

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 13769 by Pacific Gas and Electric Company
to Appropriate Water from Rocky Bar Creek Tributary to North Fork
Feather River in Butte County for Domestic and Fire Protection
Purposes.

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Decision A 13769 D 817

Decided January 13, 1955

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Appearances at Hearing Held at Oroville on May 27, 1954:

For the Applicant

Pacific Gas and Electric Company

Frederick W. Mielke, Jr.
Attorney at Law

For the Protestant

Hatetna Mining and Exploration
Company

Ernest Clewe
Attorney at Law

EXAMINER -- Leslie C. Jopson, Principal Hydraulic Engineer,
Division of Water Resources, Department of Public Works,
for A. D. EDMONSTON, State Engineer.

Assistant to Examiner -- Gavin M. Craig, Senior Attorney,
Division of Water Resources.

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OPINION

General Description of the Project

The application initiates an appropriation of 50,000 gallons per day (about 0.078 cubic foot per second), year-round, from Rocky Bar Creek, tributary to North Fork Feather River, at a point within the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 27, T23N R5E, MDB&M, in Butte County, for use for domestic purposes and fire protection at Cresta Powerhouse and a group of some 20 operators' cottages located in that vicinity. The project includes a concrete diversion dam 4.5 feet high and 25 feet long and a conduit consisting of 493 lineal feet of 4-inch followed by 846 lineal feet of 6-inch diameter galvanized pipe. The capacity of the installation, according to the application, is 330 gallons per minute. The works are said to have been built and in operation.

Protest

The application is protested by Hatetna Mining and Exploration Company. The protest contains passages, among others, as follows:

"Protestant has owned for many years and now owns all of the riparian rights to the entire flow of said Hibbard Creek (erroneously called Rocky Bar Creek in said application) and said waters are of vital necessity to the operation of a portion of the mining claim owned by protestant ... and for domestic use thereon."

"Protestant claims a right to the use of water ... based upon the appropriation of said entire creek flow for mining purposes by Louis Lemmet in 1899. Protestant is the sole successor to such water rights."

"Immediately upon the purchase by protestant of said mining claim in May, 1933, it cleaned the Lemmet ditch to increase its capacity, and ... proceeded to use the entire flow of said creek in connection with ... mining This use, together with domestic uses, continued up to the time of protestant's eviction from said premises by applicant There are two creeks furnishing water to said mining claim of said protestant and running through said mining claim, one known as Hibbard Creek ... and the other unnamed. The Lemmet appropriation, now owned by protestant, covered all of the waters of both of said creeks and (was) used by protestant in its said mining operations until the year 1941, when said Pacific Gas and Electric Company, without right, evicted protestant from said premises. Shortly thereafter, protestant commenced an action in the Superior Court ... in and for the County of Butte, numbered therein 19100, for damages and to quiet title to said mining claim so owned by protestant"

"On January 2, 1951, a decree was entered in said action wherein and whereby it was adjudged and decreed, (a) that protestant was the owner of said mining claim subject to the fee simple interest of the United States of America, and that protestant was entitled to the possession of said claim; (b) that said applicant, during the month of December, 1940, took the following described portion of said mining claim:

* * *

(c) that upon payment to protestant of the sum of \$79,465.95 together with certain interest thereon, there should be condemned to applicant the above described portion thereof. Thereafter, and during the month of November, 1952, applicant paid said sums to protestant. Protestant is still the owner of the remainder of said mining claim."

"Protestant has never abandoned its claim to the waters of said Hibbard Creek and said other creek, and now claims to be the owner of the whole and every part of said water rights."

The protestant states that its protest may be disregarded and dismissed

"if applicant will pay to protestant a reasonable sum for said water right."

Answer

No answer to the protest is of record.

Hearing Held in Accordance with the Water Code

Application 13769 was completed in accordance with the Water Code and the Rules and Regulations of the Division of Water Resources and being protested, was set for public hearing under the provisions of the California Administrative Code, Title 23, Waters, on Friday, May 27, 1954, at 10:00 o'clock a.m. in the Board of Supervisors Hearing Chamber, Court House, Oroville, California. Of the hearing, the applicant and the protestant were duly notified.

Hearing Testimony

Relevant testimony by witnesses at the hearing was in substance as follows:

Donald McCrea, an engineer of the Pacific Gas and Electric Company, testified (pages 9 to 37 of transcript) to the effect that the purpose of the application at issue is to secure a water supply for domestic and fire protection purposes at Cresta Powerhouse and Camp, that facilities have been installed to that end to include a small concrete diversion dam on Rocky Bar Creek, a pipe line therefrom and a 15,000 gallon wooden stave tank, all essentially as shown on the application map and described in the application, that there is also a distribution system to the

individual cabins at Cresta Camp and a pipe line running directly to the powerhouse, that the system serves 7 permanent homes, that according to the powerhouse foreman water spills over the diversion dam most of the year, and that there is no evidence of diversion from Rocky Bar Creek currently by anyone other than Pacific Gas and Electric Company. Witness McCrea testified further to the effect that he has observed indications of what may have once been a ditch heading on Rocky Bar Creek at the point where the applicant's dam is now located, that he walked for about a quarter of a mile along the course that that ditch appears to follow, that according to his understanding, the land upon which Cresta Powerhouse is situated was once a part of a mining claim and was acquired by Pacific Gas and Electric Company by condemnation, that in connection with mining operations carried on or that might be carried on, use of water in large quantities on that claim is very necessary, that he estimates that diversions by Pacific Gas and Electric Company are less than 10 per cent of the flow of Rocky Bar Creek, that the Pacific Gas and Electric Company tank is equipped both with a valve which regulates inflow and with an overflow pipe which allows excess water to be spilled into Rocky Bar Creek, that spillage probably occurs continuously, that he has seen 4 different descriptions of the mining claim which the Pacific Gas and Electric Company in part condemned, that he is familiar with the description of the land which the Pacific Gas and Electric Company acquired by the condemnation, that he has looked at that land and marked the boundaries approximately, that in his opinion

the portion of the claim not acquired by the Pacific Gas and Electric Company is unworkable by placer methods. Witness McCrea also testified that "yesterday" he "walked the ditch" earlier referred to, in company with Mr. Mielke, Mr. Melcon and Mr. Erskine, that the ditch was "all filled up" and appeared not to have been used for at least 5 years, possibly not for 15 years, that there was a stump in the middle of the ditch, 12 inches in diameter. He testified finally that the Pacific Gas and Electric Company took possession of a portion of the mining claim in about 1941, that water flowing over the dam continues down Rocky Bar Creek and into North Fork Feather River, that he observed the flow in Rocky Bar Creek "yesterday" and judged it to be in excess of 4 cubic feet per second, that it is his understanding that Pacific Gas and Electric Company owns the land where its diversion dam is located, and that that land is outside of the mining claim and is not subject to any easement or right of way.

Eugene D. Phelps testified to the effect that he is a partner in the Hatetna Mining Company and has been ever since its organization, that that company mined its claim prior to the eviction by the Pacific Gas and Electric Company, that the eviction took place in 1941 but that the Pacific Gas and Electric Company took possession in 1938, that subsequent to the taking of possession by the Pacific Gas and Electric Company, the partnership had no possession and could not mine, that the partnership purchased the property in 1932 and continued exploratory work until interrupted by the Pacific Gas and Electric Company, that the partnership

cleaned out the old Lemmet ditch, that Rocky Bar Creek and Hibbard Creek are one and the same stream. As to the Lemmet ditch, he testified:

"We found that Louie Lemmet and Dave Gramps in '98 had diverted all the water out of Hibbard Creek and put it over into the other small creek below; and we found it was necessary to utilize all of the water for our mining operations below on the bar."

"We cleaned it out. Louie Lemmet in his later years ... in the 20's ... became ill. And then there was a period there from '22 up to about '23, I think, that the Gramps boys were not active in mining. However, they did their assessment work and they did not mine to the extent it was necessary to recover, evaluate or do the exploratory work we were doing."

As to the portion of the mining claim that the partnership still uses,

Witness Phelps testified:

"My understanding under the severance is that we still own a portion of the mining claim fronting on the river on what is known as the lower bar; and it was on that lower bar that all of our exploratory work was done. And I believe that we still own that property."

Witness Phelps testified further to the effect that the partnership intends to continue mining operations on the portion of the claim that it still owns, that such operation will require the full flow of Rocky Bar or Hibbard Creek, that the Lemmet ditch headed above the boundary of the mining claim, that the statement in the protest as to the location of protestant's point of diversion is incorrect, that the ditch "was adequate to take all of the runoff" at the time of year when mining is in progress. As to use of water on the mining claim he testified:

"I worked on it. The property was acquired from Louie Lemmet from '98 to 1922. Lemmet and Gramps were mining continuously, and we utilized that water all the time. Then in '22 the Gramps boys appropriated the claim from Lemmet

... and then they mined continuously up to the time that we took over in '32. Then we continued our mining operations During the low flow of that stream it was diverted through this ditch into the lower creek, and that was utilized, and then there was times we didn't have sufficient water to operate two big sluice boxes. Of course there is times of the year when we get the big flow we couldn't utilize it all. But at the time when we needed it there was sometimes there when we didn't have enough water. We had to shut down one sluice box."

Witness Phelps testified further to the effect that the flow of Rocky Bar Creek was sufficient except during unusually long, dry periods in fall, that since the time of the decree in January 1951, no mining has been done because "to adequately mine ... we would have to have this water business settled", that the partnership's diversion dam was not permanent, that it was built of "rock and sticks and mud" and would last only during low stages of the creek, that Hibbard Creek enters the river on the Pacific Gas and Electric Company's property.

Donald McCrea, recalled as a witness, when asked whether applicant's Exhibit No. 1 purports to show the boundaries of the original mining claim, testified (pages 79 and 80 of transcript):

"This map was prepared by our Land Department, and I guess it was the interpretation of what that mining claim was."

Upon the conclusion of Witness McCrea's testimony, the hearing adjourned to the site of the proposed works, where Witness Phelps testified further (pages 87 to 90 of transcript) to the effect that the lower end of protestant's mining claim passes through a highway culvert marked 464, that from the culvert the boundary line runs

westerly and intersects the low water mark on the river, that the so-called lower bar on the mining claim is the area extending from the southerly boundary of the claim to the channel of Maple Creek and lying between the highway and the low water line of North Fork Feather River, that the protestant's diversion heads on Rocky Bar Creek, that that stream traverses a portion of the claim taken by the Pacific Gas and Electric Company, that it does not cross or contact any land that the protestant now owns.

Discussion

The testimony by Witness McCrea to the effect that the facilities substantially as described in the application are installed and in operation, that spillage from the storage tank occurs "probably continuously", that the applicant's diversions are less than 10 per cent of the flow of the source, that the flow of the source on May 26, 1954, in his judgment, was in excess of the amount that the applicant needs; and the testimony of Witness Phelps to the effect that the flow of the source at times has been more than the protestant could utilize and at low stages has been enough at times for the operation of "two big sluice boxes" and at other times enough to operate only one, indicates that the flow of the source is probably much more, most of the time, than the amount that the applicant seeks to appropriate.

Testimony by Witness McCrea to the effect that no water is being diverted from the source except by the applicant and that the

ditch which may have been used formerly by the protestant appears not to have carried water for from 5 to 15 years as well as testimony by Witness Phelps to the effect that the protestant's mining operations were interrupted in 1938 and have not been resumed establishes that the yield of the source is not being used currently and has not been fully used for a considerable time.

The appropriation that the applicant seeks evidently cannot injure the protestant until such time as the latter, after resuming operations -- as it will, according to Witness Phelps, when and if it can -- requires substantially the full flow of the source. The time of said resumption of protestant's operations is unpredictable in the light of the information at hand. The time after said resumption when the protestant will need the full flow of the source is likewise unpredictable. The possibility that the protestant's operation may at some time in the indefinite future require substantially the entire flow of the source is an insufficient bar to the approval of the application.

Summary and Conclusion

The applicant seeks to appropriate 50,000 gallons per day (about 0.078 cubic foot per second) from a certain small tributary to North Fork Feather River, year-round, for domestic purposes and fire protection at Cresta Powerhouse and Camp. in Butte County.

The application is protested by Hatetna Mining and Exploration Company which claims rights to the entire flow of the source filed

upon, including riparian rights and rights based upon an appropriation initiated in 1899 followed by use extending to 1941 when protestant was evicted from its property by applicant. The protestant asserts that a part but not all of its property, a mining claim, was acquired by the applicant by condemnation, that it still owns a portion of its mining claim and all of its original water rights; and that it will not press its protest if applicant will purchase its said rights. The protest was not answered by the applicant.

The application was the subject of a hearing at Oroville on May 27, 1954, at which the applicant and protestant were both represented. Witnesses at the hearing testified to the effect that facilities substantially as described in the application have been installed and are in operation, that there is no diversion currently from the source filed upon except the diversion by the applicant, that the applicant diverts more water than it requires, the excess spilling back into the source, that the applicant diverts less than 10 per cent of the flow of the source, which flow on May 26, 1954, was of the order of 4 cubic feet per second, that there is an old ditch heading at the applicant's point of diversion, that it appears not to have been used for from 5 to 15 years, that the protestant worked a certain mining claim until about 1938, that it was evicted in 1941 by the applicant which acquired a part but not all of the mining claim by condemnation, that protestant has been unable to mine since about that time, that when mining was in

progress the entire flow of the source was needed and used, that the protestant intends to resume placer mining on the portion of the claim that it still owns, when it can, that for that purpose the entire flow of the source will again be required, that when mining was in progress before eviction, flow at certain times of the year was more than could be used, and at other times was insufficient to supply more than one of the protestant's two sluice boxes.

The testimony points to the conclusion that the flow of the source is substantially more than the amount that the applicant seeks to appropriate, that that flow is not being used by anyone except, in small part, by the applicant, that it has not been used by the protestant since some time between 1938 and 1941, that diversion as proposed by the applicant cannot injure the protestant now or until the protestant has resumed operations on such scale as to require substantially the full flow of the source, an eventuality which cannot be foreseen with any degree of certainty. In view of these circumstances it is the opinion of this office that the objections advanced by the protestant are insufficient to warrant disapproval of Application 13769, that unappropriated water exists, that such water may be taken and used beneficially in the manner proposed for at least a considerable period of time without injury to the protestant and that the application should therefore be approved and permit issued, subject to the usual terms and conditions.

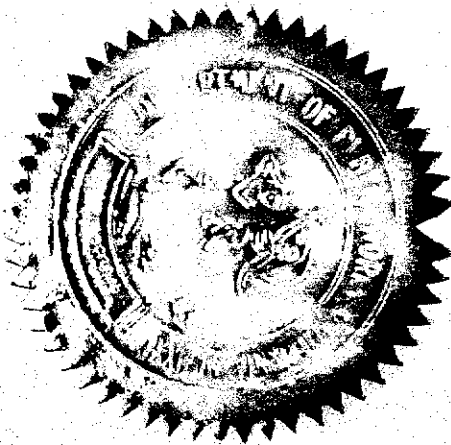
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ORDER

Application 13769 having been filed with the Division of Water Resources as above stated, a protest having been filed, a public hearing having been held and the State Engineer now being fully informed in the premises:

IT IS HEREBY ORDERED that Application 13769 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 January 13, 1955



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