

BEFORE THE DIVISION OF WATER RIGHTS  
DEPARTMENT OF PUBLIC WORKS  
STATE OF CALIFORNIA

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In the Matter of Application 6017 of George Kleinsmith  
to Appropriate from an Underground Well Tributary  
to Big Bear Lake in San Bernardino County for  
Domestic Purposes.

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DECISION A. 6017 D - 225

Decided *April 15, 1929.*

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APPEARANCES AT HEARING HELD March 13, 1929

For Applicant

George Kleinsmith

In propria persona

For Protestant

Bear Valley Mutual Water Company

Howard Surr

EXAMINER: Harold Conkling, Chief of Division of Water Rights,  
Department of Public Works, State of California.

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O P I N I O N

General Features of the Application

Application 6017 was filed by George Kleinsmith on August 17, 1928. It proposes an appropriation of 200 gallons per day from an "underground well" tributary to Big Bear Lake via Metcalf Creek in San Bernardino County. The well is located within the NW $\frac{1}{4}$  of SE $\frac{1}{4}$  of Section 25, T 2 N, R 1 W, S.B.B. & M. It is proposed to divert the water throughout the entire year for domestic purposes on Lot 44 of the Metcalf Creek Tract, within the SE $\frac{1}{2}$  of SW $\frac{1}{2}$  of Section 24, T 2 N, R 1 W, S.B.B. & M. The application was protested by the Bear Valley Mutual Water Company.

### Protest

The Bear Valley Mutual Water Company alleges in effect that it would be impossible for the applicant to obtain water from a well which is sunk within 18 feet of Metcalf Creek without drawing from the surface or sub-surface flow of the creek, thereby depriving it of water to which the company is lawfully entitled under prior vested rights. The protest also states that an agreement exists between the Bear Valley Mutual Water Company and this office whereby the Division of Water Rights will not entertain any applications for the appropriation of water from Metcalf Creek.

### Statement of Compliance with Legal Requirements

Application 6017 was completed in accordance with the Water Commission Act and the requirements of the Rules and Regulations of the Division of Water Rights and being protested was set for a public hearing in accordance with Section 1a of the Water Commission Act on March 13, 1929, at 10:00 o'clock A.M. in the Council Chamber of the City Hall, San Bernardino, California. Of this hearing applicant and protestant were duly notified.

### General Discussion

Metcalf Creek rises in the SE $\frac{1}{4}$  of Section 25, T 2 N, R 1 W, S.B.B. & M. and flows in a general northwesterly direction, a distance of a mile or a mile and a half to its junction with Big Bear Lake.

Near the headwaters of the creek, or rather the east fork thereof, the applicant on September 17, 1928, after first obtaining permission from the United States Forest Service, excavated a well on the easterly bank of the creek and about 18 feet therefrom. This well is five feet in diameter and extends vertically downward, a distance of twelve feet from the natural surface of the ground. The casing of the well extends eighteen inches above the ground surface and is enclosed at the top with a concrete cover the

level of which is three feet above the surface of the creek. The well is completely lined with stone and is cemented from the top of the casement to a depth of four feet below the surface of the ground. The water level in this well stands normally at a depth of 8 feet below the bed of Metcalf Creek.

From the information before this office it appears that Metcalf Creek in the locality of the proposed project flows through an area of meadow land extending for more than five hundred feet on each side of the stream. This meadow is covered with grass, shrubbery, willow trees, and ferns and on the east side just above the applicant's well has the appearance of a cienega from which the water slowly percolates through the soil to the creek. The creek itself in this locality has more the appearance of a ditch than that of a natural water course. The width does not exceed about three feet and when water is flowing therein at a depth of one or two inches it is considered a relatively high flow.

Evidence submitted by the applicant himself indicates that the water which he seeks to appropriate is percolating water rather than underground water flowing through known and definite channels. Pertinent testimony of applicant upon this point is quoted from the transcript as follows:

p.5 "This (referring to well from which it is sought to appropriate) is dug in a cienega surrounding Metcalf Creek, but it is not dug into a definite channel of underflow water.

"It is developed in a practically dormant water section, you see, and there is no flow of water there until you dig a hole in this section anywhere, then when you dig a hole anywhere within this section in this water bearing land there, it will cause the water to become active and seep into the hole.

"No, I am not digging into the underflow of Metcalf Creek; I am digging into practically a dormant water supply.

pp. 6 & 7     "We dug down until we came to an 8 foot level when the water started to seep through the porous ground. Above the 8 foot level the ground was practically solid, so we went down 2 feet more, making it 10 feet, and decided there was not enough seepage water coming through, so we went down to a 12 foot level. Then we decided there was enough seepage water coming through there to supply Cabin Fairyland on lot 44 with enough domestic water until the wet season came on. In digging the ditch for the outlet of the well, which was 10 foot, we noticed that the seepage water come in from the north banks and from the north and northeast water bearing lands, which extends to over 1,000 feet.

"When the well was first dug it took 3 days or 4 days-- I should say 4 days--for a level of 3 feet to rise in the well."

It appears entirely clear after careful analysis of the testimony taken at the hearing on March 13, 1929, that the water which is collected in the well of the applicant is percolating water flowing in no known and definite channel and is water which gravitates slowly from the outlying portions of the cienega through the soil downward toward Metcalf Creek and thence to Big Bear Lake along the same general course traversed by Metcalf Creek. It may ultimately be forced to the surface at some lower point and flow in the channel of Metcalf Creek, or it may continue underground until it joins the waters of the lake, but there is certainly no evidence which would indicate the existence of a sub-surface stream at a depth of some eight feet flowing parallel to the surface stream nor can we conceive circumstances which would cause such a condition to exist. The fact that it took four days to fill applicant's well to a depth of three feet and that there has been at no time since then other than a very limited flow of a few hundred gallons per day from the outlet pipe leading from the well at a depth of eight to ten feet below the level of the surface flow in the creek, indicates that it is percolating as distinguished from flowing water which feeds the well from which applicant obtains his supply.

Section 42 of the Water Commission Act declares as follows:

"Whenever the terms stream, stream system, lake or other body of water or waters occurs in this act, such term shall be interpreted to refer only to surface water, and to subterranean streams flowing through known and definite channels".

We are therefore forced to reject Application 6017 on the ground that the Division is without jurisdiction. Our action should not however be construed as ruling in any way upon the point as to whether protestant, as a downstream user of the waters of Metcalf Creek is entitled to an order restraining applicant from collecting and diverting to his use the percolating waters in question. Whether or not protestant will be injured by the proposed diversion is a question of fact which this office cannot undertake to pass upon. There is no administrative agency of the state with authority competent to pass upon this point. If the parties themselves cannot come to an understanding and are compelled to seek an adjudication of the matter, their only recourse would be in the courts.

The protestant alleges that this project is similar to that of George L. Chapman under Application 4791 which was denied by this office on the grounds that there was not a sufficient amount of unappropriated water in the proposed source to justify the approval of the application. In the Chapman case, however, it appeared that the excavation made by the applicant intercepted the water from a side draw just above its entrance to the main stream, which water, if left unmolested would pass a few feet through the coarse gravels of a well defined subterranean water course and thence into the waters of Lost Creek. The present case differs materially from the one before us at that time in that the existence of a known and definite channel was then clearly indicated.

In its protest the Bear Valley Mutual Water Company states that it had been agreed between it and this office that the Division of Water Rights would not entertain any applications to appropriate from Metcalf Creek. That is not a correct statement however. The Division cannot refuse to accept applications whatever the source.

The understanding between this office and the Bear Valley Mutual Water Company was to the effect that domestic applications within the Big Bear Valley Watershed, tributary to Big Bear Lake, would be unopposed by Bear Valley Mutual Water Company if limited to a maximum of 0.001 cubic foot per second continuous flow for each residence within said watershed, except in the case of applications for water from Metcalf Creek, China Gardens Creek and an unnamed creek flowing into the lake on the northerly side in Section 22, T 2 N, R 1 W, S.B.B. & M. about one-half mile easterly from the dam of said Big Bear Lake. On these three streams the Bear Valley Mutual Water Company reserved the right to protest all applications.

O R D E R

Application 6017 for a permit to appropriate water having been filed with the Division of Water Rights as above stated, a protest having been filed, a public hearing having been held and the Division of Water Rights now being fully informed in the premises:

IT IS HEREBY ORDERED that the said application 6017 be rejected and cancelled upon the records of the Division of Water Rights.

Dated at Sacramento, California, this 15 day of April, 1929.

Harold Conkling  
(Harold Conkling)  
CHIEF OF DIVISION OF WATER RIGHTS

WES:MP

E.N.B.

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