

STATE OF CALIFORNIA
STATE WATER RIGHTS BOARD

In the Matter of Application 17554) Source: Mormon Creek
by Gerald Engler) County: Tuolumne

Decision No. D 921

Decided: December 18, 1958

Appearances at Hearing Conducted at Sonora on May 27, 1958, by
W. P. Rowe, Member, State Water Rights Board:

For the Applicant

Gerald Engler

James R. Hardin, Attorney

For the Protestants

Frederick Waite)

George Hammer)

Alvin D. Smith)

J. Fred Hoss)

H. B. Murphy)

R. O. Hender)

Idel Mathews

Edgar H. Thrower

Don Higgins

Ruel R. Witcher

Charles A. Ross

Fred H. Kahl

Mrs. Harry Weaver

C. N. Shaver

Mrs. Donald E. Hutchinson

E. C. Barnard

Milton Rosenheim

Edwin C. Saunders, Attorney

Hugh A. Evans, Attorney

In pro. per.

In pro. per.

In pro. per.

In pro. per.

In pro. per.

In pro. per.

In pro. per.

In pro. per.

In pro. per.

In pro. per.

DECISION

Substance of the Application

Application 17554, filed by Gerald Engler on April 18, 1957, is for a permit to appropriate 35 acre-feet per annum by storage to be collected between December 1 of each year and May 1 of the succeeding year from Mormon Creek, tributary to Stanislaus River in Tuolumne County for irrigation purposes. Water is to be collected in storage by means of an earth dam 12 feet high by 450 feet long, located within the NE $\frac{1}{4}$ of NE $\frac{1}{4}$ of Section 22, T2N, R14E, MDB&M*, creating a reservoir having a maximum surface area of 11 acres and a capacity of 35 acre-feet. According to the application the proposed reservoir is to be used not only for storage of winter runoff, but also for the regulation of summer flow for more efficient use of 20 miner's inches under an alleged appropriative right initiated in 1865. Water released from the proposed reservoir will flow about 200 feet down the natural stream channel and be re-diverted at an existing rock and earth dam, one foot high by five feet long into an existing conduit system. The water to be appropriated will be applied to 50 acres of irrigated pasture within Section 22, T2N, R14E.

*All township references herein are to Mount Diablo Base and Meridian.

Protests

A total of 26 protests against Application 17554 was received.

Some protestants claim that their water supply, diverted from Mormon Creek through the Gale Ditch (located about 0.9 mile downstream from applicant's point of diversion) under rights initiated prior to the Water Commission Act, will be impaired. Others claim riparian and/or prior appropriative rights to the use of water from Mormon Creek at points downstream from the applicant and allege that the water supply will be reduced, thereby restricting subirrigation of their lands, lowering water tables from which domestic well water supplies are drawn, and leaving insufficient water for their use; that the applicant will use the proposed storage dam as a means to take a greater portion, or all of the waters of Mormon Creek during the period of low flow; and that they are apprehensive as to the safety of the storage dam, alleging that failure thereof will cause damage to their property and bridges.

Concerning conditions for disregarding and dismissing protests, some of the protestants are silent; others state in substance that their protests may be dismissed if the normal flow of Mormon Creek through their property during the period of use is not reduced or impaired and if the safety of the storage dam is authoritatively guaranteed.

Answer to Protests

In answer to the protests the applicant asserts in substance that the proposed appropriation is for the storage of surplus winter runoff, that the riparian rights of protestants and all property owners above or below the Gale Ditch on Mormon Creek are virtually nonexistent, as the first priority of the Gale Ditch water right to all waters of Mormon Creek and its tributaries was established by judgment in Case No. 16873 in the Superior Court of the State of California, in and for the County of San Joaquin, dated November 15, 1929; that the water rights of the Gale Ditch are prior in that the appropriation was established when the lands of the protestants were still part of the public domain; that the Gale Ditch water right is subject to a 20-inch appropriation by prescription owned by applicant, adjudicated in Case No. 7768 in the Superior Court of the State of California, in and for the County of Tuolumne, dated January 19, 1954; that the proposed point of diversion for storage is upstream from Gale Ditch and cannot affect the water developed between the proposed storage dam and that ditch; and that the storage of waters as has been applied for will not interfere with the use of water by any downstream owner of property.

Hearing

Application 17554 having been completed in accordance with the provisions of the Water Code and applicable

administrative rules and regulations of the State Water Rights Board (hereinafter referred to as the "Board"), was set for public hearing under the provisions of the California Administrative Code, Title 23, "Waters", before the Board on Tuesday, May 27, 1958, in Sonora, California. Of the hearing the applicant and protestants were duly notified. The hearing was conducted by W. P. Rowe, member of the Board.

Description of Mormon Creek Watershed

Mormon Creek is a foothill stream rising within the NE $\frac{1}{4}$ of T2N, R14E, near Columbia, Tuolumne County. The creek drains about 12 square miles of narrow, reverse-L-shaped watershed situated below elevation 2,500 feet. The drainage area tributary to applicant's point of diversion is about two square miles. From its heading, the creek flows southwesterly about four miles and thence westerly about six miles to its confluence with Stanislaus River at Melones Reservoir (SWRB Exh. 1).

Water Supply

The summer flow of Mormon Creek rises near the town of Springfield from water emanating from springs and abandoned mine tunnels. This water is used by the applicant and protestants under rights defined by judgment in Case No. 16873, Superior Court, San Joaquin County, entitled "In the matter of the determination of the rights...Stanislaus River and its

tributaries in California" (SWRB Exh. No. 8) and in Case No. 7768, Superior Court, County of Tuolumne, entitled "Arthur D. Shell and Mary Laverne Shell vs. Gerald B. Engler" (Engler Exh. No. 1).

The winter flows above the applicant's proposed reservoir are derived from runoff of precipitation on two square miles of moderately hilly land. There are no records available of flow of Mormon Creek during the proposed diversion season, December 1 to May 1. However, according to Bulletin No. 5, Department of Public Works, entitled "Flow in California Streams" (SWRB Exh. No. 4), the mean seasonal runoff for Littlejohns Creek watershed is 201 acre-feet per square mile. The headwaters of Littlejohns Creek are located about 12 miles northwest of the area involved in Application 17554. Littlejohns Creek drains a foothill watershed heading at an elevation lower than Mormon Creek and accordingly a mean seasonal runoff of 200 acre-feet per square mile for Mormon Creek is believed to be a conservative estimate. Bulletin No. 5 further indicates that about 94% of the annual runoff occurs during the period of December 1 to May 1, the proposed season of diversion to storage under Application 17554. If the aforementioned conditions are assumed to also prevail in the Mormon Creek watershed, an average of about 375 acre-feet runoff will occur between December 1 and May 1 from the drainage area tributary to the proposed reservoir.

According to testimony received at the hearing, the flow of Mormon Creek during the proposed storage season is dependent upon the fall and winter rainfall, that at times the stream is torrential (R.T. p. 85), that during certain storms the flow would be adequate to fill the proposed reservoir in less than two days (R.T. p. 87), and that at least a considerable portion of the winter runoff flows beyond the users of Mormon Creek (R.T. p. 86).

Discussion

The protestants are apprehensive that approval of Application 17554 will result in interference with their use of water from Mormon Creek, primarily because any reservoir constructed by the applicant will provide a facility for regulating during the irrigation season the water he is currently using under an alleged old appropriative right (R.T. p. 96). Such an operation, they argue, will allow use of water under that right to a greater extent than has been enjoyed in the past. They are also apprehensive as to the safety of the storage dam, alleging that failure thereof will endanger their property (R.T. p. 153).

There is no question by the protestants as to the availability of unappropriated water during the proposed season for diversion to storage or that the use would be beneficial. The estimated runoff of Mormon Creek as discussed in the preceding section of this decision indicates that the supply

physically available for diversion to storage is several times that sought under Application 17554.

Those protestants represented by counsel; namely, Frederick Waite, George Hammer, Alvin P. Smith, J. Fred Hoss, H. B. Murphy, R. O. Hender, and Idel Mathews offered a 5-point stipulation for the withdrawal of their protests provided the conditions contained in the stipulation were inserted in any permit issued pursuant to Application 17554 (R.T. pp. 145-146). The proposed stipulation was read into the record and approved by counsel for the applicant with the additional qualification "that this stipulation will in no way affect the existing right of Mr. Engler" (R.T. pp. 145-147). The existing right of Mr. Engler was construed by Attorney Evans as lacking the right of on-stream accumulation during periods of non-use (R.T. pp. 97, 144).

The features of the stipulation are essentially as follows:

1. Construction of the storage dam will not be undertaken without proper supervision.
2. Competent and appropriate measuring devices will be placed in the stream above the dam and below the dam in order to facilitate the passage of water through the reservoir during the non-storage season.
3. Inspection of the measuring devices within reason will be permitted to such persons as may be designated by the protestants.

4. At any time that the applicant is not using water claimed under a right other than may be created pursuant to Application 17554, said water will not be regulated in the reservoir for later use but instead will be allowed to flow downstream past the lower measuring device.

5. Any diversion or redirection of water by the applicant from Mormon Creek will be limited to that reach of the channel between the upper and lower measuring device, (R.T. pp. 145 and 146).

The aforementioned stipulation for withdrawal of protests covers the main points of contention between all parties, namely, maintenance of preproject conditions and some assurance as to the safe design and construction of the proposed dam and terms to accomplish the objective of the stipulation will be included in the permit issued pursuant to the application.

The 1929 adjudication of appropriative rights, insofar as it relates to the use of water from Mormon Creek, Case No. 16873, Superior Court, San Joaquin County (SWRB Exh. No. 8), establishes rights with respect to two diversions. Jean Gunder (Gale Ditch) is named in the decree entered in that proceeding as being entitled to divert 4.00 cubic feet per second, and Charles and Ella Shea were granted a right to divert 0.932 cubic foot per second. Subsequent court actions have resulted in judgements making the Gunder (Gale Ditch) right subject to two other rights totaling 21 miner's inches under a 4-inch head.

Twenty miner's inches have been decreed to the applicant, Mr. Engler (Engler Exh. 1) and one miner's inch has been decreed to Mr. Charles Wight (Engler Exh. 2).

Mr. Edgar H. Thrower, the present owner of the Gunder (Gale Ditch) right, (Thrower Exh. 1) claims a "property right" to the waters, ditches, conduits, and stream channels beginning at the headwater springs of Mormon Creek (R.T. pp. 156-157 and Engler Exh. 2) including the channel through the applicant's property and that any dam constructed across the stream above the Gale Ditch diversion will be a trespass (R.T. p. 165), and any excavation or blasting during construction of the proposed dam will imperil the natural flow of Mormon Creek (R.T. pp. 165 and 167).

While this Board can and must prescribe in a permit and enforce terms and conditions deemed necessary for the protection of prior vested water rights, the Board's authority does not extend to determination or protection of property rights, such as those claimed by Mr. Thrower.

Issuance of a permit does not create a water right but merely signifies the consent of the State for the applicant to appropriate water to the extent and under the conditions specified in the permit. Should the permittee be unable to proceed because of inability to secure right of access, the permit will be subject to revocation in due course for failure to comply with its terms and conditions. However to clarify the issue raised by Mr. Thrower, the permit will provide by

means of a special term that no right of access should be inferred by its issuance.

Conclusions

The evidence indicates and the Board finds that there is unappropriated water in Mormon Creek during the proposed season of diversion to storage, which water may be appropriated in the manner proposed in Application 17554 without injury to any other lawful user of water, that the intended use is beneficial and that the application should be approved and permit issued subject to the usual terms and conditions and such additional terms and conditions as the evidence justifies.

ORDER

Application 17554 for a permit to appropriate unappropriated water having been filed with the State Water Rights Board, protests having been filed, a public hearing having been held, evidence having been received and considered by the Board and said Board now being fully informed in the premises:

IT IS HEREBY ORDERED that Application 17554 be, and the same is hereby approved and it is ordered that a permit be issued to the applicant, subject to vested rights and to the following terms and conditions, to wit:

1. The amount of water appropriated shall be limited to the amount which can be beneficially used and shall not exceed 35 acre-feet per annum by storage to be collected from

about December 1 of each year to about May 1 of the succeeding year.

2. The maximum amount herein stated may be reduced in the license if investigation so warrants.

3. All rights and privileges under this permit, including method of diversion, method of use, and quantity of water diverted, are subject to the continuing authority of the State Water Rights Board in accordance with law and in the interest of the public welfare to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of said water.

4. The design and construction of the proposed storage dam shall be approved and supervised by a registered civil engineer of the State of California or by a responsible governmental agency, and be equipped with facilities to by-pass water as required in Condition No. 6.

5. From about May 1 to about December 1 of each year permittee shall maintain a stream measuring device on Mormon Creek immediately above the high water level of the proposed reservoir and a similar device below the lowest point of re-diversion from Mormon Creek. Said devices shall be of a type and at locations approved by the State Water Rights Board.

6. At such time as permittee is not using water claimed under a right other than this permit said water claimed under such other right shall not be impounded in the reservoir for later use but will be allowed to flow downstream past the lower measuring device.

7. Permittee shall allow reasonable access to his project works and measuring devices to authorized representatives of the State Water Rights Board and of those protestants of record at the hearing on May 27, 1958, in connection with Application 17554.

8. Construction work shall begin on or before June 1, 1959.

9. Construction work shall be completed on or before December 1, 1960.

10. Complete application of the water to the proposed use shall be made on or before December 1, 1961.

11. Progress reports shall be filed promptly by permittee on forms which will be provided annually by the State Water Rights Board until license is issued.

12. The issuance of this permit shall in no way be construed as conferring upon permittee right of access to the channel of Mormon Creek.

Adopted as the decision and order of the State Water Rights Board at a meeting duly called and held at Fresno, California, this 18th day of December, 1958.

/s/ Henry Holsinger

Henry Holsinger, Chairman

/s/ W. P. Rowe

W. P. Rowe, Member

/s/ Ralph J. McGill

Ralph J. McGill, Member