

App 15673

Henry Holsinger
W. P. Rowe

January 21, 1958

Gavin M. Craig

Sierra Pacific Power Co.
Application 5170 re
Truckee River and
Little Truckee River;
status in respect to
diligence requirements.

On November 19, 1957, a first day of hearing was held with respect to subject application, also on Applications 15672 and 15673 of the U. S. Bureau of Reclamation and on Permit 5287 (A. 653b) of Washoe County Water Conservation District. Attorney Orrick for Sierra Pacific referred to page 15 of the staff report dated September 6, 1957, and inquired whether any showing of diligence would be required in connection with A. 5170. Chairman Holsinger directed the legal staff to review the file with respect to the issue of diligence and to be prepared to report the result of that investigation to the Board and to the parties at the opening of the next hearing, now scheduled for February 17, 1958.

With respect to an incomplete or defective application, the statutory requirements are found in the Water Code, Sections 1270 and 1271, and in the Board's Rules Pertaining to the Appropriation of Water in California, Rules 692 to 695. All the diligence requirements found therein relate to the period prior to the perfecting of the application and giving notice thereof.

EXHIBIT

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The diligence requirements mentioned above do not apply to A. 5170, since it had been completed and had advanced to the hearing stage in 1938. At a hearing held October 4, 1938, by the former Division of Water Resources, it was determined that the point of diversion on the Little Truckee River was actually in the Boca Reservoir area, and would be inundated by water when the reservoir was built. Action was then ordered withheld pending submittal of "an amendment," or the filing of a new application.

What followed thereafter was in the same pattern as if this were an incomplete application. For example, the folder refers to a total of nine separate extensions of time "to complete" A. 5170, subsequent to the 1938 hearing.

No authority is found anywhere in the statutes or in the rules of the Board or its predecessor to "amend" an application after it has been perfected and notice has been given thereon. The Water Code, in Section 1701, does have provisions which relate to the period "after notice of an application is given," for changing the points of diversion, place of use, or purpose of use, subject to statutory requirements and approval of the Board. This is the statutory authority and procedure which the applicant is following at present. It could have followed the same procedure at any time subsequent to the 1938 hearing. The State Engineer in

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1938 or at any time thereafter could have required that A. 5170 proceed to hearing and decision.

The nine documents, referred to in the file as extensions of time to complete the application, amounted to agreement by the State Engineer to the applicant's request that A. 5170 would not be set for hearing prior to the specified dates, the latest of which was May 1, 1956. There is no reason shown by the file why A. 5170 should not be set for hearing at this time. What will be up for hearing and decision by the Board will be Application 5170 in the same form as heard by the State Engineer in 1938, together with the petitions to change the points of diversion and place of use.

Since delay in disposing of the application was approved by the State Engineer, it would not be proper for the Board as statutory successor to the State Engineer to reject the application for failure to exercise diligence. Nevertheless, diligence is a continuing requirement and failure to exercise it is fatal to validity of an appropriative right. Section 77B of the Board's Rules provides in part:

"A reservation of water may not be made by one who has no immediate plan or purpose to proceed promptly and diligently with construction of the necessary

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diversion works and beneficial use of the water.

...the [Board] will not countenance any attempt to reserve water for future use where there is no intent to proceed promptly with development."

Applicant may decide that the lapse of thirty years makes the application vulnerable to collateral attack, regardless of postponements of hearing date by the State Engineer.

Section 738 of the Board's rules relates to changes in point of diversion, place of use or character of use. It provides in part:

"After notice of an application to appropriate water has been given, changes in point of diversion, place of use or character of use as stated in the application, permit, or license may be allowed only upon petition and provided, that the petitioner establish that the allowance of the proposed change will neither in effect constitute the initiation of a new right nor operate to the injury of any other appropriator or lawful user of water. Petitions contemplating a major change in source or any other vital change in the original project will not be considered."

In its present form, A. 5170 contains two proposed points of diversion, one on the Truckee and one on the Little Truckee River. Both points are located upstream from the

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intersection of the two rivers. The petition to amend proposes to substitute a single point of diversion at Stampede Dam, which is located several miles up the Little Truckee from the Boca Reservoir area. The proposed place of use at Calvada Power Plant is several miles downstream on the Truckee from the power house site now described in A. 5170. The map attached to the staff report illustrates the changes as proposed.

The applicant should be prepared to satisfy the Board on the facts and the law that the proposed changes will not amount to the initiation of a new right.

To summarize, it is the opinion of the Board's legal staff that the applicant on February 17 should be prepared to satisfy the Board that the petition to change the points of diversion and places of use in Application 5170 will not result in injury to any other lawful user of water and will not involve a major change beyond the scope of Rule 738. It is for the applicant and its counsel to consider the effect of the lapse of thirty years on subject application and the resulting possibility of successful collateral attack.

/s/ Gavin M. Craig
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