

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

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In the matter of the Petition to Change the Place of Use Under Application 77a, Permit 1303 and Application 5414, Permit 2957 of Emma Rose and Hobart Estate Company to appropriate from Highland Creek for Power Purposes, and in the matter of Application 5592 of the Calaveras Water Users Association to appropriate from Highland Creek for Irrigation and Domestic Purposes, and Application 6545 of Emma Rose and Hobart Estate Company to appropriate from Highland Creek for Power Purposes.

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DECISION A. 77a, 5414, 5592 and 6545 D 334

Decided *October 24, 1932*

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APPEARANCES AT HEARING HELD January 29, 1930, on Application 5592.

For the Calaveras Water Users Association	Virgil Airola and Thomas H. Louittit
For Pacific Gas & Electric Company, and Sierra and San Francisco Power Company)	Thomas H. Straub and Geo. A. Hunt
For South San Joaquin Irrigation District and) Oakdale Irrigation District	John Hancock
For Emma Rose and Hobart Estate Company	John Pigott

EXAMINER: Everett N. Bryan, Hydraulic Engineer, Division of Water Resources.

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APPEARANCES AT HEARING HELD January 15, 1931, in the Matter of Application 77a, Permit 1303, Application 5414, Permit 2957 and Applications 5592 and 6545.

For Calaveras Water Users Association	Virgil M. Airola and Thomas H. Louittit
For Emma Rose and Hobart Estate Company	John E. Pigott and E. S. McCurdy

For Pacific Gas & Electric Company and )  
Sierra and San Francisco Power Company)

Geo. A. Hunt

For South San Joaquin Irrigation District )  
and Oakdale Irrigation District )

Thomas C. Boone

For South San Joaquin Irrigation District

G. Z. Parker

For Oakdale Irrigation District

R. E. Hartley

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

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## OPINION

### GENERAL FEATURES OF APPLICATIONS AND PETITIONS

#### Application 5592

Application 5592 of the Calaveras Water Users Association, Inc., was filed July 1, 1927. It proposes an appropriation of 40 cubic feet per second (gross diversion not to exceed 10,800 acre feet per annum) from the regulated flow of Highland Creek as brought about by the discharge into Angels Creek below Murphy's Power Plant of the Utica Mining Company of stored waters resulting from the operation of a storage reservoir proposed by Emma Rose and Hobart Estate Company, known as Spicer's Meadow Reservoir with an impounding dam located within the NE $\frac{1}{4}$  NE $\frac{1}{4}$  of projected Section 9, T 6 N, R 18 E, M.D.B.&M. for agricultural and domestic purposes on 14,610 acres of land within T 2 and 3 N, R 12, 13 and 14 E, M.D.B.&M. The irrigation season is from about March 1st to about November 1st of each year. The points of diversion from Angels Creek are described as follows:

- (1) At intake of North Ditch within SE $\frac{1}{4}$  SW $\frac{1}{4}$  Section 33, T 4 N, R 14 E
- (2) At intake of South Ditch within NW $\frac{1}{4}$  NW $\frac{1}{4}$  Section 4, T 3 N, R 14 E
- (3) At intake of Angels Ditch within NE $\frac{1}{4}$  NW $\frac{1}{4}$  Section 7, T 3 N, R 14 E
- (4) At intake of Union Ditch within SW $\frac{1}{4}$  SE $\frac{1}{4}$  Section 12, T 3 N, R 13 E
- (5) At intake of Jones Mine Ditch within SE $\frac{1}{4}$  SE $\frac{1}{4}$  Section 33, T 3 N, R 13 E

The application was protested by Sierra and San Francisco Power Company and Pacific Gas & Electric Company, South San Joaquin and Oakdale Irrigation Districts, and by Emma Rose and Hobart Estate Company.

Petition to Change the Place of Use Under Application 77a, Permit 1303 and Application 5414, Permit 2957.

On January 28, 1930, Emma Rose and the Hobart Estate Company operating as the Utica Mining Company filed a petition to change the place of use described in Application 77a, Permit 1303 and Application 5414, Permit 2957 by including as an additional place of use, the Angels Power Plant located within the SW $\frac{1}{4}$  of NW $\frac{1}{4}$  of Section 34, T 3 N, R 13 E, M.D.B.&M. The petition was protested by the South San Joaquin and Oakdale Irrigation Districts and by the Calaveras Water Users Association, Inc.

Application 6545

Application 6545 was filed on January 29, 1930, by Emma Rose and Hobart Estate Company (operating as Utica Mining Company).

It proposes an appropriation of 10,800 acre feet per annum throughout the entire year from Highland Creek to be diverted to storage in Spicer's Meadow Reservoir at the Spicer's Meadow dam within the NE $\frac{1}{4}$  NE $\frac{1}{4}$  Section 9, T 6 N, R 18 E, M.D.B.&M. The water is to be released from storage into Highland Creek and thence into the North Fork of the Stanislaus River from which it is rediverted into the Utica Ditch at a point within the SW $\frac{1}{4}$  NE $\frac{1}{4}$  Section 35, T 5 N, R 15 E, M.D.B.&M. and passed through Murphy's Power House under Applications 77a and 5414. The water is to be rediverted again from Angels Creek at a point within the NW $\frac{1}{4}$  NW $\frac{1}{4}$  Section 7, T 3 N, R 14 E, M.D.B.&M. and to be conveyed by the Angels Ditch to the Angels Power House within the SW $\frac{1}{4}$  NW $\frac{1}{4}$  Section 34, T 3 N, R 13 E, M.D.B.&M. and is to be returned to Angels

Creek, after use for power purposes, at the tail race of Angels power house within the SW 1/4 Section 34, T 3 N, R 13 E, N.D.B.M. The application is for use through Angels Power Plant of the same water which is now being used through Murphy's Power Plant under Application 77a, Permit 1305 and Application 5414, Permit 2957. Application 6545 was protested by the South San Joaquin and Oakdale Irrigation Districts and Calaveras Water Users Association, Inc.

PROTESTS

The South San Joaquin Irrigation District and the Oakdale Irrigation District object to the approval of the petition to change the place of use under Applications 77a and 5414 and to the approval of Application 5592 and 6545 on the grounds that there are no unappropriated waters in the Stanislaus River and that any diversions therefrom which will in any manner diminish the flow of the Stanislaus River above the Melones dam will constitute a direct infringement upon the rights of these protestants.

The Calaveras Water Users Association, Inc. alleges in effect that the granting of the petitions to change the place of use under Applications 77a and 5414 and the approval of Application 6545 would deprive them of the water to which a right has been initiated under Application 5592 for agricultural and domestic purposes which is a higher use.

The Sierra and San Francisco Power Company and its lessee, the Pacific Gas & Electric Company allege in effect that the approval of Application 5592 of the Calaveras Water Users Association would deprive them of water which they are entitled to divert and store at the Melones dam under prior vested rights.

Emma Rose and the Hobart Estate Company protest Application 5592 of the Calaveras Water Users Association on the grounds that its application was filed prematurely and if approved would prevent them from recapturing their own water at the tail race of Murphy's power plant for subsequent use at the High Angels power plant.

HEARINGS SET IN ACCORDANCE WITH SECTION 1a AND SECTION 16  
OF THE WATER COMMISSION ACT

Application 5592 of the Calaveras Water Users Association, the petition to Change the Place of Use under Application 77a, Permit 1303 and Application 5414, Permit 2957 of Emma Rose and Hobart Estate Company and Application 5545 of Emma Rose and Hobart Estate Company were completed in accordance with the Water Commission Act and the Rules and Regulations of the Division of Water Resources and being protested were set for a public hearing in accordance with Section 1a and Section 16 of the Water Commission Act on January 15, 1931, at 10:00 o'clock A.M. in Room 401 Public Works Building, Sacramento, California. On January 29, 1930, a public hearing under Section 1a of the Water Commission Act was held at the same place on Application 5592 but at the conclusion of the hearing it was agreed that action would be withheld pending the later hearing. Of these hearings applicants, petitioners and protestants were duly notified.

HISTORY

Prior to the effective date of the Water Commission Act, the Utica Mining Company, predecessors in interest of Emma Rose and Hobart Estate Company, stored waters of the Stanislaus River in Union Reservoir, Silver Valley Reservoir and Utica Reservoir on tributaries of the Stanislaus River on the

headwaters thereof and conveyed these stored waters together with natural flow of the Stanislaus River out of the watershed of the latter stream and into the watershed of Angels Creek, which is also tributary to the Stanislaus River much lower down this stream. The waters were first used in the Angels Creek watershed for the purpose of generation of hydro electric energy at Murphy's Power Plant and lower down the stream for irrigation, domestic, mining and industrial purposes in the vicinity of the town of Angels Camp. The rights of Emma Rose and the Hobart Estate Company thus initiated are fully set forth in the Stanislaus Adjudication Decree entered November 14, 1929, to which reference is made.

On July 14, 1915, the Oakdale Irrigation District and the Utica Gold Mining Company and the Hobart Estate Company filed Application 77 to appropriate 62,836 acre feet per annum of the waters of Highland Creek, such waters to be stored in Spicer's Meadow Reservoir and subsequently to be released for irrigation and power purposes. The application was prepared on the form used by the former State Water Commission which had jurisdiction over water for power purposes only and was the only form in use at the time of the filing of Application 77. Under date of July 20, 1915, the applicants were advised by this office that under the Water Commission Act then in existence, separate applications were required for agricultural and for power purposes, and as the fees had been paid for agricultural purposes only, Application 77 would hold a priority for such purposes only and that until an additional filing fee was paid for power purposes the application for such use would be considered as not being filed.

On August 4, 1915, an application was filed by the Utica Gold Mining Company and Hobart Estate Company which was given the number 77a due

to the fact that other intervening applications had been filed. As filed, Application 77a proposed to appropriate for power purposes 62,836 acre feet per annum of the waters of Highland Creek to be stored in Spicer's Meadow Reservoir on Highland Creek and used for the generation of electrical energy at a power plant to be constructed on the Stanislaus River within the SW $\frac{1}{4}$  of NW $\frac{1}{4}$  of Section 6, T 3 N, R 15 E, M.D.B.&M.; the water after use for power purposes to be returned to the Stanislaus River at the tail race of said power plant. The application was advertised but action was delayed largely through the inability of the Oakdale Irrigation District to reach a decision as to whether or not it desired to participate in the project under its Application 77, the two being related projects. The Oakdale Irrigation District eventually decided to construct the Melones Reservoir on the main Stanislaus River and on August 8, 1922, Application 77 was cancelled at the request of the District.

Application 77a was then filed in an amended form on September 11, 1922, the quantity originally named being reduced to 6,144 acre feet based upon the capacity of Spicer's Meadow reservoir with a 60 foot dam, and the place of use was changed to Murphy's Power House within the SE $\frac{1}{4}$  of SW $\frac{1}{4}$  of Section 33, T 4 N, R 14 E, M.D.B.&M., the water to be returned to the Stanislaus River by way of Angels Creek at a point within Section 34, T 2 N, R 13 E, M.D.B.&M., said point being below Angels Creek power house.

On December 29, 1922, Emma Rose and the Hobart Estate Company applied for a license to the Federal Power Commission for the construction of Spicer's Meadow Reservoir, being a modification of its Project 95 then before the Commission for the development of a power house to be located on the

Stanislaus River. Paragraph 3 of the application stated as follows:

"The water from Spicer's Meadows reservoir will be used to increase as well as to regulate the flow available at the Company's existing intake in Section 35, Tp. 5 North, R 15 East, M.B.B.&M., for use through a conduit that has been operated for many years conveying water to a power house in Section 33, Tp 4 North, R 14 East and through a lower development at Angels. The reservoir will therefore be used in conjunction with existing storage at the Silver Valley, Union and Utica reservoirs on North Fork proper, - also operated many years by the Company for domestic, power and mining supplies."

Paragraph 5 of the application to the Federal Power Commission states as follows:

"The most important power plant operated by the applicant is the existing power plant in the vicinity of the town of Murphy's, Calaveras County; a secondary plant is installed at Angels. These plants have supplied power to Angels and neighboring mines and communities, as stated above. Growth of load and occasional shortage of water has made it necessary to install new storage in addition to the old reservoirs which have approximately the following capacities:

Silver Valley	4,584 acre feet
Union	1,988 acre feet
Utica	<u>2,400</u> acre feet
Total	8,977 acre feet

Although Spicer's Meadows reservoir is on Highland Creek, it will be operated in conjunction with the other reservoirs so that the flow at the head of the existing Utica conduit will be maintained as if fed from a single storage source. After passing through the ditch and being used for power at the plant near Murphy's, water will be discharged and allowed to run down Angels Creek and will be re-diverted about three miles below into Angels ditch (a conduit of 50 second feet capacity, located entirely on patented land) through which the supply will be delivered (as heretofore) to a small fore-bay reservoir at Angels, and dropped through a head of 430 feet to a small power house at the applicants mine. A 450 horsepower induction motor (operated as a generator) and a 250 KVA generator are installed at this point, and since the mine was shut down in 1918 have been used chiefly as a public utility supply; this use will continue unless the applicants later find it profitable to reopen the mines, in which event the power generated at this drop will again be used to run the compressors."



Exhibit M-2 filed in connection with the application to the Federal Power Commission contains the following statement with respect to Angels Power Plant:

"The Angels plant may be considered a temporary project to be used only during such time as the Company's mines at Angels are shut down. If, however, they are permanently shut down, it will become a permanent power project. The plant was first operated for strictly power purposes in 1918."

On January 5, 1923, paragraph 23 of Application 77a was amended by this office to indicate that the water after use for power purposes was to be returned to Angels Creek immediately below the Murphy's power house at a point within the SW $\frac{1}{4}$  of Section 33, T 4 N, R 14 E, M.D.B.&M. The authority for the amendment was the project map filed in this office on December 14, 1922, which showed Murphy's Power Plant as the place of use only. The application was amended without first directing the applicant's attention to the apparent necessity of the change in point of return.

On February 8, 1923, Application 77a was approved by the issuance of Permit 1303 allowing the storage of 6144 acre feet per annum at Spicer's Meadow reservoir based upon the amount of water which could be stored behind a 60 foot dam.

On July 26, 1926, the Federal Power Commission granted the applicants a license giving them an easement to the land to be flooded by the water impounded by a 70 foot dam. It became apparent however that Application 77a, Permit 1303 did not provide for the full storage capacity of the reservoir and on April 11, 1927, Emma Rose and the Hobart Estate Company filed Application 5414. This application as amended requested permission to store an additional 4656 acre feet per annum in Spicer's Meadow reservoir,

thus together with Application 77a as amended, making a total storage in that reservoir of 10,800 acre feet per annum. Pursuant to this application Permit 2957 was issued on January 24, 1928, naming Murphy's Power Plant as the sole place of use. Although no reference was made in Application 5414, Permit 2957 to Angels Power Plant it was stated therein that the water after use for power purposes was to be returned via Angels Creek to the Stanislaus River at a point within the SW $\frac{1}{4}$  of SW $\frac{1}{4}$  of Section 34, T 2 N, R 13 E, M.D.B.&M. which point is below the Angels Creek Power House.

On July 1, 1927, the Calaveras Water Users Association filed Application 5592 proposing an appropriation of 40 cubic feet per second (not to exceed 10,800 acre feet per annum) as the same may be available from the regulated flow of Highland Creek resulting from the discharge into Angels Creek immediately below Murphy's Power Plant, the water to be used for agricultural and domestic purposes. Five points of diversion were named in the application, four of which were on Angels Creek between Murphy's and Angels Power Plants and one below Angels Power Plant. Four of the five ditches proposed to be used are the property of the Utica Mining Company and all thereof are the same through which the Company has been furnishing water to present members of the Association.

As the use of Spicer's Meadow stored water would by such an appropriation be made impossible at Angels Power Plant, Emma Rose and Hobart Estate Company filed a petition on January 28, 1930, to change or alter the place of use under their permits by including the Angels Power Plant as an additional place of use under Applications 77a and 5414 and being in doubt as to the proper procedure in seeking the additional use, they also filed Application 6545 on January 29, 1930, for the purpose of using at the Angels

Power Plant, the same 10,800 acre feet of stored water as was applied for under Applications 77a and 5414.

#### CLAIMANTS

1. Emma Rose and the Hobart Estate Company, operating as the Utica Mining Company, who have the privilege of storing water at Spicer's Meadow reservoir and conveying it over to Angels Creek for use through Murphy's Power Plant.

2. The Calaveras Water Users Association which has filed an application to appropriate waters stored on Highland Creek after same have been conveyed into the Angels Creek watershed and discharged at the tail race of Murphy's Power Plant.

3. The Oakdale and South San Joaquin Irrigation Districts which store water in the Melones Reservoir and divert water at Goodwin dam for irrigation purposes both of which points are located on Stanislaus River below the confluence of Angels Creek with said river.

4. The Sierra and San Francisco Power Company and its lessee the Pacific Gas & Electric Company which operate a power plant below Melones Dam where these waters if undisturbed would later become available for use.

#### THE PROBLEM

The problem which is presented here therefore involves the question as to who is rightfully entitled to the use of the 10,800 acre feet stored in Spicer's Meadow Reservoir after the same has been conveyed into the Angels Creek watershed from Stanislaus River by Utica Mining Company and used at Murphy's Power House and released into Angels Creek at the tailrace of said power house.

ORDER OF PRIORITIES

The claims of right involved in this particular problem upon which these various claimants stand are, as indicated by the order of determination referred to above and the applications filed with this office, in the following order:

1. The decreed rights of Oakdale and South San Joaquin Irrigation Districts as set forth in the Stanislaus Decree. The rights so decreed are as follows:

<u>Date</u>	<u>Source</u>	<u>Amount</u>
1853	Stanislaus River	5 c.f.s.
1885	" "	127 "
1902	" "	66.2 "
1909	" "	847.8 "
1909	" "	770.6 " (incomplete)

The water is used for irrigation purposes within the boundaries of the Districts.

2. The decreed rights of Emma Rose and Hobart Estate Company as set forth in the Stanislaus Decree. The rights so decreed are as follows:

<u>Date</u>	<u>Source</u>	<u>Amount</u>
1853	North Fork Stanislaus River and tributaries	25 c.f.s.
1857	" " " " " "	780 ac. ft.
1876	" " " " " "	30 c.f.s.
1883	" " " " " "	520 ac. ft.
1886	" " " " " "	30 c.f.s.
1888	" " " " " "	3,800 ac. ft.
1898	" " " " " "	700 "
1906	" " " " " "	800 "
1909	" " " " " "	2,400 "
1914	" " " " " "	3 c.f.s.

Emma Rose and Hobart Estate Company have used these waters for power, irrigation, domestic and industrial purposes in the Angels Creek watershed as a public utility in the territory surrounding Angels.

3. Application 77a filed August 4, 1915, and approved February 8, 1923, by issuance of Permit 1303 allowing Emma Rose and Hobart Estate Company an appropriation of 6,144 acre feet per annum to be collected throughout the entire year to storage in Spicer's Meadow Reservoir on the North Fork of Stanislaus River

which waters are taken by conduit out of that watershed and used through Murphy's power plant and released into Angels Creek. These constitute a portion of the particular waters involved in this problem. The reservoir has been partially constructed and the water has been used together with waters claimed under earlier rights for power purposes at both Murphy's and Angels power plants.

4. Application 1081 of the Oakdale and South San Joaquin Irrigation Districts filed September 20, 1918, and approved on June 29, 1925, by issuance of Permit 2104 allowing the Districts the privilege of storing 96,195 acre feet per annum to be collected throughout the entire year to storage in the Melones reservoir on the Stanislaus River at a point downstream from Spicer's Meadow reservoir and at a point downstream from where the waters appropriated under Application 77a would return to the Stanislaus River if they were allowed to flow along the natural water courses after use by applicant without being diverted.

5. Application 2480 of Sierra and San Francisco Power Company filed July 29, 1921, approved on May 29, 1925, by issuance of Permit 2105 and right confirmed by issuance of License 985 on March 2, 1931, for an amount not to exceed during any 15 day period, an average of 1500 cubic feet per second of the waters of the Stanislaus River, by direct diversion throughout the entire year and 132,450 acre feet per annum by storage in the Melones reservoir to be collected from about October 1st to about July 1st of each season. The water is used for power purposes in the Melones Power Plant.

A special clause is incorporated in the license as follows:

"It is expressly recognized by all parties hereto that no rights to water, except stored water, are acquired under this license which may in the future operate to the disadvantage of irrigation development."

6. Application 2534 filed by the South San Joaquin Irrigation District on August 29, 1921, approved on August 26, 1923, by issuance of Permit 1147 and right confirmed by issuance of license 804 on May 9, 1927, confirming the right to an appropriation from the Stanislaus River for agricultural use of an amount not to exceed 36,000 acre feet per annum to be collected to storage in the Woodward Reservoir from about September 1st to about May 1st of each season. Water is diverted at the Goodwin dam at a point below the Melones reservoir at a rate not to exceed 950 cubic feet per second.

7. Application 3091 filed October 19, 1922, by Oakdale and South San Joaquin Irrigation Districts, and approved on May 26, 1925, by issuance of Permit 2106 allowing an appropriation of 23,704 acre feet per annum of the waters of the Stanislaus River to be collected to storage throughout the entire year in the Melones reservoir and to be used for irrigation purposes within the boundaries of the Districts.

8. Application 5414 of Emma Rose and Hobart Estate Company filed April 11, 1927, and approved on January 24, 1929, by issuance of Permit 2957 allowing an appropriation of 4,656 acre feet per annum of the waters of Highland Creek by means of storage throughout the entire year in Spicer's Meadow Reservoir. The application and permit is supplemental to Application 77a, Permit 1303 described above, the waters to be used at the Murphy's power plant and returned via Angels Creek to Stanislaus river from whence they would flow if undisturbed to the Melones Reservoir. Construction under this application and permit is incomplete and none of the water has been used. They form a part of the particular waters sought to be appropriated by the Calaveras Water Users Association under Application 5592.

9. Application 5592 of the Calaveras Water Users Association filed July 1, 1927. Application 5592 seeks to appropriate 40 cubic feet per

second (not to exceed 10,800 acre feet per annum) of the regulated flow of Highland Creek resulting from the operation of Highland Reservoir and discharged into Angels Creek below Murphy's Power Plant. The matter of Application 5592 was set for hearing on January 29, 1930, but action was withheld because of considerations which are apparent by reference to items 11 and 12 following.

10. Application 5548 of the Department of Finance filed July 30, 1927. It proposes among several other appropriations, an appropriation of 65,000 acre feet per annum throughout the entire year of the waters of the North Fork of Stanislaus River to be stored in Spicer's Meadow Reservoir on Highland Creek for irrigation and domestic purposes. The application is incomplete.

11. Petitions filed by Emma Rose and Hobart Estate Company on January 28, 1930, seeking to change the place of use under Applications 77a and 5414, the purpose being to secure on behalf of the petitioners the right to use at Angels Power Plant, the same 10,800 acre feet stored under Applications 77a and 5414.

12. Application 6545 filed by Emma Rose and Hobart Estate Company. As explained heretofore the purpose of filing Application 6545 was to enable the applicants to obtain permission to use the water as set forth in the petitions described in item 11 in case that the filing of the petitions was not the proper procedure to initiate such a right.

EVIDENCE OF ORIGINAL INTENT OF EMMA ROSE AND HOBART ESTATE COMPANY

The evidence indicates that at the time Application 77a was first filed (August 4, 1915) there was no Angels Power House in existence nor was it the intention of the applicants to use the water for power purposes at Murphy's Power House although that power house was in existence and in operation.

However, at the time application 77a was amended to specify Murphy's Power House as a place of use instead of a power house on the Stanislaus River (September 11, 1922) and at the time of the filing of Application 5414 (April 11, 1927) the Angels Power House was in operation and was in operation prior to December 29, 1922, the date of the application to the Federal Power Commission for a license.

As shown above, the application to the Federal Power Commission indicates conclusively that the applicants had in mind the utilization of the water from Spicer's Meadow reservoir through the Angels Power Plant as well as through the Murphy's Power Plant.

Attention is also directed to the fact that in amended Application 77a as filed September 11, 1922, and in Application 5414 filed April 11, 1927, the point of return of the waters was described as being on the Stanislaus River within Section 34, T 2 N, R 15 E, M.D.B.2M. below the Angels Power Plant which might well indicate that further use of the water was in contemplation on Angels Creek between the tail race of Murphy's Power Plant and the junction of Angels Creek with the Stanislaus River.

If the applicant's attention had been directed to the fact that the point of return specified in amended Application 77a was to be corrected to show it at the tail race of Murphy's Power Plant instead of at the junction of Angels Creek and the Stanislaus River, prior to the issuance of permit, it is possible that the matter would have been cleared up at that time.

Mr. McCurdy testified that it was not deemed necessary to specify at the time of the filing of the applications that the water stored in Spicer's Meadow Reservoir was to be used at Angels as well as at Murphy's Power House, as it was foreign water developed by themselves and therefore they had a right to use it as they saw fit. (Transcript page 121)



Testimony presented at the hearing indicated that prior to the installation of the Angels Plant the same amount of water as is now being used at that plant was used in the operation of a cross hoist, Stickle hoist, two water compressors, a saw mill and numerous incidental power uses; that every year the Utica Mining Company had been short of water for power purposes at the mines for the generation of electrical energy at Angels and Murphy's Power Plants. (Transcript p. 141.)

Mr. McCurdy also testified that since he had been connected with the management of the Company beginning in 1917 he had never known of any single year except 1927 when the Company had sufficient water to operate the plants to capacity. (Transcript p. 146)

Testimony presented at the hearing indicated that the invested capital in the Utica Water and Power System was in excess of \$1,100,000, that about \$175,000 had already been expended on Spicer's Meadow Reservoir and that it was proposed to increase the present capacity to that specified in the permits at an additional cost of \$120,000 to \$140,000, and that the average annual cost of maintaining the Utica conduit was approximately \$19,000.

Abandonment of this stored water at the tail race of Murphy's Power Plant when it could so readily be used at the Angels Power Plant and when it was so necessary to the successful operation of that plant would be irrational and is unthinkable. The failure of Emma Rose and Hobart Estate Company to include Angels Power House as a place of use under Application 77a when amending that application to include the Murphy's Power Plant and when filing Application 5414 can only be accounted for either as an oversight or on account of the belief of the Utica Mining Company that such was unnecessary.

Weil in "Water Rights in the Western States", 3rd edition, Vol.

1, pp. 37 and 38, in discussing recapture states:

"If the discharge or escape from the ditch or tunnel, or reservoir, or other structure, is made not because it is waste, but for convenience in handling it, intending at the time to recapture it at some lower point, it is not abandoned, for abandonment is always a question of intention. In such case, if the water enters a stream, where such intention to retain ownership of the artificial increment exists, the water may be reclaimed from the stream by its producer. The usufructuary right of the stream claimants below extends only to the natural flow of the stream, the specific waters of which are nobody's property; while the property right in the water itself extends, free of such usufruct in others, to whatever liquid or artificial increment has, without intent to abandon, been artificially added, produced or introduced into the channel by the labor of man. Such increment belongs to the man whose labor produced it or brought it there when naturally it would not have existed there; having become his property by artificial development and brought under his possession and control or 'captured', it may, in such a case be 'recaptured' to use an expression of Judge Fields. Water can be discharged into a stream as a link in a ditch line and taken out again, though there are prior appropriators or existing riparian owners on the same stream. A stream may be used to carry stored water. It is not abandoned where there is intent to recapture it."

At page 40, he states

"The intention not to abandon the water turns the stream channel into a mere means of conveyance."

and

"Water may be 'developed' by a tunnel distant from and unconnected with the stream and allowed to flow from the tunnel into the stream, and where the facts show this to be new and foreign water which would not naturally have formed part of the stream, the tunnel owner, if he so intends at the time he caused this increment, may reclaim it from the stream." (Hayberry v. Alhambra etc. Co. 135 Cal. 444, 54 Pac. 550, 53 Pac. 68.)

At page 43, Mr. Weil states as follows:

"The intent to recapture the water must be present at the time it is discharged from control and must be clearly shown; otherwise an injunction will lie to prevent its recapture. The intent to recapture is essential, and without it, the water is abandoned; and, as previously set forth, cannot be reclaimed against claimants on the stream, existing at the time the recapture is attempted."

"The rule permitting recapture of artificial increments added to the stream without intent to abandon applies under the law of riparian rights as much as under the law of appropriation."

In respect to Evidence of Intention Weil at page 412 states:

"How is the intention shown? First of course, from the notice; but it may be drawn also from the appropriators acts, the manner in which they work, the general size of the ditch, etc. They aid in interpreting the notice."

From the content of the application to the Federal Power Commission and the course of conduct of the Utica Mining Company it must be taken as conclusively established, not only that the Company did not intend to abandon the water after use at the Murphy's plant but also that the Company at all times intended to use the Spicer's Meadow water in a manner similar to the use made of its other stored water, not only at Murphy's power plant, but also at the Angels Creek plant.

In the instant case the waters in question are clearly foreign waters brought into the Angels Creek watershed from the Highland Creek watershed. The intent on the part of Elma Rose and Hobart Estate Company to utilize these waters through the Angels Power Plant was undoubtedly present at the time the waters were discharged from control as at that time the waters were actually used through the lower power house. It also appears that not only was it the intent to use these waters through the lower power house at the time they were discharged from control but also at the time the applicants first conceived the idea of diverting the water stored in Spicer's Meadow reservoir for power purposes through Murphy's Power House. Of this fact Applicant Calaveras Water Users Association, Inc., had constructive notice, at least through the existing Angels Power House and ditch if not also through the past use thereof.

The individual members of the association, or the most of them at any rate, are, and for at least a time antedating the filing of Application 5414 and the amendment of Application 77a, were users of water from the water system of the Utica Mining Company. It is axiomatic that means of knowledge is the equivalent of knowledge.

The petition of the Utica Mining Company is strictly an application to make an additional use of the waters appropriated under Applications 77a and 5414 but applying thereto a reasonably liberal interpretation we believe the same may justly be deemed an application to amend the applications and the permits in order that they may speak the truth by including therein the Angels Creek plant as an additional place of use. Such is obviously the effect of the petition. To this petition we believe, under all the facts and circumstances no valid objection is presented by the Calaveras Water Users Association.

It is therefore the opinion of this office that the right of Emma Rose and Hobart Estate Company to utilize the water under Applications 77a and 5414 through the Angels Power Plant as well as through the Murphy's Power Plant should be granted by the approval of the petition to change the place of use filed in this office on January 28, 1930.

RIGHT OF IMPORTER OF FOREIGN SUPPLY TO CHANGE PROJECT  
PRIOR TO CONSERVATION REFERENCE

Spicer's Meadow Reservoir was completed to a capacity of 3,200 acre feet late in November 1929 and filled between January 1st and May 1, 1930. Water was released therefrom during the period from about July 1, 1930, to August 17, 1930, at which later date the reservoir was empty.  
Association  
The Calaveras Water Users/application was filed July 1, 1927, and the

Utica Mining Company filed its petition to change the place of use and its Application 6545 on January 28, 1930, and on January 29, 1930, respectively, before any water was stored under Application 5414 and before any water had been released from storage under Application 77a.

The fact that the Calaveras Water Users Association filed Application 5592 prior to the importation of water from Spicer's Meadow Reservoir we believe is a decisive and controlling element insofar as the contest lies between the Calaveras Water Users Association on the one hand and Emma Rose and the Hobart Estate Company on the other hand.

In so far as these parties are concerned we will state the case most unfavorably to the latter by neglecting the evidence of their intent to recapture and re-use at Angels Power House and by even assuming that they originally had no such intent. Under such an assumption they first filed applications to import water into Angels Creek from Highland Creek for use at Murphy's Power House only, thereupon and prior to actual importation the Association filed to recapture and re-use this water, and thereafter but prior to the importation of any water, Emma Rose and the Company filed applications and petitions to recapture and re-use at Angels Power House. The case thus presented is in no wise parallel to the circumstances which were decisive in previous cases decided by this Division or its predecessor in authority. Herein we are dealing with the would be importer of foreign water prior to the importation thereof and not deciding a case between parties neither of whom are or stand in comparable relationship to the importer of the waters in dispute and who are merely contesting for its usage after abandonment by the importer. This is therefore an entirely different case from that involved in the matter of Application 3648 of Waterford Irriga-

tion District and that involved in Applications 5109 and 5110 of the Phelan and Parrot interests to appropriate foreign water introduced into Butte Creek and abandoned by the Pacific Gas and Electric Company.

Herein the importer, prior to importation, and while his project is in the inceptive stages adds to his proposals of usage by including an additional place of use. May another party merely by filing a proposal to use the water at an intervening point between the time of the original filing and the amended, supplemental or additional filing of the importer, and before any actual importation is made, compel such importer, if and when he imports, to sacrifice the value of his project and dedicate it to such an interventor? Such a proposition contains its own repudiation. The interventor is in no wise a party to the importation, he contributes nothing to the cost thereof, he has no legal interest therein, he cannot compel it to be made, neither can he enforce its continuance, and he has no control thereof. To recognize such an intervening claimant might well result in destroying the value of a prior enterprise and defeat its consummation. It would be allowing an extraneous party to take away benefits which the real party in interest is clearly entitled to enjoy as a part and parcel of his contemplated enterprise. It would be allowing a new comer to take benefits without burdens and to inject himself into and engraft himself upon the project of another without the latter's consent, against his will and to his detriment. The conclusion is that prior to the consummation of a project and prior to the actual importation of a foreign supply the importer thereof may change and add to his project regardless of interventors who would engraft themselves thereon and benefit therefrom if and when completed.

APPLICATION 5648 OF DEPARTMENT OF FINANCE

Application 5648 of the Department of Finance of the State of California was filed July 30, 1927. Among the appropriations sought thereunder it proposes to appropriate 65,000 acre feet of the waters of Highland Creek to be stored in the Spicer's Meadow Reservoir to be subsequently released for irrigation purposes.

This application was filed pursuant to the power granted by Chapter 286, Statutes of 1927 and seeks unappropriated waters only, it cannot therefore be interpreted as seeking to appropriate the 10,800 acre feet which has already been appropriated by the Utica Mining Company and which the Calaveras Water Users Association seeks to reappropriate under its prior Application 5592.

SECTION 15 OF WATER COMMISSION ACT INAPPLICABLE

A portion of the lands incorporated in the place of use described in Application 5592 has been served by the Utica Mining Company as a public utility. In 1926 the Company filed a petition with the California Railroad Commission seeking to abandon all irrigation, mining and domestic service from the North, South, Angels, Union and Gold Cliff ditches other than the municipal supply to the town of Angels Camp. The petition was denied by the Railroad Commission and a suit was filed in the United States District Court. On October 16, 1931, a decree was entered in the Southern Division of the United States District Court for the Northern District of California, Third Division setting aside the decision of the Railroad Commission and definitely stating that the Utica Mining Company was entitled to abandon and discontinue said public utility water service.

One of the objections advanced by the Calaveras Water Users As-

sociation against the petition to change the place of use and Application 6545 filed by Emma Rose and the Hobart Estate Company is that a denial of the Association's application in favor of the petition or application of Emma Rose and Hobart Estate Company would work a great hardship upon the Association by virtue of the fact that any other water supply would be so expensive that it would be practically inaccessible to them. The Association contends that irrigation use is a higher use than power use and would invoke Section 15 of the Water Commission Act in support of its Application 5592.

Considering Section 15 in connection with other sections of the Water Commission Act and also in the light of the many Superior Court decisions which in past years have construed the fundamental principles of the doctrine of appropriation of water it is our opinion that the act does not empower the Division to impose any conditions which as a legislature it might consider applicable or even to speculate upon what might or might not prove to be of general public welfare and then act according to its best estimate as to what the future developments of this State may prove to be in the public interest. Outside of a manifest and indisputable certainty as to what is against public welfare we would hesitate to deny an application or petition as not best serving the public interest.

In this particular instance however the filing of the petition by Emma Rose and Hobart Estate Company to change the place of use does not initiate any new right. As shown heretofore it appears that they already have a right to recapture and re-use the foreign water brought into Angels Creek watershed until such water is actually abandoned. The petition if granted will result in so amending Application 77a, Permit 1503 and Applica-



tion 5414, Permit 2957 that the permit will clearly define the project of the Petitioners and the invocation of Section 15 of the Water Commission Act would not appear to be in order.

THERE IS INSUFFICIENT UNAPPROPRIATED WATER AVAILABLE  
DURING THE IRRIGATION SEASON TO JUSTIFY THE APPROVAL  
OF APPLICATION 5592

The amount of water sought by the Calaveras Water Users Association under Application 5592 may be segregated into separate quantities, i.e.

- (a) The 6,144 acre feet per annum which the Utica Mining Company has the privilege of using under Application 77a, Permit 1303, and
- (b) the 4,656 acre feet per annum which the Utica Mining Company has the privilege of using under Application 5414, Permit 2957.

Section 17 of the Water Commission Act provides that water which has been appropriated and used and allowed to flow back into a stream after such use is subject to reappropriation.

In Decision A 3648 D. 192 in the matter of Application 3648 of the Waterford Irrigation District, this office held

"\*\*\*\*\* that water of one season or period of time is not water of another season or period of time, that water made to flow in another season or period of time is not natural flow of the season or period of time wherein it is made to flow; that rights by appropriation are measured and limited by time or season of use as well as by amount of water; and waters of one season or period of time which are in excess of vested rights of use during that season or period of time and cannot be used by direct flow appropriators during the time of their natural occurrence are not within the right of such direct flow appropriations."

The decision is even more applicable in its reasoning to the facts in the case of Application 5592 because therein the water applied for is foreign in source as well as foreign in time or season.

The waters which the Utica Mining Company has the privilege of using under Application 77a, Permit 1303 may be used under Applications 1031,

2460, 2524 and 3091 filed subsequently by the Oakdale and South San Joaquin Irrigation Districts and the Sierra and San Francisco Power Company insofar as these waters may be needed to satisfy their prior rights. Although there is a clause in the license issued on Application 2460 of the Sierra and San Francisco Power Company to the effect that no rights to water except stored water were acquired thereunder which might in the future operate to the disadvantage of irrigation development, the water diverted by the Power Company during the irrigation season is utilized by the Oakdale and South San Joaquin Irrigation Districts and as hereafter shown would not be available for the use of the Calaveras Water Users Association.

A comparison of the flow in the Stanislaus River as measured at a point about six miles above Knights Ferry with the total amount of water diverted by the Oakdale and South San Joaquin Irrigation Districts at the headgates of their respective ditches about two miles below the point of measurement of the U.S.G.S. described above, indicates that there is little if any water available for appropriation in the Stanislaus River during the months of July, August and September which has not already been appropriated and used by the two irrigation districts.

on January 29, 1930,

Testimony presented at the hearing/indicated that the Sierra and San Francisco Power Company began the operation of its Melones Plant on June 1, 1927, and that it has been operated thereafter continuously utilizing all of the natural and regulated flow of the Stanislaus River at the Melones dam and power plant with exception of water in the stream during the periods from March 1928 to June 17, 1928, and from June 17, 1929, to June 22, 1929, during which periods there was spill over the dam.

On October 1, 1931, Mr. McCurdy, managing engineer of Utica Mining Company advised this office that during the years 1930 to 1930, inclusive, the average date of commencement of release from storage at its mountain reservoirs was about July 12th, and that the first beneficial rain occurred about the first of November.

It may therefore be concluded that during the period that water is spilling at the Melones dam there is no release from mountain storage by the Utica Mining Company and that during the remainder of the year any water released from storage under Application 77a of the Utica Mining Company is or will be fully appropriated by the Oakdale and South San Joaquin Irrigation Districts and/or by the Sierra and San Francisco Power Company under prior applications and is not available for appropriation under Application 5592 of the Calaveras Water Users Association.

As to the waters released from storage under Application 5414, Permit 2957, of the Utica Mining Company, these waters are subject to appropriation by the Calaveras Water Users Association under its Application 5592, this being the first application filed subsequent to Application 5414.

The testimony presented at the hearing indicates conclusively that release of stored waters from the other reservoirs of the Utica Mining Company will be made before any release is made from Spicer's Meadow Reservoir due to the fact that the amount of water lost from the other reservoirs due to evaporation and leakage is much greater than that at Spicer's Meadow Reservoir and that release from Spicer's Meadow reservoir will not be commenced prior to September 1 to September 15 depending upon the season. As the waters stored under Application 77a will necessarily be released prior to release of waters stored under Application 5414 it will probably be some two months later before release under the later application is commenced.

In the event that the water should be released during the early part of the irrigation season, diversion could be made only through the Jones Mine ditch as it is our view as stated above that the Utica Mining Company has the privilege of using the water through both Murphy's and Angels Power Plants. The amount of appropriation under these circumstances would necessarily be limited to the 8 cubic feet per second which has been stated in the application as the amount to be diverted through this ditch and the area which can be irrigated is reduced to the amount of land which may be susceptible of irrigation from the ditch. Inasmuch however as the waters are to be released at a time when little or no use can be made of them for agricultural purposes it is not seen wherein the project proposed is practicable or that any useful and beneficial purpose may be served by the approval of Application 5892. It should therefore be rejected.

It is clear that no injury to South San Joaquin and Oakdale Irrigation Districts would result by reason of the approval of the petition to change place of use under Applications 77a and 5414 and the proposed re-use of water through the Angels plant.

#### CONCLUSION

1. The petition to change place of use under Applications 77a and 5414 appears to involve no actual change in plans of applicant but is in effect merely an effort to correct an error in the description of the project covered by these two applications. Before the stored water was available under these two applications to any other users applicant filed a petition to correct this error. It is our conclusion that the petition should be granted and that Emma Rose and Hobart Estate Company should be

allowed to amend these two applications by changing the description of the place of use therein to include a second place of use, to wit Angels Power House.

2. Application 5592 of the Calaveras Water Users Association should be rejected and cancelled upon the records of the Division of Water Resources as it appears that there will be insufficient unappropriated water released during the irrigation season to justify the approval thereof.

3. Application 6545 of Emma Rose and Utica Mining Company should be rejected and cancelled upon the records of the Division of Water Resources as there is no apparent necessity therefor.

ORDER

Applications 5592 and 6545 for permits and a petition to change the place of use under Application 77a, Permit 1303 and Application 5414, Permit 2957 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 the said petition for change in place of use under Application 77a, Permit 1303 and Application 5414, Permit 2957 be granted, and

IT IS FURTHER ORDERED that Applications 5592 and 6545 be rejected and cancelled upon the records of the Division of Water Resources.

WITNESS my hand and the seal of the Department of Public Works of the State of California, this 24<sup>th</sup> day of October, 1932.

EDWARD HYATT, State Engineer

BY Harold Conkling  
Deputy

WES: M  
SEB: M