

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 14721 by Ralph Doe Sturtevant to
Appropriate Water from East Fork Piney Creek, Tributary Via
Piney Creek to Merced River in Mariposa County.

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Decision A-14721 D. 788

Decided March 12, 1954

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In Attendance at Investigation Conducted by the Division of Water
Resources on September 16, 1952:

Ralph D. Sturtevant	Applicant
W. B. Sturtevant	Applicant's son
F. M. Brunnett) E. F. McMahon)	Owners of adjacent property
Robert W. Lynn	Protestant
Thomas C. Brown	Protestant's predecessor in interest
Antone Egildson	Old-time resident of locality
Clair Schilling) J. W. Turpin) C. N. Nash)	Owners of near-by property
G. H. Haigh	Water user on Piney Creek
Harry Hinckley	County Farm Advisor
A. S. Wheeler	Senior Hydraulic Engineer Division of Water Resources Department of Public Works Representing the State Engineer

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OPINION

Description of the Project

The application initiates an appropriation of 80 acre-feet per annum from East Fork Piney Creek in Mariposa County, the water to be collected between March 1 and June 1. An earth and concrete dam 31 feet high by 830 feet long is to be constructed on the stream mentioned at a point within the SE 1/4 NW 1/4 Section 5, T2S R5E; it will create a reservoir 10 acres in surface area and 60 acre-feet in capacity and it will also serve to divert to an off-stream reservoir approximately 1/4 mile to the Southwest. At the off-stream site there is to be an earth dam 18 feet high by 300 feet long which will create a reservoir 3 acres in surface area and 20 acre-feet in capacity. Conveyance to off-stream storage is to be effected by 1400 lineal feet of earth ditch. Water is to be conveyed from the on-stream site to the place of use by means of a 4-inch pipe line 1000 feet long. According to the application, the maximum rate of diversion to off-stream/^{storage} is 1.4 cubic feet per second. The place of use is a 15-acre pasture. Irrigation is to extend from about June 1 to about October 30. The applicant reports another source of water supply, i.e. a spring, yielding 5 acre-feet per annum.

Protest

Robert W. and Shirley E. Lynn protest the application. They assert that the proposed appropriation will deny them the use of water to which they are entitled and which is vital to their

livelihood, that any further diversion of water will dry up the creek bed at their property and will also cause the cessation of flow from certain springs located in the creek bed upon which they also depend for water, that the creek and the spring now constitute an unfailing supply and that any further diminution of the supply will cause a reduction in the value of their property and seriously jeopardize their investment therein. The protestants claim a right to the use of water based upon riparian ownership, old appropriative rights and use begun prior to December 9, 1914. They state that the past use of water on their property has been continuous for over a half-century and that present use consists of the watering of livestock and poultry and the irrigation of approximately 25 acres. They state that their property is located within NE 1/4 SE 1/4 Section 34, T2S R15E and Lot 1 of Section 3, T3S R15E MDB&M. They state that they divert near the point where East Fork Piney Creek enters their property and that they also pump at various lower points along the stream. They state that their objection may be withdrawn under the following conditions:

1. That applicant will not divert water to off-stream storage.
2. That redirection of stored water will not exceed a maximum rate of 1.4 cubic feet per second.
3. That applicant will not impound or divert water prior to June 1 when the flow of said creek at its entrance upon protestants' property is less than 1 cubic foot per second nor after June 1 when the flow at the above mentioned point is less than 1/2 cubic foot per second.

4. That the parties will bind themselves and their successors by written agreement to cover right of access for the purpose of measuring the flow of said stream at critical points."

Answer

In answer to the protest the applicant states that he built one dam "under the P.M.A. program for soil and water conservation", that the dam filled in the spring of 1951, that he observed more water in the creek below the dam in 1951 than in any of the 22 previous years, that his point of diversion is one-half mile upstream from protestants' property, that the creek normally dries up in late July, that as for underground water it is hard to tell where it originates, that the creek is not an unfailing source of supply and never has been, that protestants' use is limited to the watering of 85 turkeys and 25 head of livestock, and that to the best of his knowledge the protestants have not used creek water for irrigation since about 1938.

Field Investigation

The applicant and the protestants with the approval of the Department having stipulated to the submittal of the application and protest upon the official records of the Department, a field investigation was conducted at the site of the proposed appropriation on September 16, 1952, by an engineer of the Division. The applicant and the protestants were present or represented during the investigation.

Records Relied Upon

Application 14721 and all data and information on file therewith.

Information Secured by Field Investigation

According to the report covering the field investigation of September 16, 1952, East Fork Piney Creek heads in the Sierra Nevada, flows southwesterly to Piney Creek and then southeasterly to Merced River which it joins at ^{Lake} McClure; the watershed above the parties' properties is moderately wooded, has an average rainfall of about 25 inches and an area of about 4 square miles; little rain falls between April and October; creek flow at time of field investigation was about 0.05 cubic foot per second just below the applicant's dam, 0.10 cubic foot per second at bridge on State Highway 132, and 0.15 cubic foot per second at protestants' diversion point; flow below the dam was due to seepage from the reservoir which then contained 16 acre-feet; accretion occurred below that point from springs and seeps; the creek does not have a heavy late spring flow because the watershed is not sufficiently elevated to collect and hold a snow mantle that would sustain such flow. The report states that according to one of the local residents (Brunnett) the stream is usually dry at the protestants' place in late summer, that according to another (McMahon) there are pools only at his place and the applicant's at that season and that the stream bed is then dry at the protestants' place except for the water supplied by their springs, and that according to a third (Haigh) there was only enough

water at the protestants' place during two certain summers to water 10 head of cattle. The report also states that the applicant and certain others present believed that there was surplus water in the creek until about June 1; but others present (Lynn and Brown) insisted that surpluses do not exist after May 1.

As to the protestants' use of water the report states:

"Protestants' past use has been for the watering of a maximum of 18 head of cattle and 8500 turkeys and for the irrigation of a maximum of 12 acres. They ultimately propose watering 40 head of cattle and 30,000 turkeys, facilities for which have been constructed, and irrigation of 20 acres.

"...Protestants' ultimate requirements...will be about...0.263 cubic foot per second.

"Protestants have been diverting and irrigating by means of concrete lined ditches but propose installation of a pumping plant and sprinkling system.

"The maximum use by protestants, prior to...this investigation, was about...0.155 cubic foot per second."

The closing paragraph of the report of field investigation reads:

"It should also be noted that during the course of the conference the protestants withdrew their objection to the off-stream storage feature of the application in the belief that such storage would increase the flow of their domestic supply spring. Their main objection, however, had been that they mistakenly understood that use from the reservoir would not be in the East Fork Piney Creek watershed."

Developments Since Field Investigation

The protestants on September 18, 1952, submitted a memorandum to the effect that they will not oppose the issuance of a permit "provided that same be limited and conditioned specifically and fully" to provide:

1. That the appropriation be limited to periods from January 1 to March 1,
2. That use be limited to lands within the East Fork watershed and that water be not impounded except when flow at State Highway 132 exceeds 1.5 cubic feet per second,
3. That except between January 1 and March 1 the applicant shall not divert or obstruct any portion of the full natural flow and
4. That the applicant and protestants shall execute and file for record an agreement granting each other permanent right of access as necessary for inspection and measurement of flow.

The protestants on September 25, 1952 submitted another proposal as to terms under which their protest might be withdrawn, such terms being in effect:

1. That the appropriation be limited to periods from March 1 to May 15,
2. That before and after that period the applicant shall bypass all flow and shall install and maintain facilities adequate therefor,
3. That applicant shall install and maintain suitable weirs,
4. That applicant shall divert or impound only when the flow by-passing his dam exceeds the amount necessary to satisfy downstream claimants including the protestants, and
5. That the parties grant each other, representatives, etc., the right of access for purposes of inspection and measurement.

The applicants's son (Blaine Sturtevant) by letter dated October 1, 1952, addressed the protestants as follows:

"In regard to the grant of limited right of access.

"The folks are not here at the present time, but I will forward their copy to them tonite.

"However, I believe that they would want a third party to inspect if either grantees or grantors requested. Also, inspection cannot be done unless both parties are present."

The protestants' reply (signed T. Cline Brown) to the October 1 letter contained the following paragraph:

"The other suggestion you now make--that Mr. Lynn be denied access except in your presence--is completely improper and impractical...because it would require in each instance your availability for, consent to, arrangement for, prenotice of, deferment, and even prevention of the timely information due him as to your acts. You have unhampered access. So should he. If, as surely is the case, you have nothing to conceal and intend compliance with permit, there is no practicality and no reason for such a restriction."

Applicant Sturtevant, by letter date-stamped November 17, 1953, informed this office:

"I will give Mr. Lynn a copy of the enclosed paper tomorrow. We believe that this will serve the purpose without so much detail.

"Sorry to have been so long, but this business of writing back and forth takes lots of time."

The paper referred to--a letter addressed to the Division dated November 12, 1952, and bearing the signatures "Rose Marian Sturtevant and R. D. Sturtevant", reads as follows:

"The purpose of Application No. 14721 is solely the storage and diversion for irrigation of surplus runoff water from East Piney Creek during the period between March 1 and June 1 annually.

"We, the undersigned, agree to allow an amount of water to flow below the overflow from off-stream storage equal to that flowing above the proposed dam. Except, that during the period of storage the amount shall be limited to 1/2 second foot or the natural flow of the stream which ever is less.

"It is understood that nothing herein contained shall in any way invalidate the riparian right of the undersigned or their heirs or assigns to the water of said stream.

"Any time inspection of the flow of water above and below the said dam is deemed necessary, it shall be done in the presence of both parties or their representatives. If at any time an agreement cannot be reached between the interested parties as to the flow of water above or below the dam, a third party mutually acceptable to both parties shall decide."

Protestant Robert W. Lynn addressed this office on December 23, 1952 a letter which reads in part as follows:

"This will serve to inform you that the applicant...has, up to this date, made no response to us whatever in connection with effecting contractual arrangements between us for the essential inspection on his property of his diversion and storage thereof under such application. He has sought no contract with us to that end, since...October 1, 1952.

"Inasmuch as such contract is one of the stipulations...upon which our withdrawal of protest is definitely conditioned, it is assumed that no further action has been taken toward the granting of permit..."

"...We are reliably informed that said applicant has been steadily proceeding with further construction pertaining to diversion of these waters.

"We further submit...that no proposals by said applicant which diverge or are counter to the above mentioned or any of the numbered stipulations contained in our conditional withdrawal of protest, dated September 25, 1952...will be acceptable to us.

"May we point out that applicant has demanded he be present at any time we seek to inform ourselves on the ground as to his acts of water diversion and measurement of flow; that any such restriction could most effectively prevent us from the information to which we are entitled, as envisioned by the agreed-upon conditions and limitations proposed as a part of any permit granted him; would make such limitations entirely

meaningless. If this applicant continues refusal to be open and above board, not granting the entirely reasonable arrangement required it should be taken as prima-facie indication of his purposes and intention, and the application denied."

Runoff Data

According to Water Supply Paper 1181, United States Geological Survey, the discharge of Merced River at Exchequer has averaged 1215 cubic feet per second over the 34 water-year period ending in 1950 and the drainage area tributary to the point of measurement comprises 1035 square miles. Evidently runoff from that area has averaged $1215/1035$ or 1.175 cubic feet per second, equivalent to about 850 acre feet per square mile of tributary watershed, per annum. No record of the flow of Piney Creek or of any of its tributaries is at hand. The watershed tributary to the applicant's proposed point of diversion on East Fork Piney Creek, according to maps of the region, is lower than the Merced River watershed above Exchequer; the runoff per square mile from the former watershed therefore is probably less in amount and earlier in occurrence than the runoff from the latter. Actually the East Fork Piney Creek watershed appears to be more closely comparable, from the standpoint of water-productivity, with that drained by a group of streams in Amador County, designated "Sutter Creek Group" in Bulletin 5, "Flow in California Streams," Division of Engineering and Irrigation, 1923, than with the Merced River watershed.

According to the reference mentioned the Sutter Creek group of streams yields an average of 327 acre-feet per square mile of tributary watershed, of which yield 23.7% normally occurs in March, 5.5% in April and 2.6% in May. By this comparison the normal flow of East Fork Piney Creek at the applicant's proposed point of diversion may be supposed to be of the order of 310 acre-feet in March, 72 acre-feet in April and 34 acre-feet in May.

Other Filings Below the Applicant

The records disclose no other active applications to appropriate from Piney Creek or its tributaries. Active applications to appropriate from Merced River below the junction of Piney Creek with that stream include the following:

Application 1221 Permit 912 License 990, Merced Irrigation District, 1200 cubic feet per second, year-round, diverted from Merced River at a point within Sec. 13, T4S R15E (Exchequer Dam) for power purposes.

Application 1222 Permit 913 License 2684, Merced Irrigation District, 362 cubic feet per second, diverted directly from January 1 to about October 31 and 272,800 acre-feet per annum collected in Lake McClure between October 1 and July 1, at a point within Section 13, T4S R15E (Exchequer Dam) for power purposes.

Application 1224 Permit 914 License 2685, Merced Irrigation District, 1500 cubic feet per second, diverted from March 1 to about

October 31 and at other times as required for domestic purposes plus 266,400 acre-feet per annum collected between October 1 and July 1 in Lake McClure at Exchequer Dam, for irrigation and domestic purposes.

Application 6470 Permit 3456 License 1911, Pacific Gas and Electric Company, 1750 cubic feet per second year-round, diverted at a point within Sec. 4, T5S R15E, for power purposes.

Application 10572 Permit 6806, Merced Irrigation District, 500 cubic feet per second, year-round, diverted from Merced River at a point within Sec. 4, T5S R15E (Merced Falls Dam), and within Sec. 7, T5S R15E (Crocker Dam) for domestic purposes and irrigation.

In an inspection report dated September 19, 1928 upon the project under Application 1221, the following paragraph appears:

"The use is complete insofar as the flow of the Merced River will allow, i.e. 1200 s.f. are diverted when the natural flow is that much or more and the total flow is diverted when the stream flow is less than the above figure."

Discussion

Inasmuch as licensed Application 1221 indicates a utilization for power generation of 1200 cubic feet per second at Exchequer Dam and other early appropriations have been perfected or initiated at and below that location, it is evident

that the flow of Merced River at Exchequer Dam, up to its mean value, is fully appropriated. However, at times of spring freshets and rapid snow-melt, Merced River is swollen considerably above its mean rate of flow, supply is more than enough to satisfy vested rights and wastage occurs down river and into the ocean. At such times unappropriated water evidently exists. The period within which the applicant seeks to appropriate falls for the most part within the period of spring freshets.

The protestants' objections to the proposed appropriation, based upon apprehension that it will deny them water to which they are entitled and that it will dry up the creek bed and stop the flow of certain springs, are not supported by the information presented or collected. Since diversion under a permit is invariably contingent upon observance by permittee of vested rights of downstream users the approval of Application 14721 would only authorize Applicant Sturtevant to divert or impound unappropriated water, i.e. flows in excess of those required for the satisfaction of the rights of downstream users, including the protestants. Insofar as flow occurs that is in excess of the reasonable needs of downstream users, the latter lack sufficient grounds for protesting its appropriation. When however as in the matter at issue a protestant apprehends undue interference with streamflow by proposed on-stream storage the situation may be relieved by the employment of special terms and conditions in such permit as may be issued, requiring the applicant to provide and operate suitable facilities for the measurement and control of water

entering, stored in and leaving his reservoirs, to record and transmit certain flow data upon request and to allow unhindered access by representatives of the Department for the purpose of inspecting his facilities.

Summary and Conclusion

The applicant seeks to appropriate 80 acre feet per annum in two reservoirs, one on-stream, the other off-stream, from March 1 to June 1, from East Fork Piney Creek, tributary via Piney Creek to Lake McClure, the latter being a reservoir on the course of Merced River in which water is impounded by Exchequer Dam and used by Merced Irrigation District, Pacific Gas and Electric Company and others. The appropriators at and below Exchequer Dam do not protest the application which however is protested by Robert W. and Shirley Lynn, who divert for stockwatering and irrigation from East Fork Piney Creek below the applicant and apprehend that the proposed appropriation will prevent enough water from reaching them to satisfy their needs. The parties have negotiated as to terms under which the protest may be withdrawn but have failed to reach an agreement. The available information indicates that unappropriated water probably exists, at times, at the proposed point of diversion, during the proposed collection period, in amounts aggregating more per average season than the applicant seeks to appropriate. It indicates also that the applicant is aware of his obligation to refrain from intercepting amounts necessary to satisfy prior rights of downstream users.

In view of the facts summarized, it is the conclusion of this office that unappropriated water exists in East Fork Piney Creek, that such water may be taken and used in the manner proposed by the applicant without injury to the protestants and that the application should be approved subject to the usual terms and conditions, and subject to special provisions to the effect that the applicant shall install, maintain and operate facilities to ensure passage downstream of all water entering the reservoir insofar as necessary for the satisfaction of downstream rights, secure, record and transmit to the Department such flow data relating to the operation of his proposed reservoirs as that agency may deem necessary, and allow unhindered access for purposes of inspection to representatives of the Department.

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ORDER

Application 14721, having been filed with the Division of Water Resources as above stated, a protest having been filed, stipulations having been submitted, a field investigation having been conducted and the State Engineer now being fully informed in the premises:

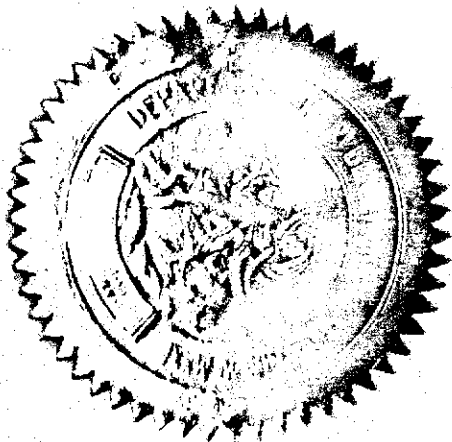
IT IS HEREBY ORDERED that Application 14721 be approved and that a permit be issued to the applicant, subject to such of the usual terms and conditions as may be appropriate and subject to the following special terms and conditions, to wit:

Permittee shall install, maintain and operate suitable facilities, including measuring devices, to assure that all water entering his reservoirs, insofar as such water is required for the satisfaction of prior rights, will flow downstream.

Permittee upon request shall furnish to the Department such records of flow as that agency deems necessary for determination with reasonable accuracy of the amount of water entering, stored in and leaving each reservoir.

Permittee shall allow access to all measuring devices and facilities for the control of water under this permit, for purposes of inspection by representatives of the Department, at such times as that agency deems necessary.

WITNESS my hand and the seal of the Department of Public Works of the State of California this 12th day of March, 1954.



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