in Napa County. The period of direct diversion is from April 1 to September 1 of each season and the period of diversion to storage is from September 15 to May 1 of each season. The point of diversion is described as being within the SW $\frac{1}{4}$ of SW $\frac{1}{4}$ of Section 1, T 7 N, R 5 W, M.D.B. & M.

It is proposed to use the water for the irrigation of 20,000 acres of land more or less within Napa Valley as shown upon a map filed with the Division of Water Rights.

Application 5841 was assigned to Utility and Service, Inc., on January 25, 1929.

Both applications were protested by Eugene S. Sheffield, Scott S. Southworth, et al, California Water Service Company and Bernice S. Parker.

DESCRIPTION OF PROTESTS

Eugene S. Sheffield claims appropriative and riparian rights to divert from the Napa River and alleges possible interference with the natural moisture content of the soil and that the approval of the applications might result in depriving him of sufficient water for irrigation purposes, thereby decreasing the value of his land.

Scott S. Southworth and ten others claim vested rights by use and riparian ownership. These protestants divert from Conn Creek and/or the Napa River and allege in effect that the approval of the applications would result in substantial diminution or complete deprivation of their only available water supply.

The California Water Service Company claims no rights to the use of water from Conn Creek but does claim a right to serve water to the territory south of Carquinez Straits which it alleges the applicant proposes

to invade. The protest is filed against both applications but appears to be directed against Application 5409 only.

Bernice T. Parker alleges possible interference with the replenishment of the ground waters in Napa Valley by absorption from Conn Creek.

STATEMENT OF COMPLIANCE WITH LEGAL REQUIREMENTS

Applications 5409 and 5841 were completed sufficiently for advertising in accordance with the Water Commission Act and the requirements of the Rules and Regulations of the Division of Water Rights and being protested were set for a public hearing in accordance with Section 1a of the Water Commission Act on January 22, at 10:30 o'clock A.M. in the Supervisor's room of the Court House, Napa, California. Of this hearing applicants and protestants were duly notified.

HYDROGRAPHY AND HYDROLOGY

Conn Creek, the source of the proposed appropriations rises on the westerly slope of a spur of the Coast Range Mountains on the easterly side of Napa Valley approximately ten miles easterly of the Town of St. Helena. Its two main tributaries are Sage Creek and Chiles Creek.

From its junction with Chiles Creek, Conn Creek flows westerly for a distance of about two and one-half miles to its junction with Sage Creek and thence westerly for a distance of about three miles to the easterly boundary of Napa Valley. It then turns abruptly and flows down Napa Valley in a southeasterly direction for a distance of approximately six miles and enters Napa River at a point about one and one-half miles northwesterly of the town of Yountville and about nine miles northerly of the City of Napa.

Conn Creek is a torrential stream during periods of precipitation and about 97% of the total runoff occurs during the months of December to May inclusive.

According to Bulletin 5 of the Division of Engineering and Irrigation Department of Public Works, State of California, entitled "Flow in California Streams" the area of Conn Creek watershed is about 40.7 square miles or about 18% of the total drainage area which contributes to the flow in the Napa River tributaries above the main agricultural area of Napa Valley.

Although the engineer for the Utility and Service Inc., is of the opinion that the flow in Conn Creek is in excess of 18% of the combined flow in the Napa River tributaries, his hydraulic studies are predicated upon the assumption that the runoff from the Conn Creek watershed is approximately 18% of the Napa River Tributaries.

The mean seasonal runoff of the Napa River tributaries, according to Bulletin 5, is 115,200 acre feet per annum, varying from a minimum of 9,600 acre feet to a maximum of 419,400 acre feet. On the above assumption of 18% it would appear that the mean seasonal runoff of the Conn River watershed would be approximately 21,000 acre feet per annum varying from a minimum of about 1700 acre feet to a maximum of about 75,500 acre feet.

From the testimony presented at the hearing it appears that it is the applicants intention to maintain a regulated flow, under Application 5409, of $15\frac{1}{2}$ cubic feet per second throughout the entire year, by means of storage in the proposed reservoir. This draft would be equivalent to approximately 11,300 acre feet per annum which is about one-tenth of the mean seasonal runoff of the Napa River tributaries and about fifty-four percent of the mean seasonal flow of Conn Creek as estimated above.

Apparently the reason for requesting an appropriation of 50,000 acre feet per annum under Application 5409 over and above the direct flow diversion is for the purpose of enabling the applicant to avail itself of the opportunity to fill the reservoir during a season of maximum runoff and thereby create hold over storage to maintain the required

regulated flow during seasons of lesser runoff. After the reservoir is once filled it is likely that water would naturally waste over the dam in all years except those which were less than 50 per cent normal.

DISCUSSION OF PROTESTS

The California Water Service Company objects to the possible invasion by the applicant of the territory which it is now serving.

Protestant owns and operates the water system on the south side of Carquinez Straits formerly owned and operated by the Port Costa Water Company and is engaged in supplying water to that territory.

Testimony presented at the hearing indicates that applicant proposes to use the water under Application 5409 for the most part in the territory between Napa and Vallejo and on the north side of the Straits and does not propose to use the water on the south side except possibly in supplying the Sugar Company at Crockett. However be this as it may it is not a function of the Division of Water Rights to regulate matters of this kind. The protestant Company asserts in its protest that it claims no rights to the use of the waters of Conn Creek and in view of the above the protest of the California Water Service Company may be dismissed.

Protestants Eugene S. Sheffield and Scott S. Southworth, et al allege possible interference with their prior vested rights to appropriate from Napa River and/or Conn Creek.

Testimony presented at the hearing indicates that during the period of applicants proposed diversion under Application 5409, there is ordinarily water in Conn Creek which finds its way to the ocean without serving any useful and beneficial purpose. In fact, the flood menace to the riparian owners on Conn Creek is so great that it has been necessary to construct levees in order to prevent these flood waters from devastating their lands.

Testimony presented at the hearing indicated that at times the water rose to a height of ten to twelve feet.

Bulletin 5, referred to above, indicates that during the months of October to May inclusive of normal season of runoff, the runoff from the Conn Creek watershed is approximately 98.6% of the total seasonal runoff. From testimony presented at the hearing it appears that the flow of Conn Creek often ceases in May and portions of the creek bed are dry until the fall rains.

Under Application 5409, applicant is seeking to appropriate the flood waters of Conn Creek at such times as they are not needed for irrigation purposes in the valley. From June 1st to September 1st the applicant proposes to release an amount of water at the outlet of the reservoir equivalent to the natural flow of the creek into the reservoir in case the water level falls below the level of the spillway, otherwise applicant would allow the natural flow to pass down the creek over the spillway. During the remainder of the year the burden necessarily would be upon the applicant to divert water at such times as will not interfere with prior vested rights.

No testimony was presented at the hearing as to the present irrigation demands or future requirements of the users of water from either Conn Creek on the Napa River.

Realizing however that there are prior existing rights on Conn Creek between the proposed dam of the applicant and the confluence of Conn Creek with the Napa River, a form of contract has been drawn up by the applicant and offered to land owners affected by which whatever riparian or other water rights owners may have will be protected in such way as to insure a continuance of the enjoyment thereof without any increase in the cost of delivery of water to the land. In other words applicant contracts upon demand to take over the various plants and deliver water at a cost not to exceed the present cost.

By these contracts it is understood however the applicant is not endeavoring to furnish the riparian owners with a water right but is merely undertaking to insure to them the water to which they are already entitled under their existing rights.

To the riparian owners on Napa River between the confluence of the river with Conn Creek and the City of Napa applicant has offered 100 million gallons or approximately 370 acre feet per annum in order to relieve protests with the understanding that this amount would be released to them from storage during the months of June, July and August in addition to whatever release there might be from the normal stream flow during this period, delivery to be under some sort of water master agreement administered by the Division of Water Rights, with the further understanding that the applicant would not be responsible for the water being captured by some user on Conn Creek after it was once released.

There has been apparently no disposition on the part of the protestants to accept this proposal and the necessity of incorporating such a provision in any permit which may be issued on Application 5409 is not apparent.

In view of the above the protests of Eugene S. Sheffield and Scott S. Southworth insofar as they relate to possible interference with surface diversions may be dismissed.

Eugene S. Sheffield alleges possible interference with the natural moisture content of the soil and Bernice T. Parker alleges possible interference with the natural replenishment of the ground waters in Napa Valley.

No attempt was made by the applicant to determine what effect if any the proposed diversions would have upon the natural moisture content of

the soil or upon the replenishment of the underground waters in Conn or Napa Valleys, it being the opinion that such studies were unnecessary as its hydraulic studies were predicated upon the amount of water measured in the vicinity of Napa after it had been subjected to all possible drafts.

An inspection of Table 99 of Bulletin 5 which table is entitled "Napa River Tributaries" shows however that the seasonal discharges listed therein are the discharges as estimated above the main agricultural area and the points of measurement of the flows in the various tributaries are located at the mouths of the several tributaries as they debouch into Napa Valley and therefore the sum of these flows does not represent the flow in the Napa River in the immediate vicinity of the City of Napa as might be inferred by the statements of the applicant.

While it may be possible that the proposed diversion of the applicant would have a slight effect upon the ground water levels in the immediate vicinity of Conn Creek it is our opinion that this effect would not be appreciable as it is reasonable to assume that a large amount of replenishment occurs from the precipitation on the valley floor and from other tributaries of the Napa River.

As no evidence was presented by the protestants in support of the contention that injury would result in the possible lowering of the ground water plane occasioned by the proposed diversion of the applicant these protests are dismissed.

Application 5841 Abandoned

Application 5841, as stated above, was filed for the purpose of supplying approximately 20,000 acres of land in Napa Valley with water for irrigation purposes.

Subsequent to the filing of this application contracts have been entered into between the applicant and the Board of Supervisors of Napa County by which, in consideration of certain rights and privileges exchanged, the applicant agrees to permit the County of Napa to enlarge the dam and diversion works, under the supervision of the company, for the purpose of storing and maintaining for the use and benefit of said county or any other utility district and the inhabitants thereof, not less than 10,000 acre feet per annum of the flood waters of Conn, Chiles and Sage Creeks. In addition to the waters to be stored and maintained in said reservoir for all other purposes for which the same is to be constructed, the County of Napa or utility district to have full power and authority to distribute and dispose of said 10,000 acre feet of water.

The advent of these contracts has changed the aspect of the company's operations so materially that as far as the applicant is concerned it is not its intention to proceed under Application 5841 and it may be abandoned.

There is nothing in the contracts which would bind the applicant to proceed under Application 5841. No legal relationship has been established between the applicant and the lands which it was proposed to serve and although the applicant has signified its willingness to assign this application to the Board of Supervisors of Napa County, no showing was made at the hearing on behalf of the county relative to its intent to proceed thereunder. As it is not the practice of the Division of Water Rights to approve an application unless there is an apparent intent on the part of the applicant or its prospective assignee to proceed within a reasonable time to carry out the work proposed in the application, there would appear to be no purpose served by approving Application 5841 and therefore it should be denied.

Prospective Plans of Applicant
(Application 5409)

The Utility and Service Inc., a private corporation has already expended four or five hundred thousand dollars in securing approximately 2,000 acres of land, acquiring about 90% of the necessary rights of way and the prospective damsite and in conducting geological studies and other preliminary investigations.

It has yet to secure contracts for the sale of water and acquire the remaining rights of way before it will be able to finance the project. Bond houses have been approached informally it appears and although no documents have been signed the applicant is assured that the project can be financed and constructed within a reasonable time.

The applicant feels that the approval of the application or reasonable assurance that the application will be approved is necessary before final contracts for the consumption of the water may be entered into, although preliminary negotiations have been had with manufacturing concerns and with the Department of Finance of the State of California with a view of serving certain State Institutions.

Conclusion

From the evidence presented at the hearing there appears to be a sufficient amount of unappropriated water in Conn Creek to justify the approval of Application 5409. The purpose which is to be served is a useful and beneficial one and there appears no reason why this office could not take immediate action thereon except for the fact that contractual relationship has not been established between the applicant and prospective consumers. As it is contrary to the policy of this office to approve an application until such contractual relationship has been established the approval of Application 5409 should be withheld for a reasonable time in order to afford

the applicant an opportunity to submit proof that there is a substantial demand among prospective consumers. A permit will issue upon Application 5409 when and if satisfactory legal relationship with prospective consumers is assured.

As the applicant has no intention of proceeding under Application 5841, and there does not appear to be any immediate prospect of the County of Napa or any other interested party or parties proceeding thereunder, Application 5841 should be cancelled.

O R D E R

Applications 5409 and 5841 for permits 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 action on Application 5409 be withheld for a reasonable time until further order is entered in order to allow applicant an opportunity to submit satisfactory evidence as to its contractual relationship with prospective users.

IT IS FURTHER ORDERED that Application 5841 be rejected and cancelled upon the records of this office.

Dated at Sacramento California, this 9th day of February 1929

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Harold Conkling
(Harold Conkling)
CHIEF OF DIVISION OF WATER RIGHTS