

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

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In the Matter of Application 9734 of Paul Ziegelmaier
and E. A. Hefler to Appropriate from an Unnamed Stream
Tributary to Willow Creek, thence Middle Fork
of Feather River in Plumas County for
Mining and Domestic Purposes

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Decision A. 9734 D-476

Decided *March 31, 1941*

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APPEARANCES AT INVESTIGATION CONDUCTED AT THE SOURCE OF THE PROPOSED
APPROPRIATION ON JULY 31, 1940.

For Applicants

Paul Ziegelmaier and E. A. Hefler

E. A. Hefler

For Protestants

F. G. Gansner

In propria persona

E. I. Lane

In propria persona

C. W. Hymer

For Division of Water Resources

A. S. Wheeler, Assistant Hydraulic Engineer, for Harold Conkling, Deputy
State Engineer in Charge of Water Rights, Division of Water Resources,
Department of Public Works, State of California.

O P I N I O N

General Description of Project

Application 9734, filed on September 22, 1939 by Paul Ziegelmaier
and E. A. Hefler proposes appropriations of 3 cubic feet per second by direct
diversion and 9 acre-feet per annum by storage from an unnamed stream, tribu-
tary to Willow Creek thence Middle Fork of Feather River.

Diversion is proposed throughout the year for mining and domestic purposes within the E $\frac{1}{2}$ of SW $\frac{1}{4}$ and W $\frac{1}{2}$ of SE $\frac{1}{4}$ of Section 15, T 23 N, R 7 E, M.D.B. & M. after which the water used for mining purposes will be returned to Willow Creek within the SE $\frac{1}{4}$ of NE $\frac{1}{4}$ of said Section 15.

The points of diversion are described as being located as follows:

- (1) Within SE $\frac{1}{4}$ of SW $\frac{1}{4}$ of Sec. 15, T 23 N, R 7 E, M.D.B.M.
- (2) Within NE $\frac{1}{4}$ of SW $\frac{1}{4}$ of Sec. 15, T 23 N, R 7 E, M.D.B.M.

Direct diversion will be made from either or both points of diversion. Diversion to storage will be made at Diversion Point (2).

Protests

Application 9734 was protested by F. G. Gansner and S. I. Lane, Mr. Gansner as a claimant of the reservoir and the water which applicants propose to use and Mr. Lane as one of the lessees of protestant's property upon which it is proposed to use water under a right claimed by Mr. Gansner.

Mr. Gansner claims that the reservoir which the applicants propose to use was constructed by his predecessor in interest prior to the effective date of the Water Commission Act and that as a prior appropriator and as an owner of property riparian to the stream he is entitled to the use of the water which applicants propose to appropriate and that any water diverted by the applicants would infringe upon his prior vested rights. Mr. Lane is dependent upon any rights which Mr. Gansner may claim for the operation of the mining property which he has leased from Mr. Gansner.

Investigation

On July 31, 1940, an investigation of Application 9734 was conducted in the field by an engineer of this office. Of this investigation applicants and protestants were duly notified and urged to be present or to be represented.

Stipulated Hearing

Stipulations under Regulation 12B of the Rules and Regulations of the Division of Water Resources signed by applicants and protestants were received in this office on March 11 and March 20, respectively, and have been approved and accepted by the Division of Water Resources.

The records relied upon in the determination of the matter are:

Application 9734 and supporting maps	Filed Sept. 22, 1939
Protest of F. G. Gansner	Filed Nov. 28, 1939
Letter from F. G. Gansner	Filed Dec. 11, 1939
Letter from E. I. Lane	Filed Jan. 2, 1940
Letter from E. I. Lane	Filed Jan. 6, 1940
Letter from F. G. Gansner	Filed Apr. 4, 1940
Report of Investigation by A. S. Wheeler	Dated Dec. 10, 1940
* Copy of Notice of Placer Location by E. A. Hefler and Paul Ziegelmaier, et al, dated and recorded September 1, 1939.	
* Copy of proof of labor recorded by E. A. Hefler, November 28, 1939.	
* Copy of proof of labor by Paul Ziegelmaier dated June 28, 1940.	
* Copy of notice of location of Placer Claim by E. I. Lane et al dated April 23, 1940 and recorded April 24, 1940.	
Letter from U. S. Forest Supervisor	Filed Sept. 26, 1940
Letter from E. I. Lane	Filed Sept. 28, 1940
Letter from F. G. Gansner	Filed Sept. 30, 1940
Stipulation under Regulation 12B by Paul Ziegelmaier and E. A. Hefler	Filed Mar. 11, 1941
Stipulation under Regulation 12B by F. G. Gansner	Filed Mar. 20, 1941
Stipulation under Regulation 12B by E. I. Lane	Filed Mar. 20, 1941

- * These copies were made of certified copies presented to the Division for inspection and returned to applicants at their request.

General Discussion

From a careful consideration of the records the essential facts in the matter appear to be as follows:

- (1) Prior to 1914 water was used by the predecessor in interest of protestant Gansner for domestic and hydraulic mining

purposes. Extent of use not known.

- (2) From 1914 to 1938 water has been used by protestant Gansner and his predecessors at interest for domestic purposes and at irregular intervals for ground sluicing. The extent of this use has probably not exceeded 7.0 cubic feet per second.
- (3) A special use permit granted by the U. S. Forest Service in 1909 to the predecessors in interest of protestant Gansner for use of the reservoir which applicants propose to use and for the diversion system was cancelled by the U. S. Forest Service in 1937 for non-use.
- (4) In 1933 a portion of Mr. Gansner's diversion system was destroyed by floods and since then no use of the water has been made.
- (5) Applicants now have an application for a special use permit pending before the U. S. Forest Service. This application has not yet been approved and action is being delayed until more definite information concerning the contemplated use is available. This is the only application pending for the use of the area involved.
- (6) Mining claims have been filed by both applicants and protestant E. I. Lane on the place of use and reservoir site named in Application 9734. Applicants' filing however is prior to protestants' and proof of labor has been filed.
- (7) Protestant Lane's only interest is in obtaining the use of water claimed by protestant Gansner for mining use on lands leased from Gansner.

- (8) Mr. Gansner admits that during a year of normal runoff there is water in the creek in excess of rights claimed by him from about April 1 to about July 1 of each season.
- (9) Mr. Gansner owns land which is riparian to the creek and as such is entitled to use water as a riparian owner even though he may not have a valid appropriative right. As a riparian owner however he is not entitled to store water.

Conclusion

The main controversy between applicants and protestants apparently centers around the right claimed by both to utilize the existing reservoir, a matter over which this office has no jurisdiction. In cases where the allegations of both parties as to adverse possession are such that the issue is squarely joined and susceptible of determination only by hearing of the evidence it is the practice of the Division to wait a reasonable time for the parties to proceed with an adjudication before some court of competent jurisdiction. In this case however it appears that a special use permit for the use of the reservoir once granted to the predecessors in interest of protestant Gansner was revoked in 1937 by the U.S. Forest Service for non-use and the only application now pending before the Forest Service for the use of the reservoir is that filed by applicant Ziegelmaier. While the special use permit has not yet been granted it is our understanding that action will be favorable to the applicants if and when Application 9734 is approved by the Division. Although protestant Lane and his associates have endeavored to obtain control of applicants' lands and proposed reservoir site by filing a mining claim on the property, this claim is subsequent to that of applicants and therefore it is not seen wherein it is valid as against the prior claim of the applicants. We can therefore express the opinion that

any doubts in the matter are resolved in favor of the applicants and there is apparently no necessity in delaying action in the matter needlessly.

While the record is not entirely clear as to whether or not the appropriative right initiated by protestant Gansner's predecessors in interest has been lost by non-user, the fact remains that Mr. Gansner and Mr. Lane are not in a position to utilize the reservoir and use of water has not been made since 1938 and is not now being made. While it appears that Mr. Gansner owns land which is riparian to the proposed source of appropriation and as a riparian owner he may share reasonably in the beneficial use of the waters with other riparian owners on the creek, he is not using the water at the present time and riparian use which is prospective only cannot be urged as a basis upon which to deny an application.

Furthermore, protestant Gansner admits that during a year of normal runoff there is water in the creek in excess of rights claimed by him from about April 1 to about July 1 of each season. Should protestant Gansner continue his use of water from the creek the burden will be upon the applicants to so regulate their diversions as not to interfere with any rights which protestants may have but with no water now being used by the protestants there is no necessity at this time in limiting the season of diversion.

ORDER

Application 9734 for a permit to appropriate water having been filed with the Division of Water Resources as above stated, protests having been filed, a field investigation by the Division of Water Resources having been made, and a stipulated hearing having been held in accordance with Regulation 12B of the Rules and Regulations of the Division of Water Resources and the Division of Water Resources now being fully informed in the premises:

IT IS HEREBY ORDERED that Application 9734 be approved and that a permit 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 *31st* day of *March* 1941.

EDWARD HYATT, State Engineer

By HAROLD CONKLING Deputy

(Seal)

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