

STATE OF CALIFORNIA
DEPARTMENT OF PUBLIC WORKS
BEFORE THE STATE ENGINEER AND
CHIEF OF THE DIVISION OF WATER RESOURCES

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In the Matter of Application 13159 by Zachariah Meltzer to Appropriate Water in El Dorado County, from Scott Creek, Tributary via Cedar Creek to South Fork of Cosumnes River, for Domestic Purposes and Irrigation.

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Decision A. 13159 D. 684

Decided November 27, 1950

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APPEARANCES AT HEARING HELD AT SACRAMENTO ON JULY 7, 1950:

For the Applicant

Zachariah Meltzer

Zachariah Meltzer

For the Protestant

Arroyo Ditch Company

Carr & Donelson, Attorneys at Law
By Kenneth W. Donelson

EXAMINER - HARRISON SMITHERUM, Supervising Hydraulic Engineer, Division of Water Resources, Department of Public Works, for A. D. EDMONSTON, State Engineer.

ALSO PRESENT - Kenneth L. Woodward, Assistant Civil Engineer, Division of Water Resources.

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OPINION

General Description of the Project

The application (as amended) contemplates an appropriation of 0.15 cubic foot per second, from March 1 to October 1 of each season, from Scott Creek, tributary via Cedar Creek to the South Fork of Cosumnes River. The proposed point of diversion is within the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 18, T 8 N, R 12 E, M.D.B.&M. Diversion is to be effected by

means of a pump, 133 gallons per minute in capacity. The conduit is to be a 2 inch pipe, 500 feet long. The water is to be used for domestic purposes and irrigation on a place of use consisting of 2 acres within the NW $\frac{1}{4}$ NW $\frac{1}{4}$ and 10 acres within the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 18, T 8 N, R 12 E, M.D.B.&M. According to the application domestic use is to include household use and stockwatering. A 2 acre orchard and 10 acres of general crops are to be irrigated. The applicant asserts also a riparian right.

Protest

The Arroyo Ditch Company claims a right based upon early appropriation. It assertedly operates a public ditch system under control of the California Public Utilities Commission. It claims that its predecessor, the Arroyo Seco Dredge Company first used water about 100 years ago. It claims that the entire supply is used in dry seasons and that in dry years use extends year-round. It states that its customers include the town of Plymouth, miners, dredge operators and farmers in the vicinity of Plymouth and sometimes farmers in the Ione district. It states that its point of diversion is at a dam on the South Fork of Cosumnes River within the SW $\frac{1}{4}$ of Section 8, T 8 N, R 11 E, M.D.B.&M. It protests the application stating that under no conditions is its protest to be disregarded and dismissed without its written consent. It explains that all available water has been used, at least during the dry season, for over 50 years, that during dry years of that period use has extended over the full 12 months, and that during the past 3 years it has used all the water for from 6 to 9 months and some water during almost all of the remainder of each year. It argues that if the applicant is allowed to use any water at all, that amount necessarily will have to be taken from the protestant and its customers.

Answer

In partial answer to the protest the applicant quotes an alleged passage from page 3 of the protestant's Application 27113 dated June 1, 1946 before the State Public Utilities Commission:

"During the winter and spring months when a sufficient quantity is obtained from the South Fork of the Cosumnes River, and Pigeon, and Indian Creeks, no water is diverted from the Middle Fork. However since the South Fork and Indian Creek are dry during the summer and fall months, the entire supply during this period is largely obtained from the flow from the Middle Fork."

The applicant argues that the passage quoted is an admission that the water sought under Application 13159 does not reach the protestant's point of diversion in summer and fall.

The applicant takes exception to the statement in the protest to the effect that the removal of any water at all will deprive the protestant of water to which it is entitled. The applicant asserts that water is removed at many points by users other than the protestant, under riparian rights.

The applicant represents that the protestant is not beneficially using all of the water that it is diverting but instead is diverting it into wasteful channels for lack of customers.

Hearing Held in Accordance with the Water Code

Application 13159 was completed in accordance with the Water Code and the Rules and Regulations of the Division of Water Resources and being protested was set for public hearing under the provisions of Article 733(a) of the California Administrative Code on Friday, July 7,

1950 at 10:10 o'clock A.M. in the Public Works Building, Sacramento, California. Of the hearing the applicant and the protestant were duly notified.

General Discussion

At the hearing of July 7, 1950 the applicant authorized (transcript, page 11) the reduction of the diversion period set forth in the application to the period commencing March 1 and ending October 1 of each season. The application was so amended in due course.

At the hearing the applicant also asserted in effect (transcript, page 12) that the South Fork of Cosumnes River is dry during summer and fall and is not a material element of the protestant's source of supply during those seasons. He did not however introduce either testimony or competent evidence to support that assertion.

The applicant testified (transcript, page 32 et seq.) that his proposed point of diversion is upstream roughly 6 or 8 miles from the protestant's point of diversion, that on March 1 water runs by his place and by the protestant's diversion point, the protestant using but a portion of the available flow at that time. He testified further that by about July 7 the stream, while continuing to flow past his place, goes dry before reaching the protestant's intake, but admitted under cross examination (transcript, page 38) that his testimony about the stream going dry in the reach between his property and the protestant's intake was based upon hearsay.

The protestant's witness Garibaldi testified (transcript, page 58) that there is no unappropriated surplus available in the stream filed upon after April 15, the protestant using, usually, the entire flow therein from that time on. He testified that the source seldom goes completely

dry, and that ordinarily it furnishes some water year round. He testified (transcript, 78) that after about July 1 the protestant requires all the water available at its diversions on both the Middle Fork and the South Fork. He testified (transcript, page 82) that the protestant's right authorizes it to divert a total of 1000 miner's inches at either or both of its two intakes.

During the field investigation on July 25, 1950, supplemental to the Hearing, Division personnel observed the flow at the applicant's proposed point of diversion to be approximately 1.5 cubic feet per second and the flow at the protestant's point of diversion on the South Fork to be between 1.25 and 1.50 cubic feet per second, the latter flow being diverted in its entirety by the protestant. During that investigation it was also observed that the protestant's ditch from the Middle Fork was flowing almost to capacity and that approximately 5.0 cubic feet per second was passing the dam and continuing downstream. The protestant claimed a right to the excess passing downstream and stated that it was selling it to downstream dredgers. The validity of the claim to more water from the Middle Fork than the ditch therefrom can carry is not apparent.

During a supplemental investigation on August 29, 1950, also by the Division personnel, the South Fork was carrying some 0.75 cubic foot per second just below its confluence with Scott Creek and 0.1 cubic foot per second at the protestant's intake on that stream, all of the latter amount being diverted into the protestant's South Fork ditch. During the same investigation it was observed that the Middle Fork, about 5 miles above the protestant's intake thereon, was carrying about 10 cubic feet

per second and that the Middle Fork ditch just above its junction with the South Fork ditch was carrying approximately 2.5 cubic feet per second.

Summary and Conclusions

The protestant appears to possess an appropriative right to divert from either the South Fork or the Middle Fork of Cosumnes River or from both of those streams. The amount to which the protestant is entitled is undetermined but is presumed to be in excess of the dry season flow of the South Fork at the protestant's intake on that stream. When the flow of the South Fork is insufficient it is the protestant's practice to divert also from its intake on the Middle Fork, up to the capacity of the ditch leading therefrom.

The availability or nonavailability of a supplementary supply in the Middle Fork is irrelevant to the issue as to the existence of unappropriated water in the South Fork.

Testimony is to the effect that unappropriated water does not exist in the South Fork subsequent to April 15 at the protestant's intake on that stream. It is common knowledge that streams draining the west slope of the Sierra Nevada reach low stages before July 1. Supply was definitely less than demand when Division personnel visited the South Fork on July 25 and August 29, 1950.

The representation by the applicant that the channel of the South Fork between the applicant's proposed point of diversion and the protestant's intake goes dry, being based upon hearsay, is not competent testimony. In the absence of the establishment of that point, and its contradiction by testimony of another witness, it is concluded that surface flow is continuous throughout the reach in question and that an

upstream diversion such as the applicant proposes would lessen the supply reaching the protestant. It follows therefore that unappropriated water when non-existent at the protestant's intake is non-existent at the applicant's proposed intake, also.

As to flow conditions during March, testimony to the effect that water bypasses the protestant's intake on March 1 was not contradicted. In view of that testimony and the testimony that surpluses do not exist after April 15 it is concluded that surpluses do exist until April 15. Surpluses may in fact exist later than April 15, despite testimony to the contrary. Such surpluses however may be supposed to be too erratic to be of material value as a supply for domestic use and irrigation. Again a supply which fails even as early as April 15 or even June 15, is inadequate as a supply for the purposes named.

In view of the apparent non-existence of unappropriated water in firm supply after about April 15 or in erratic supply for a few weeks thereafter and the inadequacy for the purposes named in the application of a supply of such short and uncertain duration it is the opinion of this office that the approval of Application 13159 is not justified and that the application therefore should be denied.

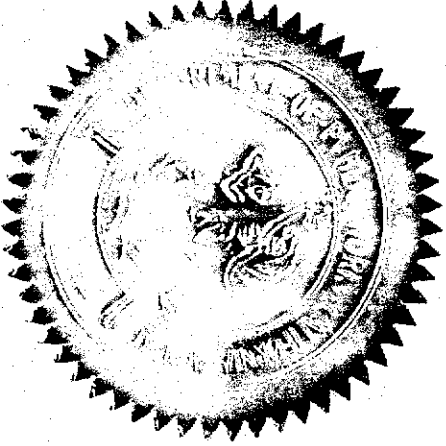
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ORDER

Application 13159 having been filed with the Division of Water Resources as above stated, a protest having been filed, a public hearing having been held and the State Engineer now being fully informed in the premises:

IT IS HEREBY ORDERED that Application 13159 be rejected and cancelled upon the records of the Division of Water Resources.

WITNESS my hand and the seal of the Department of Public Works
of the State of California this 27th day of November, 1950.



A. D. Edmonston
A. D. Edmonston, State Engineer.