

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

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In the Matter of Application 6066 of Florence Hogue to Appropriate From Bixby Creek in Monterey County for Power Purposes, Application 6067 of Florence Hogue to Appropriate from Bixby Creek and Cross Canyon, Dairy Gulch and Bear Trap Canyon, tributaries of Bixby Creek in Monterey County for Domestic Purposes and Application 6122 of Florence Hogue to Appropriate from Sierra Creek Tributary of Bixby Creek in Monterey County for Domestic Purposes.

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DECISION A. 6066, 6067, 6122 D-292

Decided *May 25, 1931*

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APPEARANCES AT HEARING HELD AT SALINAS, March 26, 1931

For Applicant

Florence Hogue

Chas. T. Broughton

For Protestants

Leo S. Bullene, Ralph S. Hughes )  
and Herbert Baltz )

Russel Scott  
Stanley Lawson  
Paul Pioda

H. G. Sharpe

Argyll Campbell

EXAMINER: Everett N. Bryan, Hydraulic Engineer, Division of Water Resources, Department of Public Works, State of California.

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O P I N I O N

GENERAL FEATURES OF THE APPLICATIONS

Application 6066 was filed September 27, 1928, by Florence Hogue.

It proposes an appropriation of 3 cubic feet per second from Bixby Creek in Monterey County, throughout the entire year for power purposes at a

power house to be erected within the SE $\frac{1}{4}$  of NW $\frac{1}{4}$  of Section 16, T 18 S, R 1 E, M.D.B. & M. The point of diversion is within the NW $\frac{1}{4}$  NW $\frac{1}{4}$  Section 15, T 18 S, R 1 E, M.D.B. & M. The power is to be used for generating electricity for electric lighting and other purposes on lands of applicant. After passing through the power house the water is to be returned to Bixby Creek at a point within the SE $\frac{1}{4}$  NW $\frac{1}{4}$  Section 16, T 18 S, R 1 E, M.D.B. & M.

Application 6067 was filed September 27, 1928, by Florence Hogue. It proposes an appropriation of 3 cubic feet per second throughout the entire year from Bixby Creek and its tributaries, Cross Canyon, Dairy Gulch and Bear Trap Canyon for domestic purposes on 1000 acres of land within Sections 15, 16, 21 and 22, T 18 S, R 1 E, M.D.B. & M. which is to be subdivided into high class estates. The points of diversion are located as follows:

<u>Source</u>	<u>Point of Diversion</u>
Bixby Creek	SE $\frac{1}{4}$ NW $\frac{1}{4}$ Section 16, T 18 S, R 1 E, M.D.B. & M.
Cross Canyon	NE $\frac{1}{4}$ SW $\frac{1}{4}$ Section 16, T 18 S, R 1 E, M.D.B. & M.
Dairy Gulch	NW $\frac{1}{4}$ SE $\frac{1}{4}$ Section 16, T 18 S, R 1 E, M.D.B. & M.
Bear Trap Canyon	SE $\frac{1}{4}$ SW $\frac{1}{4}$ Section 15, T 18 S, R 1 E, M.D.B. & M.

Application 6122 was filed November 15, 1928, by Florence Hogue. It proposes an appropriation of 2 cubic feet per second throughout the entire year from Sierra Creek, a tributary of Bixby Creek in Monterey County for domestic purposes on 360 acres of land within Sections 16 and 21, T 18 S, R 1 E, M.D.B. & M. which is to be subdivided <sup>into</sup> high class estates. The point of diversion is within the NW $\frac{1}{4}$  of NW $\frac{1}{4}$  of Section 21, T 18 S, R 1 E, M.D.B. & M.

The applications were protested by Leo S. Bullene and H. G. Sharpe prior to the hearing and by Ralph S. Hughes and Herbert Baltz at the hearing.

APPLICATIONS 6067 and 6122 AMENDED BY STIPULATION

As presented at the hearing these applications sought to appropriate a total of 5 cubic feet per second; 3 cubic feet per second under Application 6067 and 2 cubic feet per second under Application 6122. At the hearing however it was stipulated that no more than 3 cubic feet per second would be diverted under both Applications 6067 and 6122 and they have been amended accordingly.

PROTESTS

The protestants own land below the applicant which is riparian to Bixby Creek and allege in effect that the proposed appropriations of applicant would deprive them of water for domestic and recreational purposes and would render their lands valueless for subdivision into high class residence sites such as proposed by applicant and which they also have in contemplation. They also allege that the amount of water which applicant proposes to appropriate is greatly in excess of the amount actually necessary for the use contemplated.

HEARING HELD IN ACCORDANCE WITH SECTION 1a  
OF THE WATER COMMISSION ACT

Applications 6066, 6067 and 6122 were completed in accordance with the Water Commission Act and the requirements of the Rules and Regulations of the Division of Water Resources and being protested were set for a public hearing in accordance with Section 1a of the Water Commission Act on March 26, 1931, at 10:00 o'clock A.M. in the Board of Supervisors Room, Court House, Salinas, California. Of this hearing applicant and record protestants were duly notified.

PHYSIOGRAPHY AND HYDROGRAPHY

Bixby Creek or as it is sometimes called Mill Creek, rises in the Skinner Ridge of the Santa Lucia Range and flows in a general westerly di-

rection to the Pacific Ocean just below Bixby Landing. Its main tributaries in downstream order are - Turner Creek, Beartrap Canyon, Dairy Gulch, Cross Canyon and Sierra Creek. The drainage areas of the several streams from which applicant seeks to appropriate are as follows:

<u>Stream</u>	<u>Drainage Area</u>
Bixby Creek above mouth	11.20 sq. mi.
Bixby Creek above proposed point of diversion	5.97 sq. mi.
Sierra Creek above junction with Bixby Creek	2.12 sq. mi.
Sierra Creek above proposed point of diversion	1.52 sq. mi.
Cross Canyon above junction with Bixby Creek	0.27 sq. mi.
Cross Canyon above proposed point of diversion	0.18 sq. mi.
Dairy Gulch above junction with Bixby Creek	0.37 sq. mi.
Dairy Gulch above proposed point of diversion	0.27 sq. mi.
Beartrap Canyon above junction with Bixby Creek	0.72 sq. mi.
Beartrap Canyon above proposed point of diversion	0.31 sq. mi.

The entire property of the applicant lies within the watershed of Bixby Creek as does also almost the entire area of protestants' properties. Practically the entire area of the Dairy Gulch and Cross Canyon watersheds lie within the boundaries of Applicant's property. About one-half of the Beartrap Canyon watershed and one-third of the Sierra Creek watershed also lie within the boundary line of applicant's property.

The watersheds of Bixby and Sierra Creeks are very heavily wooded and the canyon walls are very precipitous with occasional benches.

The flow of the streams has always been very uniform and testimony presented at the hearing indicated that the summer flow in Bixby Creek at Limekiln which is located just below the junction of Dairy Gulch and Bixby Creek is approximately 3.5 cubic feet per second which amount was obtained by measurement on August 15, 1928. (Transcript p. 43 and 50) At the time of the measurement it was estimated that the flow in Beartrap Canyon was about one-tenth of this amount and the flow in Dairy Gulch was about one-third of the flow in Beartrap Canyon. On about August 17th, the flow in

Sierra Creek was  $2\frac{1}{2}$  second feet as measured by Mr. Broughton, engineer for the applicant. (Transcript pages 50, 51)

USE OF WATER BY PROTESTANTS

Protestants Bullene, Hughes and Baltz own a tract of land containing 160 acres riparian to Bixby and Sierra Creeks and adjacent to and downstream from the lands of applicant. The next property in downstream order is owned by one Brazil which property corners on Bixby Creek. Adjacent to the Brazil property is an acre of land belonging to a Mrs. Gregg of Monterey. Below Mrs. Gregg's property is ten acres of land owned by R. L. Hughes one of the protestants and below Mr. Hughes' property and extending to the Pacific Ocean is about 230 acres of land belonging to Major H. G. Sharpe, also a protestant, containing approximately 230 acres and known as "The Rainbow Lodge" properties.

Bullene, Hughes and Baltz acquired their property about four years ago and about a year and a half later erected a cabin on Bixby Creek at which as many as 35 guests have been entertained during a week end. Very little water has been used and this is dipped directly from the stream by buckets. The owners intend to sell the property either as a subdivision or as a whole and have 35 building sites staked out along Bixby Creek. About 120 acres of the 160 acres are stated by the owners to be suitable for subdivision and a tentative map has been prepared.

Major Sharpe's property, or "Rainbow Lodge" has been used for summer resort purposes for at least 12 years, its main attraction being the trout fishing in Bixby Creek which stream flows through the property a distance of about one and one quarter miles. A tract of land containing 3 acres, lying on Bixby Creek has been leased by Major Sharpe to one

Reynolds who constructed a trout hatchery about a year and a half ago. On this 3 acre tract there are 3 cottages and a partial enclosure for the trout troughs. Mr. Reynolds occupies one of the cottages and the others are rented to summer residents. The domestic supply for the cottages is obtained from springs on protestants' property. At the fish hatchery less than one second foot of water from Bixby Creek is passed through a series of troughs and is immediately returned to the stream. Major Sharpe has had the subdivision of his property in mind but apparently has made no definite plans therefor.

Testimony presented at the hearing indicated that for 60 or 70 years cattle had obtained drinking water from the several streams and springs on both the properties of applicant and protestants.

#### INSPECTION BY THE EXAMINER

During the course of the hearing much testimony was presented relative to the adaptability of the applicant's property for such an extensive development as proposed. While the protestants were willing to concede that there were scattered benches here and there which were suitable for building sites it was emphatically denied that it was possible to develop the property to the full expectations of the applicant due to the ruggedness of the topography.

In order to satisfy himself on this point the examiner, at the close of the hearing, made a trip to Bixby Creek. While unable to go directly upon the property on account of the lateness of the hour, he viewed a considerable portion of the proposed project from a sharp promontory adjacent to Sierra Creek and with the aid of the Point Sur Quadrangle of the United States Geological Survey was able to form a reliable opinion upon the point.

In a memorandum dated May 6, 1931, he states that the area proposed for service by the applicant under Applications 6067 and 6122 is of very bold topography, some of the slopes being so precipitous that they could be scaled only with difficulty and that there are considerable areas where they approach angles of some 30 to 40 degrees.

It was his view that the project is located far from centers of population and undoubtedly would be of very slow development particularly as there are vast areas on every hand in the same general locality which are susceptible of similar development.

The observations of the examiner bore out the testimony presented by the protestants at the hearing to a large extent and an inspection of the Point Sur Quadrangle above referred to, indicates that the slopes of the hills on applicant's property vary from a minimum of about 250 feet in 1000 feet or approximately 15 degrees to a maximum of 800 feet in 1000 feet or approximately 40 degrees and that the average slope is about 450 feet in 1000 feet or approximately 25 degrees.

AMOUNT OF WATER APPLIED FOR APPEARS TO BE EXCESSIVE

Applicant seeks an appropriation of 3.0 cubic feet per second for domestic purposes upon 1360 acres of land. Applicant's estimate of need was based upon experience in the use of water on high class estates or subdivisions in Marin and Los Angeles Counties where it appears that in some instances as large an amount of water as 2500 gallons per day per acre is used for domestic purposes and the irrigation of extensive gardens and lawns.

We are of the opinion however that the lands of the applicant are too remote from centers of population and the terrain of the watershed

too rugged to permit of such development within any reasonable period of time. That the property of the applicant is well suited to summer home development is evident and is so admitted by protestants but it is improbable that any person now living will see the entire 1360 acres occupied either by small homes or a single magnificent residence and cultivated lawns and shrubbery as contemplated by the applicant.

The plans of the applicant are markedly immature. She hopes to market her property either by subdivision and sale to many individuals or by sale as a whole for some magnificent country estate. The property has not been surveyed and no evidence was presented of imminent sale of any portion thereof and pending such sale applicant's only use for the water is for domestic use for members of the family and friends who may visit the property occasionally, stock watering and fish propagation.

So far as the evidence presented would indicate, the plans of the applicant for the development of her property are no further advanced than are the plans of the protestants. In fact those of Bullene, Hughes and Baltz are apparently more advanced as their lands have been surveyed and a tentative map of subdivision prepared.

It is a well established rule of the Division not to approve an application for an amount clearly in excess of what is reasonably necessary for the use intended and we feel that this particular case demonstrates the soundness of that rule. Protestants apparently have little or no fear that actual use by applicant would injure them. They were concerned however that this office might award to the applicant an amount of water grossly in excess of what was reasonably required thereby casting a cloud upon their riparian claim and it is our opinion that this apprehension is justified.



It will be many years before the project could even approach the completeness which was predicted for it by the applicant and during those many years, if permit were granted as applied for, this incomplete appropriation would threaten downstream owners with the substantial diminution if not the drying up of these small streams which are the very substance of the value of their property due to fishing and other recreational facilities which they afford.

We are confronted in this case, therefore with the necessity of scaling down to what appears reasonable, the amount for which Applications 6067 and 6122 should be approved and this is not easy because of the meager information which is available as to the probable extent and nature of the ultimate development. The customary allowance of the Division is 200 gallons per day per lot for domestic use at homesites within forest reserves and in other similar situations. Upon this basis, when the property has been developed to a point where one-half the acreage is occupied by owners of half acre lots some 270,000 gallons per day or somewhat less than 0.5 cubic foot per second would be required. In the event however that the residences constructed were to be occupied throughout the year, modern plumbing equipment would be installed and more attention given to the care of lawns and shrubs, thereby necessarily increasing the use of water. In view of this possibility it is not likely that the needs of the applicant will exceed twice the amount usually allowed for summer home sites in the national forests or roughly, one cubic foot per second.

Should the project area, on the other hand, be sold and occupied as one magnificent country estate we cannot contemplate a greater use. This should take care of the irrigation of 100 to 200 acres of lawns, shrubbery, etc., as well as satisfy the domestic needs.

It is our opinion therefore that Applications 6067 and 6122 should be approved at this time for a combined total of one cubic foot per second only and that the applicant should be allowed a reasonable time to proceed with the development and demonstrate the need for a greater supply. If such need is demonstrated within a reasonable time an additional amount not unduly harmful to properties downstream may be allowed. In the event that need for an additional amount is not shown within reasonable time the two applications may be denied as to all amounts over a combined total of one cubic foot per second and what may be reasonable when time for decision comes will depend upon the demonstrated needs of the applicant, the rapidity of the development, the development of the property of the downstream owners and the apparent injury which may inure to them as a result of additional diversions upstream.

As no basis for the proportion of the entire amount of water required under each application has been shown it is deemed advisable to allow applicant to divert the one cubic foot per second from either Sierra Creek or Bixby Creek or in part from both sources as may be required with the understanding that this amount shall not be exceeded under both applications.

#### APPLICATION 6066

Application 6066 for power purposes proposes to divert water from Bixby Creek at a point within the NW $\frac{1}{4}$  of NW $\frac{1}{4}$  of Section 15, T 18 S, R 1 E, M.D.B. & M. and to return the water to Bixby Creek at a point within the SE $\frac{1}{4}$  of NW $\frac{1}{4}$  of Section 16, T 18 S, R 1 E, M.D.B. & M.

The use is a non consumptive one and as the point of diversion and the point of return are both above the protestants' lands it is not seen whersin the rights of the protestants can possibly be interfered with

should this application be approved. We are of the opinion therefore that no cause of action has been stated by the protestants and therefore the protests should be dismissed.

Under date of November 16, 1928, the District Engineer of the U.S. Forest Service informed this office that as the development proposed by the applicant would be entirely on private property no authorization from the Federal Power Commission was necessary.

#### SUMMARY

The uses to which applicant proposes to put the water under Applications 6066, 6067 and 6122 are useful and beneficial ones.

The use proposed by applicant under Application 6066 is a non consumptive one and no authorization from the Federal Power Commission is necessary. It should therefore be approved subject to the usual terms and conditions.

For reasons above stated it is the opinion of this office that Applications 6067 and 6122 should each be approved at this time for an amount not to exceed one cubic foot per second, subject to the usual terms and conditions and a special term or condition to the effect that the amount diverted under each one of the applications together with the amount diverted under the other, shall not exceed one cubic foot per second. Action should be withheld upon the remaining quantities named therein until further order is entered.

#### O R D E R

Applications 6066, 6067 and 6122 for permits to appropriate water having been filed with the Division of Water Resources as above stated, protests having been filed, a public hearing having been held and the Division of Water Resources now being fully informed in the premises:

IT IS HEREBY ORDERED that said Application 6066 be approved and that a permit be issued thereon subject to such of the usual terms and conditions as may be appropriate, and

IT IS FURTHER ORDERED that said Application 6067 and 6122 each be approved for an amount not to exceed one cubic foot per second and that permits be issued thereon subject to such of the usual terms and conditions as may be appropriate and subject to a special term or condition to the effect that the amount of water diverted under both permits shall not exceed one cubic foot per second, and

IT IS FURTHER ORDERED that action be withheld upon the remaining quantities of water sought in Applications 6067 and 6122 until further order is entered.

WITNESS my hand and the seal of the Department of Public Works of the State of California this 25 day of May, 1931.

EDWARD HYATT, State Engineer

BY Harold Conkling  
Deputy

