

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 13149 by Rosie D'Agostini to Appropriate Water from Spanish Creek in El Dorado County for Domestic, Irrigation and Stockwatering Purposes.

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Decision A. 13149 D. 649

Decided March 9, 1950

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IN ATTENDANCE AT INVESTIGATION CONDUCTED BY THE DIVISION OF WATER RESOURCES AT THE SITE OF THE PROPOSED APPROPRIATION ON DECEMBER 29, 1949:

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| John D'Agostini and) | } | Applicant's representatives |
| B. K. Harper | | |
| William Higgins | | Protestant |
| Merle Higgins | | Protestant's son |
| F. M. Kuchta | | Assistant Hydraulic Engineer, Division of Water Resources, Department of Public Works, Representing the State Engineer. |

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OPINION

General Description of the Project

The application contemplates the diversion of 1.44 cubic feet per second year-round and 200 acre feet per annum (collected between November 1 and April 1) from Spanish Creek, a tributary of Middle Fork of

Cosumnes River, for domestic, irrigation and stockwatering purposes. The proposed point of diversion lies within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 35, T 9 N, R 11 E, M.D.B.&M. Diversion is to be by pumping, by means of a plant of a capacity of 1800 gallons per minute. The impounding dam contemplated is to be an earth fill, 20 feet high by 475 feet long; it is to be located in the same NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 35 and is to create a storage reservoir 25 acres in extent and 200 acre feet in capacity. The proposed place of use is 115 acres in extent and is also located within the same Section 35. The entire acreage which is a pasture is to be irrigated from March to November, both months inclusive. Water is also to be used for household and garden purposes and for the watering of 40 head of cattle and 250 sheep. The applicant claims also a riparian right to the use of water.

Protest

William Higgins protests that the proposed appropriation will injure him in that Spanish Creek (the creek filed upon) flows through his land, subirrigates his pasture, feeds several springs used by him for stockwatering and supplies him with water for domestic use. He claims a riparian right, asserts use to the extent of 1 cubic foot per second for the past 40 years, describes his land as being located within Lots 1 and 2 and the S $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 3, T 8 N, R 11 E, M.D.B.&M. He states that his protest may be disregarded and dismissed if the applicant is required at all times to allow at least 1 cubic foot per second to flow down Spanish Creek to his lands.

The applicant answers the protest by asserting that Spanish Creek flows through the protestant's land at an elevation too low to permit subirrigation; that the protestant's springs are fed from a

different watershed; that the proposed dam will not be water tight but will prolong the flow of Spanish Creek throughout the summer; that Spanish Creek usually flows until August 10, that the protestant has never diverted water by ditch, pump, or otherwise to the best of the applicant's knowledge. The applicant is unwilling to accede to the terms under which the protestant agrees to dismissal of the protest. He remarks that to furnish 1 cubic foot per second (after the stream goes dry) would dry his reservoir in 100 days.

Field Investigation

The parties 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 December 29, 1949 by an engineer of the Division. The applicant and the protestant were present or represented at the investigation.

Records Relied Upon

Application 13149 and all data and information on file therewith.

Discussion

Spanish Creek, above the proposed point of diversion drains ^{square} some 5/miles of foothill watershed ranging in elevation from about 1900 to about 3000 feet. According to the report of field investigation the flow on December 29, 1949 was approximately 0.75 cubic foot per second. The investigating engineer reports Spanish Creek to be a seasonal stream, beginning ordinarily to flow after the first heavy fall rains and continuing to flow thereafter until July or August. From the appearance of the channel and from information obtained by local inquiry the investigating engineer gathered that there is a sustained flow of 10 cubic feet

per second or more during 2 or 3 months of the rainy season, that there are occasional flash floods of 100 cubic feet per second or more for short periods and that in early spring the flow is of the order of 2 to 3 cubic feet per second, dwindling gradually thereafter to zero by mid-summer.

As to use of water by the protestant the investigating engineer states that the only visible use is for stock watering, that some 30 head of the protestant's cattle and horses drink from the stream when water is available, and that any water not so consumed is allowed to pass on downstream, unused. According also to the report of investigation the springs which the protestant claimed are fed by Spanish Creek are actually located in a draw which is tributary to Spanish Creek, the water levels in the springs apparently are higher than the water level at the proposed dam-site, and, according to the parties, the springs maintain almost a constant level even during periods when there is no water flowing in Spanish Creek. Finally, according to the report, the bed of Spanish Creek is an estimated 30 feet or more below the greater part of the protestant's land, traversing that land in what might be termed a canyon, and the land itself is rough and rolling - conditions all uncondutive to subirrigation.

The protestant at the close of the investigation reportedly admitted that his only actual use of water is for stockwatering, and that his requirements for that purpose do not exceed 750 gallons per day; and expressed willingness to withdraw his protest if the applicant would agree to release water for his stock when there was flow in the stream and the need existed. Instead of an outright withdrawal however, ^{the}protestant submitted a conditional withdrawal, dated December 29, 1949, under which he agrees to withdraw his protest provided that any permit in the

matter contains an express provision that the applicant shall at all times allow one half of the stream flow or 10 miner's inches whichever is lesser, to reach the protestant's lands. John D'Agostini on behalf of the applicant agreed to the terms of that conditional withdrawal.

Despite the acceptance by the applicant's representative of the terms of the conditional withdrawal this office is not justified in including in the prospective permit a clause imposing those terms. The rights which the protestant seeks to protect are already protected by the general terms appearing in every permit. Since the protestant has himself admitted that his use does not exceed 750 gallons per day it would be unreasonable to require the applicant to release to him 10 miners inches (equivalent to some 130,000 gallons per day). If the applicant and protestant are both riparian, as they appear to be, each is entitled to share with other riparian owners in a reasonable use of such waters as naturally flow, and no permit which may be issued under existing law can diminish that right. Any surplus beyond the needs of riparian owners are however subject to appropriation.

The information indicates that surpluses exist in Spanish Creek during the winter months and during at least the early irrigation months. The time at which surpluses cease in spring or early summer and resume in fall or early winter probably varies considerably from year to year as is the general habit of streams draining foothill watersheds; for this reason the limitation as to exact dates between which diversion for direct application to beneficial use without storage will be permitted, appears unwarranted.

In view of the evident existence of surpluses in Spanish Creek in considerable amounts, and of the relatively small amounts beneficially

used by the protestant, it is apparent that water can be appropriated as provided in the application without injury to the protestant or to other users. The protest against Application 13149 therefore is adjudged insufficient and the application should be approved and permit issued, subject to the usual terms and conditions.

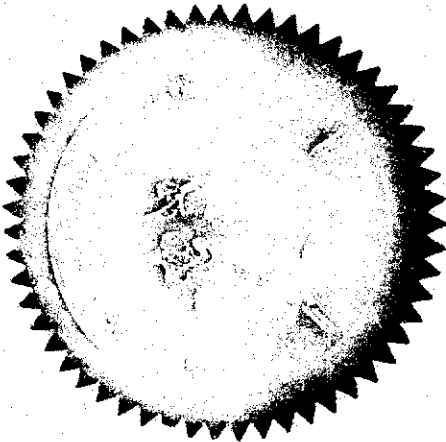
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ORDER

Application 13149 for a permit to appropriate water having been filed, a field investigation having been made, a stipulated hearing having been held in accordance with Article 13, Section 733(b) of the Administrative Code and the State Engineer now being fully informed in the premises:

IT IS HEREBY ORDERED that Application 13149 be approved and that a permit be issued to the applicant, subject to such of the usual terms and conditions as may be appropriate.

WITNESS my hand and the seal of the Department of Public Works
of the State of California this 9th day of March 1950.



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