

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

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In the Matter of Application 5869 of M. H. MacIlwaine  
to Appropriate from Buckeye Creek in Trinity County  
for Mining and Domestic Purposes.

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DECISION A. 5869 D 230

Decided: *June 11, 1929*

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APPEARANCES AT HEARING HELD January 14, 1929.

For Applicant:

M. H. MacIlwaine

No appearance

For Protestant:

Buckeye Placer Mines, Inc.

No appearance

EXAMINER: Everett N. Bryan, Deputy Chief for  
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 APPLICATION 5869

Application 5869 was filed March 29, 1928 by M. H. MacIlwaine. It proposes an appropriation of 6 cubic feet per second from about November 1st to about May 1st to be diverted from Buckeye Creek in Trinity County, tributary of the Trinity River, to be used for mining and domestic purposes at mines located as follows:

$N\frac{1}{2}$  NW $\frac{1}{4}$  NW $\frac{1}{4}$ )  
 $N\frac{1}{2}$  NE $\frac{1}{4}$  NW $\frac{1}{4}$ ) Section 29, T 37 N, R 7 W, M.D.B. & M.

$W\frac{1}{2}$  NW $\frac{1}{4}$  SW $\frac{1}{4}$ )  
 $SW\frac{1}{4}$  SW $\frac{1}{4}$ ) Section 20, T 37 N, R 7 W, M.D.B. & M.

$E\frac{1}{2}$  SE $\frac{1}{4}$  SE $\frac{1}{4}$ ) Section 19, T 37 N, R 7 W, M.D.B. & M.

The method of utilizing the water is by ground sluicing and hydraulicking.

The point of diversion is located within the NW $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 19, T 37 N, R 7 W, M.D.B. & M.

The application was protested by the Buckeye Placer Mines, Inc.

#### PROTEST

The Buckeye Placer Mines, Inc., claims to have acquired, by purchase from the applicant, all the lands bordering on Buckeye Creek lying west of Section 29, T 37 N, R 7 W, M.D.B. & M. which includes the site of applicant's proposed point of diversion. Protestant has the privilege of diverting 15 cubic feet per second of the waters of Buckeye Creek under a permit issued by this office and in addition to this claims under riparian rights, all the rest of the flow of the creek for the operation of its sluiceways. Interference with its prior vested rights is alleged should Application 5869 be approved.

#### STATEMENT OF COMPLIANCE WITH LEGAL REQUIREMENTS

Application 5869 was completed sufficiently for advertising in accordance with the Water Commission Act and 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 January 14, 1929, at 10:00 A.M. in Room 401 Public Works Building, Sacramento, California. Of this hearing applicant and protestant were duly notified. No appearance was made however by either party on account of illness.

#### GENERAL DISCUSSION

It appears from information on file with this office, derived principally through correspondence, that the protestant, Buckeye Placer Mines, Inc., pur-

chased from the applicant about 300 acres of land bordering on Buckeye Creek, lying to the west of and adjacent to Section 29, T 37 N, R 7 W, M.D.B. & M. The protestant claims that these lands include the proposed point of diversion named in Application 5869.

Under Application 5810, Permit 3093 protestant has acquired the privilege of diverting 15 cubic feet per second of the waters of Buckeye Creek to be diverted throughout the entire year for mining purposes within the E $\frac{1}{2}$  of Section 24, T 37 N, R 8 W, and Sections 19, 29 and 30, T 37 N, R 7 W, M.D.B. & M. The point of diversion is located within the SW $\frac{1}{4}$  of NE $\frac{1}{4}$  of Section 24, T 37 N, R 8 W, at a point approximately one-half mile above the proposed point of diversion of the applicant. In addition to the appropriative right initiated, protestant claims riparian rights to the rest of the flow in Buckeye Creek for sluiceway purposes.

It also appears that protestant has made some arrangement with the applicant by which it purchased the lands designated as the place of use in Application 5869 and known as the Enright Placer Mines but the final payment has not been made thereon and the applicant in order to insure a water supply for this tract should the purchase not be consummated filed Application 5869 with the intention that should the final payment be made he would convey the permit, if granted, to the protestant.

The applicant admits that protestant purchased certain mining claims from him but urges that the purchase was made subject to existing conditions at the time of sale insofar as rights of way for roads, trails, etc., were concerned and that he is entitled to the use of existing ditches for conveying the water applied for.

On September 5, 1928, Mr. Curson, the president of the Buckeye Placer Mines, Inc., called at the office and exhibited a deed and receipt for lands purchased from the applicant in support of his contention that the proposed point of diversion was located on property purchased by him, and stated that he would immediately submit copies of this deed to the office for our records, but to date this has not been done. He stated at that time also that although the Enright Mines had been offered to him, he had no intention of purchasing them.

As stated above no appearance was made at the hearing but on the day thereof this office was advised by the secretary of the Buckeye Placer Mines, Inc., that the protestant's attitude toward the purchase of the Enright Group of Mines had changed and that payments were being made on these properties in the expectation of consummating the purchase and that if the purchase was consummated the protest against Application 5869 would be withdrawn. He further stated that the protestant did not foresee any necessity of re-opening the hearing at a future date but requested that consideration of the matter by this office be deferred for thirty days pending further advices in the premises.

On February 14, 1929, Mr. Curson visited this office and stated that while he and the applicant had come to some understanding in the matter whereby either Application 5869 or the protest would be withdrawn, Mr. MacIlwaine had subsequently failed to sign the agreement as proposed and requested a further extension of thirty days to complete his negotiations. The request was granted and action was delayed until April 18, 1929, upon which date the protestant was requested to submit definite information as to whether or not it desired to withdraw its protest. To date no reply to the request

has been received and it appears that no purpose can be served by further delaying action in the matter.

We have been informed by the applicant that measurements of the flow in Buckeye Creek made about the middle of April during the years 1925 to 1928 inclusive, when the creek was at flood stage, indicated an average of about 108 cubic feet per second, a quantity which applicant claims is greatly in excess of the amount which can be used by the protestant. From this statement there would appear at times to be unappropriated water in the creek.

It is our practice to deny an application when it can not be shown that right of access can be procured, but in this case applicant maintains that he has right of access in spite of the fact that protestant denies the claim. It appears that it is a matter of dispute which may have to be settled in the courts. Furthermore if the applicant has right of access as claimed it would appear that injury would perhaps result to him should the application be denied and the protestant fail to acquire the Enright mining properties. On the other hand we do not believe that any rights which the protestant may claim could be jeopardized by the approval of the application since any permit issued would be issued subject to prior vested rights and the burden would be upon the applicant to divert at such times as not to interfere with protestant's rights.

The protestant has failed to submit copies of the deeds in support of his contention that applicant has no right of access and by not replying to our letter of April 18th has apparently assumed an attitude of indifference in the matter.

#### CONCLUSION

From the above it is concluded that Application 5869 be approved

and a reasonable time allowed the applicant within which to commence his construction work. If the applicant can not establish his claim to right of access or does not exert such diligence as may be necessary to acquire the same then the permit may later be revoked for failure to comply with the terms thereof.

ORDER

Application 5869 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 Application 5869 be approved and that a permit be granted to the applicant subject to such of the usual terms and conditions as may be appropriate.

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

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

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