

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 12864 by Grover E. Sanderson to
Appropriate Water from Whitmore Creek and from Reese Gulch,
both Tributary to Klamath River in Humboldt County for Domestic
Purposes and Irrigation.

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Decision A 12864 D 827

Decided April 19, 1955

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Appearances at Hearing Held at Sacramento on December 15, 1953:

For the Applicant

Grover E. Sanderson

In propria persona

For the Protestant

Theodosia F. Caldwell

In propria persona

EXAMINER - LESLIE C. JOPSON, Principal Hydraulic Engineer,
Division of Water Resources, Department of Public Works, for
A. D. EDMONSTON, State Engineer.

Also present: Hugh Ferrier, Associate Attorney, K. L. Woodward,
Associate Hydraulic Engineer, and F. M. Kuchta, Assistant Hydraulic
Engineer, Division of Water Resources, Department of Public Works.

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OPINION

General Description of the Project

The applicant seeks to appropriate 0.75 cubic foot per
second, year-round, and 0.5 acre-foot per annum collected between

November 1 and May 1, from Whitmore Creek and/or from Reese Gulch, both tributary to Klamath River in Humboldt County. The proposed points of diversion are located within the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 21 and the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 20, respectively, of T11N R6E, HB&M. The project includes a wood, stone and gravel diversion dam 3 feet high by 12 feet long, a concrete diversion dam 4 feet high by 4 feet long, an earth storage dam 6 feet high by 100 feet long, a reservoir 0.5 acre-foot in capacity and 0.1 acre in surface area, 4,800 lineal feet of earth ditch, 975 lineal feet of flume, 250 lineal feet of 20-inch diameter steel pipe. The water is wanted for "domestic and stock use in connection with 3 existing houses and in connection with possible future subdivision"; it is wanted also for the irrigation of a 15-acre orchard, 5 acres of general crops and 40 acres of pasture. Irrigation is to extend from April 1 to November 1. The applicant claims also a riparian right and an old appropriative right. He asserts ownership of the proposed place of use; as to his proposed points of diversion he claims "possessory right and right of preemption."

Protest

The application is protested by one Theodosia F. Caldwell who states as the basis of her protest:

"I have already appropriated the waters of Whitmore Creek and I am using it for mining purposes. I use all the waters in the creek. My application ... is numbered 10064"

Answer

No answer to the protest is of record.

Hearing Held in Accordance with the Water Code

Application 12864 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 the California Administrative Code, Title 23, Waters, on Tuesday, December 15, 1953, at 10:00 o'clock a.m., in Room 402, Public Works Building, Sacramento, California. Of the hearing the applicant and the protestant were duly notified.

Substance of Hearing Proceedings

Applicant Sanderson testified (Pages 4 to 26 of transcript):

"If you want to go back from the interruption in my home ... everything was intact up until 1940 when a party named Mrs. Theodosia Caldwell wanted to lease the property from me. She wanted a five-year lease, and in this lease she leased the water rights and all"

Applicant Sanderson next introduced exhibits as follows:

Applicant's Exhibit No. 1 -- Original lease of Rocky Point sixty acres.

Applicant's Exhibit No. 2 -- Preemption of Right of Way for Ditch and Location of Water.

Applicant's Exhibit No. 3 -- Dissolution of Partnership between Frank Reese and William Whitmore.

He then read into the record a purported copy of a notice of location covering an appropriation of 200 inches of water from Reese Gulch for mining purposes at Rocky Point Mine, bearing the name of William Whitmore and dated September 28, 1908. He also read into the record a purported quitclaim deed, dated December 6, 1933, by which, allegedly, he acquired the Rocky Point Mine from Nellie Whitmore. As to the occurrence of water he testified:

"We have always had water down there every summer. I got it for irrigation--planting a garden."

"I have always had the water down when I am there in the summer, then the water is always down Whitmore Creek, quite a head of water there has been--goes to pipe, which at one time put it way down; except for that interruption I would probably have pipe down; so there is good agricultural land down there. I have discontinued mining on the property, no more mines can be had on that property, by Federal Government order."

Applicant Sanderson further testified to the effect that he has irrigated from Whitmore Creek and from Reese Gulch, that such use of water has been made as far back as his knowledge extends, that it will always be utilized, that water was in use in 1939 or 1940 and prior thereto, that part of the ditch system is on "the lease lands", that he has an easement, that he has permission from the Forest Service, that the conduits leading to his proposed place of use are the same as those presently used by the protestant. When asked whether he is relying on any judgment relating to the five-year lease to protestant he testified:

"No, I have nothing, only I wanted to clarify the whole thing. It has been complicated so long, it is getting to be impossible; it cannot operate, it cannot be peaceful, and it is just one continuous dogfight after the other and I want that stopped completely."

Protestant Caldwell testified (Pages 27 to 45 of transcript)

to the effect that in 1940, during the first year of her lease, she found that there was no water right, that it was necessary for her to go into that matter, that there is no water for irrigation from Reese Gulch or Whitmore Creek. Protestant Caldwell next introduced Protestant's Exhibit No. A -- an affidavit by Lottie McLaughlin Beck dated October 14, 1953. As to the flow of Reese Creek she testified:

"Now Reese Creek will come down if you cut his water line. You would have to go up and cut his water line."

She also volunteered (page 29 of transcript):

"I would like also to correct the application of Mr. Sanderson for the water. This is Swede Gulch and not Reese Gulch. Reese Gulch is Reese Creek that comes down near the house."

In answer to a question as to whether she is now using the conduit from Whitmore Creek she testified (pages 36 and 37 of transcript):

"From the first of December to the first of July I can use, but just now I am not. I have before but last year my ditch has gone down. It has washed out twice. I have to replace it each year."

"... I completed the claim in 1941 for use in 1941 and then we were ordered to close the mines during the war and then I repaired the ditch ... and indicated full use again."

"Not this year and last year; I haven't done any mining because there is a controversy on present use . . . I expect to go ahead and use it."

Protestant Caldwell testified further to the effect that the ditch she uses to carry water for mining purposes has never carried water for use by Applicant Sanderson, that the period of which she is speaking extends from 1941 to the present time, that when she leased from Applicant Sanderson the ditch appeared not to have been used for many years, that she has claimed exclusive rights to the use of the ditch, flume etc. since 1941, that she diverts at a point above the Forest Service intake, that if she "took the whole thing out there would still be more than that for use down below", that "it seeps underground and comes out below but I have (she has) been the only one using it", that her mining claim is not patented but is a mining claim easement from the Forest Service, that there are five claims, called "Hopewell", "No Man's Land", "Point 1", "Point 2", "Point 3", that she has done her assessment work on all five claims each year, that her claim includes some lands lying north and south of the original 60 acres as well as a 15-acre place at the southwest corner.

The protestant's hearing exhibit reads in part as follows:

"Lottie McLaughlin Beck ... deposes and says:

"That she is a resident ... of the age of 45, and has resided near the Rocky Point Mine ... since early childhood; that she is personally acquainted with the said Rocky Point Mine and the history thereof; that she is personally acquainted with one Grover Sanderson; that she was personally acquainted with one Nellie Whitmore; that said Nellie Whitmore was, when first known by affiant, an aged and infirm woman who was unable to read or write."

"That she lived near the cabin on the Rocky Point Mine built by William Whitmore and had occasion often to visit there both before and after the death of the said William Whitmore."

"That she knows ... that Theodosia F. Caldwell has been in possession of the said Rocky Point Mine since 1940; that ... extensive ... improvements have been placed upon said mine by Mrs. Theodosia F. Caldwell for the purpose of Placer mining; that she knows ... that the said Grover Sanderson has never used water from Whitmore Creek"

"That she knows ... that Grover Sanderson did not reside upon the said mine property prior to the year 1933 ... that said property has been used as a mine and for mining purposes for many years prior to 1933 and thereafter."

Other Available Information

Application 10064 Permit 5889 License 3709 stands in the name of Theodosia F. Caldwell, protestant against Application 12864. It covers an appropriation of 12 cubic feet per second diverted from Whitmore Creek at the same point as the one at which Grover E. Sanderson seeks to appropriate under Application 12864. Under License 3709 Mrs. Caldwell may convey water to Rocky Point Mine, located within SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 20 and NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 29, T11N R6E, HB&M, for use thereon from about December 1 of each year to about July 1 of the next, for mining purposes, the water to be returned, after use, to Klamath River.

Extracts from a report covering an inspection made by an engineer of the Division on June 16, 1943, of the project under Application 10064 Permit 5889 are as follows:

"The source under this filing is Whitmore (Reese) Creek which heads ... in the Salmon-Trinity Mountains and flows northwesterly to the Klamath River."

"The contributory watershed is heavily wooded, has an area of about 1.25 square miles and an average annual rainfall of about 48 inches. The estimated flow in the creek at the time of this inspection was 3.0 cfs."

"The controlling sections of the conduit are the ... flumes and the capacity thereof ... was found to be 14.0 cfs"

"The place of use is located along ... the Klamath River and is known as the Rocky Point Placer Mine."

"The place of use consists of a house ... small gardens around the house, a hoist ... a small hydro-electric plant ... and a mining area at which there are two giants"

"The use of water ... is for mining ... purposes with ... (use) having extended from January 1 to April 30"

" ... it was found that the giant regularly employed ... requires 14.0 cfs"

" ... it would appear evident that the amount beneficially used ... was in excess of the 12.0 cfs covered by the permit whenever excess water was available which probably occurs only for short periods during storms."

"Maximum use occurred in 1942."

"At the time of this inspection all use of water on the project had ceased due to the restrictions imposed on mining ... because of the present war. The permittee's future plans are ... to resume mining at such time as the restrictions are removed and also to attempt to establish a longer season"

An investigation memorandum by the same engineer dated May 21, 1948, reads in part:

"On April 12, 1948, Grover C. Sanderson ... visited the office of the Division ... and stated that the diversion system and place of use covered by Permit 5889 was owned by him and that the permittee, who had leased the property from him, was attempting, through unethical means, to obtain permanent possession He further claimed valid water rights for the project which were initiated prior to 1914."

"He was told ... that the matter would be gone into"

"On May 21, 1948, the writer discussed the situation ... and the following information was secured:

"Documents were shown the writer which indicated that Mr. Sanderson owned the mining claims comprising the Rocky Point Mine, leased to the permittee, and that taxes had been regularly paid thereon and on the conduit right of way."

"Additional documents were presented showing Mr. Sanderson's ownership of the conduit right of way, that the right of way had been granted his predecessor in interest ... that the ditch, flumes, and dams had been constructed in 1898, that a water right for 1,000 miners inches from Whitmore Creek had been initiated by a filing ... on January 7, 1907, to be conveyed through the said conduit and that a water right for 200 miners inches from Reese Creek had been initiated by a filing on September 28, 1908, to be conveyed through the same conduit."

"Mr. Sanderson stated that there had never been a sufficient period of nonuse for the above-mentioned rights to have been lost."

An addendum inspection report covering an investigation of the project on September 11, 1952, contains among other statements the following:

" ... the limiting factor in the entire conduit system is the capacity of the flumes which is about 14 cfs."

"Domestic and power use have been abandoned. Water for domestic purposes is secured from another source under riparian claim and since there is no night operation there is no need for lights in the pit. The use of the hoist has also been abandoned as being too time consuming. Large boulders are now handled by blasting and a bulldozer."

"As noted in the 1950 and 1951 reports, water was used from about December 1 to about July 1 for mining purposes each season to the full capacity of the system, which has been calculated as 14 cfs."

"During a full season due to inclement weather etc. the mine is actually operated only about ninety 12-hour days."

"The project is complete and license is desired based upon 1950 use."

Another filing of record on Whitmore Creek is Application 11692 Permit 6992 License 3418, held by the United States - Six Rivers National Forest, authorizing a diversion of 0.8 cubic foot per second, year-round, at a point within the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 21, T11N R6E, HB&M, for power and domestic purposes. Extracts from report of inspection of that project on September 23, 1949 are as follows:

"Flow in the creek at permittee's diversion at the time of the inspection was about 0.10 cfs which was said to be below normal."

"The place of use embraces a ... house ... gardens ... and a hydroelectric plant consisting of a ... generator ... driven by the jet from a 1 $\frac{1}{4}$ " nozzle during high flow periods and a 3/4" nozzle during other periods."

"The use of water ... extends from January 1 to December 31 and is for domestic uses and the generation of ... energy."

" ... the capacity of the largest nozzle used is 0.80 cfs and this represents the beneficial use during the maximum month of use."

"The energy generated is used for lighting and to operate ... household appliances."

"The incidental domestic use ranges from about 120 gpd to about 2,000 gpd"

The point of diversion under Application 11692 scales about 1/4 mile downstream from the point at which diversion is proposed under Application 12864.

Discussion

In view of Protestant Caldwell's right under Application 10064 Permit 5889 License 3709 to divert up to 12 cubic feet per second from about December 1 to about July 1 of each water-year, for hydraulic mining, from Whitmore Creek, by means of the same diversion and conveyance facilities that Applicant Sanderson proposes to use under Application 12864, it is evident that even if the Sanderson application is approved that applicant cannot divert from Whitmore Creek during those seven months except when the flow of Whitmore Creek is in excess of 12 cubic feet per second or when Protestant Caldwell's development is not in operation. Since Whitmore Creek was discharging but 3 cubic feet per second on June 16, 1943, it is

improbable that the flow of that stream exceeds 12 cubic feet per second often if at all during irrigation months. Since, however, the Caldwell development reportedly is operated only about ninety 12-hour days per season - a minor fraction of the 7-month period during which Protestant Caldwell may divert - ample water probably exists frequently during that period to supply both Protestant Caldwell's requirements and the appropriation that Applicant Sanderson seeks; on days when mining is not in progress the full flow less amounts required to satisfy licensed Application 11692 would be available to Applicant Sanderson and when the mine does operate Applicant Sanderson could collect a part at least of the night flow. Since Protestant Caldwell's right does not extend into the period between July 1 and December 1 that right would not be invaded by diversion by the applicant within that period. That right would not be invaded by diversions from what the applicant terms Reese Gulch, at any time.

During the period from about July 1 to about December 1 the applicant could divert at any time insofar as the protestant's rights under licensed Application 10064 are concerned. The applicant would be limited during that period (insofar as he relies upon Application 12864) by the necessity of allowing enough of the flow of Whitmore Creek to pass his proposed point of diversion on that stream to enable up to 0.8 cubic foot per second to be diverted under licensed Application 11692 at a point about 1/4 mile below him. In view of

the only figures available - flows of 3.0 cubic feet per second on June 16, 1943 and 0.10 cubic foot per second on September 23, 1949 - it is evident that a junior appropriator could divert water at Applicant Sanderson's proposed intake some of the time within the July-December period but not all of that time, without interfering with the exercise of rights under licensed Application 11692.

The ownership of the diversion works on WhitmoreCreek and of the conduit leading therefrom is obscure. Such obscurity is not necessarily a bar to the approval of an application to appropriate water, the determination of ownership of the properties involved being a matter beyond the jurisdiction of this Division. Should the application be approved confusion may be lessened by the employment of permit terms (1) setting forth that the permit neither strengthens nor impairs any other water right that may exist and is without force or effect as to rights of way or rights of access that may have to be acquired before the project can legally operate and (2) conditioning approval upon the procurement by the permittee of a court order quieting title to permittee's claimed right to the use of the headworks and conduit described in the application.

Summary and Conclusions

The applicant seeks to appropriate 0.75 cubic foot per second from Whitmore Creek and/or from Reese Gulch, tributaries of Klamath River in Humboldt County, for domestic and stockwatering purposes,

year-round, and for the irrigation of 60 acres of orchard, general crops and pasture each year from about April 1 to about November 1, the proposed place of use being a portion of the lands comprising the so-called Rocky Point Mine.

The application is protested by the holder of Application 10064 Permit 5889 License 3709 who claims under that filing to have appropriated the entire flow of Whitmore Creek and to be using it for mining purposes on the Rocky Point Mine.

The application was the subject of a hearing at Sacramento on December 15, 1953 at which both the applicant and the protestant were in attendance.

At the hearing the applicant testified to the effect that in 1940 he leased the Rocky Point Mine to the protestant, that the lease was to run for five years and to include water rights. The applicant introduced as hearing exhibits purported copies of original lease of the Rocky Point Mine, notice of preemption of right of way for ditch and location of water, and dissolution of partnership of two former co-owners. He read into the record a purported location notice by one William Whitmore executed in 1908, initiating an appropriation of 200 inches for mining purposes on Rocky Point Mine. He also read into the record a purported quitclaim deed transferring the Rocky Point Mine to him (Sanderson) in 1933. The applicant testified further that water reaches the Rocky Point Mine in summer time, that he uses it there for irrigation, that

the land there is good agricultural land, that mining has been discontinued, that the supply from Whitmore Creek and Reese Gulch has been used for irrigation since prior to 1940, that the conduits leading to his proposed place of use are the same conduits that the protestant is using, that he has "permission" from the Forest Service.

At the hearing the protestant testified to the effect that in 1940, the first year of her lease, it appeared to her that the land had no water right, that she therefore filed Application 10064, that there is no water from Reese Gulch or Whitmore Creek for irrigation. She introduced as an exhibit an affidavit by one Lottie McLaughlin Beck, the affidavit setting forth in effect that the affiant is 45 years old and since early childhood has lived near and been acquainted with the Rocky Point Mine, that she is personally acquainted with Grover Sanderson and with Nellie Whitmore, that Nellie Whitmore when first known by affiant was an aged and infirm woman, unable to read or write, that Grover Sanderson has never used water from Whitmore Creek for mining or for any other purpose, that the Rocky Point Mine has been operated for mining purposes for many years both prior to 1933 and since. The protestant testified further that she has used the conduit leading from Whitmore Creek, is not using it currently, will use it in future, that the applicant has never used water supplied by that conduit, that when she leased from the applicant the conduit appeared not to have been used for

many years, that she (the protestant) has claimed exclusive right to use of the conduit since 1941, that her mining claim is not patented but is a Forest Service easement, that her claim is actually a group of 5 claims, that she has done her assessment work on those 5 claims each year.

According to Application 10064 Permit 5889 License 3709 Theodosia F. Caldwell may divert 12 cubic feet per second from Whitmore Creek each season from about December 1 to about July 1 for mining purposes on the Rocky Point Mine. According to the report of an inspection made on June 16, 1943 the flow of Whitmore Creek on that date was about 3 cubic feet per second, the conduit was capable of carrying about 14 cubic feet per second, the water had been used beneficially for mining and for power incidental thereto on Rocky Point Mine in amounts up to 12 cubic feet per second, maximum use was in 1942, use had ceased due to war time restrictions by the federal government, use was to be resumed in the event of removal of restrictions. According to a report covering a subsequent inspection made on September 11, 1952, conduit capacity remains at 14 cubic feet per second, domestic and power uses have been discontinued, water has been used for mining purposes from about December 1 to about July 1 in amounts up to 14 cubic feet per second, the mine is operated about ninety 12-hour days per season, the project appears complete.

Although the holder thereof did not protest, another filing is of record to appropriate waters of Whitmore Creek. Under that filing --Application 11692 Permit 6992 License 3418 -- the United States - Six Rivers National Forest may divert 0.8 cubic foot per second, year-round, at a point about 1/4 mile downstream from the point at which Applicant Sanderson seeks to appropriate, for power and domestic purposes. According to report covering an inspection of that project on September 23, 1949, the flow of Whitmore Creek was then about 0.1 cubic foot per second, the place of use was found to contain a house, a garden and a small hydro-electric plant, the latter used to light the premises and to power household appliances.

In view of licensed Application 10064, Applicant Sanderson could not divert from Whitmore Creek, under the appropriation that he seeks, between about December 1 and about July 1, except when the flow of that stream exceeds 12 cubic feet per second or when rights under Application 10064 are not exercised. Since however the development under that application reportedly operates no more than 90 - 12-hour days per season water may be supposed to exist in excess of needs under that prior application much if not most of the time. Rights under Application 10064 would not be invaded by diversions by Applicant Sanderson from Whitmore Creek between about July 1 and about December 1; no rights of record would be invaded by diversions from Reese Gulch at any time.

The ownership of the diversion works on Whitmore Creek and the conduit leading therefrom is obscure and requires clarification in view of the present possession of those facilities by the protestant. The obscurity may be clarified by appropriate court action.

The circumstances summarized point to the conclusion that unappropriated water exists at times both in Whitmore Creek and in Reese Gulch: that it exists in Whitmore Creek when flow in that stream exceeds requirements under Applications 10064 and 11692; that it exists in Reese Gulch at all times when flow therein occurs. The circumstances also indicate that the only protest filed against Application 12864 is not sufficiently supported and is not a bar to the approval of that application provided the obscurity as to the ownership of the diversion and conveyance facilities that the applicant proposes to use is dispelled. In view of the circumstances it is the opinion of this office that action upon the application should be deferred long enough to enable the applicant to initiate appropriate court action to establish his claimed right to the use of the headworks and conduit described in the application and, in due course, to furnish this office with a copy of a court judgment quieting title to his claimed right to the use of said facilities. It is the opinion of this office further that unless the applicant with reasonable promptitude initiates said appropriate court action and procures and submits copy of said judgment, the application should be denied.

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ORDER

Application 12864 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:

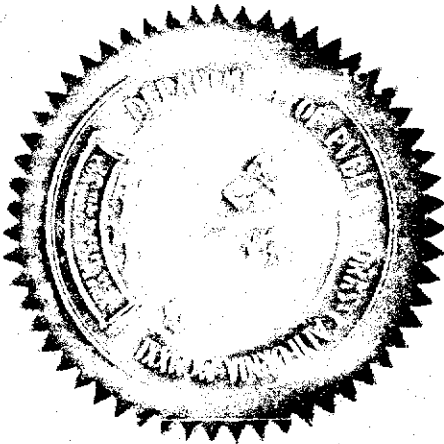
IT IS HEREBY ORDERED that action upon Application 12864 be deferred for 90 days from date hereof to enable applicant to submit proof to the Division of Water Resources that he has filed an action in a court of competent jurisdiction to establish his alleged right to the use of the headworks and conduit described in the application.

IT IS FURTHER ORDERED that if within said 90-day deferment or within such extension thereof as may for good cause be granted applicant submits said proof action upon the application be deferred for an additional year or for such extension thereof as may for good cause be granted to enable applicant to submit to the Division of Water Resources a certified copy of a final judgment of an appropriate court establishing his right to the use of said headworks and conduit.

IT IS FURTHER ORDERED that upon timely submittal by applicant of a certified copy of a final judgment of an appropriate court establishing his right to the use of said headworks and conduit, Application 12864 be approved and that a permit be issued to the applicant subject to such of the usual terms and conditions as may

be appropriate; and that upon failure of applicant to submit proof that he has filed an appropriate court action and to submit copy of court judgment as specified above, Application 12864 be rejected and canceled 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 19th day of April, 1955.



A. D. Edmonston

A. D. Edmonston
State Engineer