

STATE OF CALIFORNIA
STATE WATER RIGHTS BOARD

In the Matter of Application 20545)
of Philip E. and John E. Baxter)
to Appropriate from Birch Creek)
in Inyo County)

Decision D.1154

ADOPTED DEC 19 1963

DECISION APPROVING APPLICATION

Philip E. and John E. Baxter having filed Application 20545 for a permit to appropriate unappropriated water; protests having been received; the applicants and protestants having stipulated to proceedings in lieu of hearing as provided for by Title 23, California Administrative Code, Section 737; an investigation having been made by the State Water Rights Board pursuant to said stipulation; the Board, having considered all available information and now being fully advised in the premises, finds as follows:

1. Application 20545 is for a permit to appropriate 6 cubic feet per second (cfs) by direct diversion, year-round, for generation of power from Birch Creek in Inyo County. The point of diversion is to be located within the NW $\frac{1}{4}$ of NE $\frac{1}{4}$ of Section 19, T10S, R34E, MDB&M.

2. The applicants propose to divert from Birch Creek at a point approximately two miles above its junction with Tinemaha Creek. Tinemaha Creek flows from this junction approximately two miles into the Tinemaha Reservoir located on the Owens River. The water will be diverted at an earth dam and conveyed through a conduit to an off-stream regulatory reservoir which is to have a capacity of 4.75 acre-feet. A steel pipe will carry the water from the reservoir to a powerplant to be located on the bank of the creek approximately 1,500 feet downstream from the point of diversion which will discharge the water into the creek. The power produced will be utilized in pumping water from wells on the applicants' ranch, to operate a sawmill, and for use at two houses.

3. A protest was filed by the Department of Fish and Game, State of California, to insure protection of trout existing in Birch Creek. The Department has agreed that its protest may be disregarded if any permit issued upon Application 20545 contains a term providing that the permittee bypass at his point of diversion into the natural streambed a minimum of 1.5 cfs, or the entire flow of the stream if less.

4. Protestants E. E. and Edna M. Ives, located on Birch Creek approximately 1-1/4 miles below the applicants' proposed point of diversion, hold License 85 to divert 0.63 cfs, year-round, for power purposes. Protestant K. H. Ives, located just below them, diverts under claim of riparian and pre-1914 appropriative rights for domestic use and for the irrigation of

approximately 1 acre. Protestant Elizabeth B. King, located below these protestants and just above the Birch Creek-Tinemaha confluence, diverts under rights confirmed by a decree of the U. S. District Court, Southern District of California, adjudicating rights to waters of Birch and Tinemaha Creeks, dated May 8, 1917, (United States of America et al. v. The City of Los Angeles et al.) for domestic use, fish culture, and for the irrigation of approximately 5 acres. These protestants assert that the applicants' project will interfere with the supply of water necessary to satisfy their prior rights, will deteriorate the quality of the water, raise the temperature of the water with an adverse effect on fish culture, and that the applicants do not have access to their proposed point of diversion.

5. Spot measurements of the flows of Birch Creek taken at or near the applicants' proposed point of diversion, along with the available records of a USGS gaging station located near the mouth of the creek, show that water is physically available during most times to satisfy the applicants. As the water that will be consumed by the project is limited to minimal evaporation and seepage losses at a small reservoir, there should be no appreciable diminution in the supply available to the protestants.

6. Water temperatures in the stream will not be substantially affected, as there will be a continuous flow of water through the applicants' reservoir, and local health authorities have investigated the proposed project and concluded that it will not result in a deterioration of water quality that would affect its potability.

7. There is unappropriated water available at times to supply the applicants, and subject to suitable conditions, such water may be diverted and used in the manner proposed without causing substantial injury to any lawful user of water.

8. The intended use is beneficial.

9. The applicants claim to have received approval from the U. S. Bureau of Land Management to use the land upon which the proposed point of diversion is to be located. Protestant E. E. Ives contends that it would be upon his mining claim. The Board does not have jurisdiction to resolve this controversy and the permit should contain a term stating that the issuance of this permit shall not be construed as conferring upon permittees right of access to the point of diversion.

10. The permit term proposed by the Department of Fish and Game as a condition for dismissal of its protest is necessary to keep in good condition any fish that may be planted or exist below the proposed dam and is in conformance with Sections 5937 and 5946 of the California Fish and Game Code. It should be included in the permit. This provision will also serve to protect the protestants during the periods of low streamflow, as the amount of water to be bypassed is essentially the entire flow of the stream during such periods.

From the foregoing findings, the Board concludes that Application 20545 should be approved and that a permit should be issued to the applicants subject to the limitations and conditions set forth in the following Order.

The records, documents, and other data relied upon in determining the matter are: Application 20545 and all relevant information on file therewith, particularly the report of the field investigation made June 19, 1963; records of streamflow submitted by applicants and also by the City of Los Angeles; Department of Public Works Bulletin No. 5, "Flow in California Streams," dated 1923; State Water Resources Board Bulletin No. 1, "Water Resources of California," dated 1951, and U. S. Geological Survey Big Pine and Waucoba Mountain 15-minute quadrangles, dated 1950 and 1951, respectively.

ORDER

IT IS HEREBY ORDERED that Application 20545 be, and the same is, approved, and that a permit be issued to the applicants subject to vested rights and to the following limitations and conditions:

1. The amount of water appropriated shall be limited to the amount which can be beneficially used and shall not exceed 6 cubic feet per second by direct diversion to be diverted year-round.
2. The maximum amount herein stated may be reduced in the license if investigation warrants.
3. Actual construction work shall begin on or before June 1, 1964, and shall thereafter be prosecuted with reasonable diligence, and if not so commenced and prosecuted, this permit may be revoked.

4. Construction work shall be completed on or before December 1, 1966.

5. Complete application of the water to the proposed use shall be made on or before December 1, 1967.

6. 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.

7. 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.

8. Permittee shall allow representatives of the State Water Rights Board and other parties, as may be authorized from time to time by said Board, reasonable access to project works to determine compliance with the terms of this permit.

9. Permittee shall install and maintain suitable measuring devices (a) at the intake of the conduit conveying water to the off-stream regulatory reservoir, (b) in the stream channel below his diversion dam, and (c) at or immediately below the powerplant in order that accurate measurement can be made of the rate of flow of water in the stream and into and out of said reservoir.

10. Permittee shall at all times bypass a minimum of 1.5 cubic feet per second or the flow of the stream whenever

it is less than 1.5 cubic feet per second at the point of diversion to maintain fishlife.

11. This permit is conditioned upon full compliance with Section 5937 of the Fish and Game Code.

12. Rights under this permit are and shall be subject to existing rights determined by Birch Creek and Tinemaha Creek Adjudication (United States et al. v. The City of Los Angeles et al., United States District Court, Southern District of California, No. B 32, dated May 8, 1917), and such other rights as may presently exist on the stream insofar as said existing and adjudicated rights are maintained.

13. The issuance of this permit should not be construed as conferring upon permittee right of access to the point of diversion.

Adopted as the decision and order of the State Water Rights Board at a meeting duly called and held at Sacramento, California, on the day of , 1963.

Kent Silverthorne, Chairman

Ralph J. McGill, Member

W. A. Alexander, Member

