

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 13400 by Howard R. Boots to appropriate Water from South Fork of Montgomery Creek in Shasta County for Domestic, Irrigation and Stockwatering Purposes.

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Decision A. 13400 D. 705

Decided May 28, 1951

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IN ATTENDANCE AT INVESTIGATION CONDUCTED BY THE DIVISION OF WATER RESOURCES AT THE SITE OF THE PROPOSED APPROPRIATION ON NOVEMBER 8, 1950:

Howard R. Boots	Applicant
Harry A. Hanson, Biologist) Bert M. Mann, Warden)	Representing California State Fish and Game Commission
D. Gould Bowley	Protestant
George A. Carver	Protestant, representing himself and Protestant Erna A. Carver
Ralph Hill	Protestant, representing himself and Protestant Nellie A. Huff
Aaron Smith) Mr. Calkins)	Protestants' witnesses
Orr M. Chenoweth	Protestants' Attorney
L. C. Jopson	Supervising Hydraulic Engineer Division of Water Resources Department of Public Works Representing the State Engineer

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O P I N I O N

General Description of the Project

The application contemplates the appropriation of 0.25 cubic foot per second, from May 15 to October 1, from the South Fork

of Montgomery Creek (sometimes called Johnson Creek), in Shasta County, for domestic, irrigation and stockwatering purposes. The proposed point of diversion is located within the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 15, T 34 N, R 1 E, M.D.B. & M. Diversion is to be by means of a rock dam, 2 feet high by 4 feet long, conveyance by means of an earth ditch of a capacity of from 1 to 1.5 cubic feet per second and $\frac{3}{4}$ mile long. The place of use is a 65 acre pasture, located within the W $\frac{1}{2}$ of the same Section 15. Domestic use is to include service to a 5 room home and to a $\frac{1}{2}$ acre garden. Sixty head of cattle are to be watered. No other water right or source of water supply is claimed.

Protests

The California State Fish and Game Commission protests that the proposed appropriation will result in the destruction of trout, the flow of the stream at times being less than the amount of water applied for. It states that trout are present and spawn naturally in Johnson Creek and are planted there by the State. The protest may be disregarded and dismissed, it is stated, if such permit as may be issued contains the following clause:

"Permittee shall at all times bypass a minimum of 0.5 c.f.s. or the natural flow of the stream whenever it is less than 0.5 c.f.s. at the point of diversion to maintain fish life."

D. Gould Bowley asserts ownership of a one-third interest in a ditch known as the "Bowley, Childs and Calkins Ditch." He states that Nellie A. Huff and Ralph Hill own a one-third interest in the same ditch and that George A. and Erna Carver own the remaining one-third interest. He states that said ditch heads on Johnson Creek at a point within Section 15, T 34 N, R 1 E, below the applicant's proposed point of diversion, that said ditch was constructed by the predecessors of himself and his

co-owners in 1880 or thereabouts, and that water from Johnson Creek is diverted through that ditch to his and to his co-owners' lands in Sections 7, 17 and 18 of the same T 34 N, R 1 E. He states further that he and his co-owners and predecessors divert and have diverted continuously for more than 60 years all of the water flowing in Johnson Creek at the head of their ditch, including the water brought into Johnson Creek by the Snow Mountain Ditch. He states that all of the water mentioned not only has been continuously used but also is necessary for his lands and his co-owners' lands, for irrigation and stock-watering. He states finally that there is no unappropriated water in Johnson Creek at any point above the intake of the Bowley, Childs and Calkins Ditch.

Two other protests, substantially identical to the one in the name of D. Gould Bowley, were filed against the application. One of these was by George A. Carver and Erna A. Carver and the other by Nellie A. Huff and Ralph Hill.

Answer

In reply to the protests the applicant asserts (in a single, collective answer) that the appropriation which he seeks would injure no downstream user, his application being limited to unappropriated water. He states that the ditch (called in the protests the "Bowley, Childs and Calkins Ditch") simply spills into Sawdust Creek, seeping over quite an area in doing so. He argues that the water which he seeks to appropriate seeps away and is lost as a result of the protestants' carelessness and "misuse of the present ditch." He implies that if he diverts as he hopes to do the protestants will receive as much

water as they do now, or more. He contends in effect that the protestants (along Sawdust Creek) do not hold an exclusive right to the ditch or to the water therein, the topography of his meadow and the irrigated pasture growing thereon proving use of the ditch by his own predecessors in ownership. He represents that the protestants' assertion that the ditch was built by their predecessors is untrue, maintaining that the ditch was originally used as a flume ditch by Terry Mill and that the protestants used a ditch which was located elsewhere and which they abandoned when Terry Mill closed down. He states that through neglect and misuse the ditch below his property has deteriorated, having become choked with brush and debris and that it is no longer functioning as a ditch and has not been for some time. He denies the protestants' statement to the effect that they have continuously diverted all the water in Johnson Creek, stating that there have been several plantings of trout downstream from the ditch intake and stating further that by his own observation on several occasions last summer (1949) the flow below the intake of the ditch exceeded 1 cubic foot per second. He denies the protestants' statement that all of the water has been continuously used and is required, asserting on the contrary that all of the water is not used because neglect of the ditch has caused many leaks, resulting in the wandering away of the water, with damage, incidentally, to his own road and meadow. He denies the protestants' contention that there is no unappropriated water in the stream.

Field Investigation

The applicant and the protestants having stipulated to an informal hearing as provided for in Section 733(b) of the California Administrative code, a field investigation was conducted at the site

of the proposed appropriation on November 8, 1950. The applicant and the protestants were all present or represented at the investigation.

Records Relied Upon

Application 13400 and all data and information on file therewith.

Discussion

According to the report of the investigation of November 8, 1950 the flow of Johnson Creek at the applicant's proposed point of diversion on that date was about 1.75 cubic feet per second. The flow appeared to be more than usual and the investigating engineer attributed ^{it} to rains which had occurred just before the investigation. At the time of the investigation, according to the same report, the ditch from Johnson Creek was carrying 0.70 cubic foot per second, all of which was passing through the applicant's lands for use by the protestants. According to the protestants, the report states, that flow of 0.70 cubic foot per second was about equal in amount to the dry weather flow of Johnson Creek at the head of the ditch, including water imported from the North Fork of Montgomery Creek.

Further information, extracted from the report of investigation of November 8, 1950 is as follows:

"Johnson Creek (called South Fork of Montgomery Creek on the U.S.G.S. map) heads at an elevation of about 5100 feet - - - and flows northwesterly about 6 miles to a junction with the North Fork of Montgomery Creek. - - - . The North Fork - - - parallels roughly the course of Johnson Creek and heads - - - some 700 feet higher - - - . The protestants maintain a ditch from the North Fork - - - into Johnson Creek near its head to supplement the flow available for their diversion.

"The applicant seeks to use the ditch claimed by the protestants and to take therefrom the water applied for on his property

which lies about $\frac{1}{2}$ mile from the head of the ditch. The protestants convey their water down the ditch another $\frac{1}{2}$ mile and spill it into Sawdust Creek from which they divert the water about 1 mile downstream.

" Sawdust Creek heads in and above the property owned by the applicant and the water therefrom is used on all except 3 acres of the 65 acres claimed to be irrigated by the applicant. The 3 acre tract is all that can be irrigated from Johnson Creek whereas the whole 65 acres is subject to being irrigated from Sawdust Creek. - - - -.

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"Johnson Creek apparently has a considerable flow during the snow melt period and during heavy rains but - - - the flow drops rapidly and by May 15 the protestants claim they normally begin diverting and using the entire flow. By June 15 it is generally necessary to open the ditch from North Fork of Montgomery Creek to maintain an adequate supply.

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"Although the California State Fish and Game Commission protested the application as originally submitted, their representative indicated at the investigation that they had no objection to the application as amended to apply for 0.25 cubic foot per second.

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"- - - -. It was estimated that the ditch capacity was about 2.5 cubic feet per second. This is approximately the amount required to irrigate the protestants' lands. The drainage from applicant's irrigation of 62 acres from Sawdust Creek probably is not in excess of the amount required to compensate for ditch losses in delivery of the Johnson Creek water through the 2 or more miles of conduit to the protestants' lands.

"The protestants' diversion and delivery system is maintained in accordance with accepted practice in the area.

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"From information presented at the field investigation it was apparent that the ditch from Johnson Creek has been used for many years both for agricultural purposes by protestants and their predecessors and for sawmill purposes by other parties below applicant. Witnesses agreed that the agricultural right of protestants was recognized by the sawmill when the mill was in operation.

"The ditch follows along one side of the applicant's Sawdust Creek meadow and at various times in the past has been tapped by the applicant's predecessors to irrigate the area involved but always under protest by the protestants. Diversion from the ditch has been stopped by personal act and threat of legal action at numerous times."

The information above set forth indicates that the protestants divert and apply to beneficial use some 2.5 cubic feet per second when that amount is available in the ditch heading on Johnson Creek at the applicant's proposed point of diversion, that the natural flow of Johnson creek during the summer months is of the order of 0.70 cubic foot per second and that in order to augment the supply obtainable from Johnson Creek the protestants import water by means of a ditch heading on the North Fork of Montgomery Creek and discharging into Johnson Creek above the head of the ditch which conveys their supply from the latter stream. The information further indicates that by May 15 the protestants begin diverting and using the entire flow of Johnson Creek and that by June 15 it is generally necessary to begin the importation of water from the North Fork of Montgomery Creek.

In view of the circumstances above set forth it is the conclusion of this office that unappropriated water does not ordinarily exist, after about May 15, in the source from which appropriation is sought under Application 13400, and that that application should therefore be denied.

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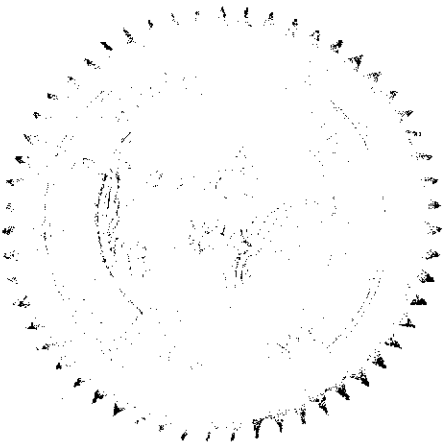
ORDER

Application 13400 having been filed with the Division of Water Resources as above stated, protests having been filed, a stipulated

hearing having been held and the State Engineer now being full informed in the premises:

IT IS HEREBY ORDERED that Application 13400 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 28th day of May, 1951.



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