

Before the Division of Water Resources
Department of Public Works
State of California

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In the Matter of Revocation of Permit 5197 Heretofore Issued in Approval of Application 9270 of Elert A. Hill to Appropriate from South Fork of Webber Creek in El Dorado County for Mining and Domestic Purposes and In the Matter of Application 9684 of Clifford E. Smith and Application 9701 of Archer C. Smith to Appropriate from South Fork Webber Creek for Mining Purposes.

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Decision 9270, 9684, 9701 D 458

Decided

May 27, 1940

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APPEARANCES AT HEARING HELD AT SACRAMENTO, APRIL 13, 1940.

For Applicants

Clifford E. Smith
Archer C. Smith

J. M. Inman
J. M. Inman

For Permittee and Protestant

Elert A. Hill

In propria persona

EXAMINER: Harold Conkling, Deputy in Charge of Water Rights, Division of Water Resources, Department of Public Works, State of California.

O P I N I O N

Application 9270 was filed by Elert A. Hill on April 13, 1938 and was approved on August 23, 1938 after a public hearing, by the issuance of Permit 5197 for an amount of water not to exceed 3 cubic feet per second to be diverted from the South Fork of Webber Creek from about October 1 to about August 31 of each season for mining and incidental domestic purposes within the SW $\frac{1}{4}$ of NW $\frac{1}{4}$ and NE $\frac{1}{4}$ of NW $\frac{1}{4}$ of Section 21, T 10 N, R 12 E, M.D.B.M. The point of diversion was described as being within the NW $\frac{1}{4}$ of NW $\frac{1}{4}$ of Section 22, T 10 N, R 12 E, M.D.B.& M.

Application 9684 was filed by Clifford E. Smith on July 29, 1939 and Application 9701 was filed by his brother Archer C. Smith on August 21, 1939.

Each application proposes an appropriation of 3 cubic feet per second from the South Fork of Webber Creek to be diverted from October 1 to May 15 of each season for mining purposes within the $W\frac{1}{2}$ of $NE\frac{1}{4}$ of $SE\frac{1}{4}$ and $SE\frac{1}{4}$ of $NE\frac{1}{4}$ of Section 20, T 10 N, R 12 E, N.D.B.& M. The point of diversion in each application is described as being within the $SW\frac{1}{4}$ of $NW\frac{1}{4}$ of Section 22, T 10 N, R 12 E, N.D.B.M.

Applications 9684 and 9701 were protested by Elert A. Hill upon the grounds that the Smith brothers proposed the use of the Steadman ditch through which he was obtaining his water supply. The Smith brothers on the other hand had been successful in a court action against Mr. Hill and he was enjoined from using the Steadman ditch and they maintained that the permit heretofore issued to Mr. Hill in approval of his Application 9270 should be revoked.

Applications 9684 and 9701 were completed in accordance with the provisions of the Water Commission Act and the requirements of the Rules and Regulations of the Division of Water Resources and being protested were set for public hearing on Monday April 15, 1940 at 10:00 o'clock a.m. in Room 401, Public Works Building, Sacramento, California. As it appeared that Mr. Hill had lost the use of the Steadman ditch and was therefore not in a position to consummate the appropriation proposed by him a public hearing was also set at the same time and place in accordance with Section 20 of the Water Commission Act to afford Mr. Hill an opportunity to appear and show cause why Permit 5167 should not be revoked. Of these hearings applicants and permittees were duly notified.

At the time of the hearing held on July 14, 1938 in connection with Application 9270 of Elert A. Hill, the Pioneer Hardware Store, Inc. claimed the ownership of the Steadman ditch which Mr. Hill proposed to use but the testimony presented at the hearing indicated that its rights had been lost by non-user and as there was unappropriated water in South Fork of Webber Creek at the intake of the Steadman ditch, Application 9270 was approved.

Mr. Hill then proceeded with his proposed development until hindered by Ed Deths, Clifford Smith and others who claimed that he had no right to the ditch. An action was then brought by Mr. Hill against these parties in the Superior Court of the State of California in and for the County of El Dorado and on March 31, 1939 Judge Thompson rendered a decision by which the defendants were enjoined and restrained from interfering with, diverting or otherwise exercising control over the water, not exceeding 3 cubic feet per second, as specified in Permit 5197 appropriated by the plaintiff Elert A. Hill from South Webber Creek by and through a diversion and made by means of the Old Steadman Ditch, so called, at a point within the Northwest one-quarter of Section Twenty-two, Township Ten North, Range Twelve East, Mt. Diablo Base and Meridian, and thence by said Ditch, and whilst carried therein to and upon the lands of the plaintiff included in Section Twenty-one of the aforesaid Township and Range."

Subsequently another suit was instituted by A. P. Smith, Clifford E. Smith, Abel Campini and Lena Campini, husband and wife, Cora C. Potts, Mill E. Maginess and Katherine Maginess, husband and wife, and Joseph Ahart against Elert A. Hill in the Superior Court of the State of California in and for the County of El Dorado and a decision was rendered which was adverse to Mr. Hill, enjoining and restraining him from the use of and interference with the Steadman ditch or its appurtenances and quieting title to the property through which the major portion of the ditch passed.

Following this decision Mr. Hill on January 30, 1940 filed a notice of a motion for a new trial in the County Clerk's office at Placerville but according to information received from the County Clerk on May 11th the motion for a new trial was denied by Judge Pierovich on March 23, 1940.

Although the point of diversion described in Application 9270, Permit 5197 differs somewhat from the point of diversion described in Applications

9684 and 9701 it is actually the same point it being the intake of the Steadman ditch located upon property owned by A. Campini who has denied Mr. Hill right of access. Furthermore as stated above Mr. Hill has been enjoined by Court decree from the use of the Steadman ditch.

On the day of the hearing the entire morning was occupied in presenting testimony in connection with Application 9270, Permit 5197 but upon motion of Mr. Hill all of this testimony was stricken from the record. Apparently Mr. Hill realized the futility in proceeding further under Application 9270, Permit 5197 and wished to avoid the expense of hearing. Although Mr. Hill apparently wishes to rely on a claim of riparian ownership as indicated by him at the hearing held in connection with Applications 9684 and 9701 (Transcript, page 14), there is no certainty that he will proceed with his mining development. Certainly he is not in a position to proceed under Application 9270, Permit 5197 and therefore Permit 5197 should be revoked.

The testimony presented at the hearing held in connection with Applications 9684 and 9701 indicated that there is water subject to appropriation under Applications 9684 and 9701. A quit claim deed to the Steadman Ditch has been executed by the Pioneer Hardware Store, a corporation, in favor of A. P. Smith, father of the applicants and the applicants have obtained leases from A. Campini, Joseph Ahart, and Mrs. Petts through whose lands the major portion of the ditch passes. The uses to which applicants propose to put the water are beneficial ones and it is the opinion of the Division that Applications 9684 and 9701 be approved subject to the usual terms and conditions.

ORDER

Permit 5197 having heretofore been issued in approval of Application 9270 and it appearing to the Division that by Court Decree the permittee is not in a position to consummate the appropriation under the permit and permittee after due notice and a hearing having failed to show cause why said permit should

not be revoked, and Applications 9684 and 9701 for permits to appropriate water having been filed with the Division of Water Resources as above stated, protests having been filed, a public hearing having been held and the Division of Water Resources now being fully informed in the premises:

IT IS HEREBY ORDERED that Permit 8197 heretofore issued in approval of Application 9270 be revoked and cancelled upon the records of the Division of Water Resources, and

IT IS FURTHER ORDERED that Applications 9684 and 9701 be approved and that permits be granted to the applicants subject to such of the usual terms and conditions as may be appropriate.

WITNESS my hand and the seal of the Department of Public Works of the State of California, this 27 day of May, 1940.

EDWARD HYATT, State Engineer

(Seal)

By HAROLD CONKLING
Deputy