

Standard

STATE OF CALIFORNIA
DEPARTMENT OF PUBLIC WORKS
DIVISION OF WATER RESOURCES

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In the matter of Application 8364 by W. J. Callick to appropriate for mining purposes from Middle Fork of Humbug Creek, a tributary of Klamath River in Siskiyou County.

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DECISION A. 8364 D-382

Decided *February 6, 1936.*

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APPEARANCES AT HEARING HELD JANUARY 21, 1936, AT YREKA, CALIFORNIA

For Applicant

W. J. Callick

James D. Fairchild

For Protestant

W. A. Johnston

James Davis

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

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O P I N I O N

Application 8364 is to appropriate one cubic foot per second for mining purposes from Middle Fork of Humbug Creek, a tributary of Klamath River, in Siskiyou County, the diversion to be made in the SW $\frac{1}{4}$ of SW $\frac{1}{4}$ of Section 10, T 45 N, R 8 W, M.D.B.&M. and the use to be made within the S $\frac{1}{2}$ of NW $\frac{1}{4}$ and N $\frac{1}{2}$ of SW $\frac{1}{4}$ of Section 11, T 45 N, R 8 W, M.D.B.&M. The diversion ditch is some 2000 feet in length, is already constructed, and crosses mining claims of one W. A. Johnston who protests approval of the application on the grounds that there is no surplus or unappropriated water and that the project proposed by applicant involves the

operation of a ditch across his (protestant's) mining claims for which he will deny an easement.

Application 8364 was completed as required by the Water Commission Act and the rules and regulations of the Division of Water Resources, was duly noticed as required by law, was protested, and a hearing has been held upon the protest with due notice to the parties in interest.

It appears that the ditch which applicant has used and proposes to use under this application was constructed by Ryder and Fiddler about 1927 for the purpose of working certain mining property which they had under lease from one Thrash and also other claims and which included a part of the mining claims now held and operated by the applicant, Thrash having been operating in this area for some 15 years or more at that time. Ryder and Fiddler apparently assigned their rights in the ditch to Thrash who about 1928 sold a half interest in his property and water rights to one Edward W. Nolan.

Nolan used the ditch, according to his testimony, in the years 1928, 1929, and 1930 at about which time Mr. Thrash died. His use however was limited to the period beginning about July 1st of each season and did not continue on after the winter storms. Neither Ryder, Fiddler, Thrash, nor Nolan, so far as the record shows proceeded as appropriators, and whatever use they made must therefore have been based upon claim of riparian right.

In 1930 Mr. Nolan abandoned his mining claims on Middle Fork of Humbug Creek and upon his suggestion they were relocated by one W. A. Johnston, the protestant in this matter, who in 1935 took an assignment from Mr. Nolan of whatever ditch rights he had. It is not clear how these rights could have been of any substantial value unless it be the physical ditch property, because he had neither acquired nor initiated any appropriative rights so far as the

record shows and he had abandoned some five years previously any mining claims which might have afforded a basis for a claim of riparian right. He testified that during the time he was interested in the property he did not observe any use by Mr. Callick or others, and had no knowledge of a use of the ditch by Mr. Callick.

W. J. Callick, the applicant, located certain claims on Middle Humbug about 1928, after abandonment thereof by Fiddler and Ryder. He began to use the ditch which he proposes to use under this application, in 1929 and according to the testimony used it each year thereafter down to the present year. Whether or not he was led to believe he had succeeded in some way to the Ryder and Fiddler rights in the ditch and by what means, is not clear. In any case he asserted such right and when Mr. Johnston, the protestant, located the Thrash-Nolan claims in 1930, Mr. Callick asserted his superior right to the use of the ditch. This assertion of right was of such a nature and so enforced that in 1933 and 1934 Mr. Johnston paid Mr. Callick for its use rather than to go to court about it and he himself testified that in other years Mr. Callick had turned the water out of the ditch whenever he wished to, and he (Mr. Johnston) had not insisted upon or enforced any rights which he might have had. This he did not undertake to do until after he took a quit claim to the so-called Nolan rights in the spring of 1935. There then followed a controversy between applicant and protestant over the right to use the ditch.

Mr. Callick's son testified, and it is to be inferred from Mr. Callick's testimony, that there was no assertion of right by Johnston to use the ditch until 1935, and when the right was asserted he filed the application which is here involved. It may well have been that he used the ditch in the spring and early summer months while Nolan was interested in the property without Nolan.

being aware of the fact because the evidence is to the effect that the flow in Middle Fork of Humbug Creek falls to a point about July 1st or soon after so that it is too small to be of value and Mr. Nolan did not attempt to use it until about this time.

The evidence indicates that since Mr. Johnston located his mining claims which are here involved in 1930 the use of the ditch which he has made, and which has been made by lessees of his property, has been limited to the domestic use of some five persons who carry their water from a trough outside the house, to the irrigation of some 1/4 acre of garden truck, 100 raspberry plants, and 14 or 15 fruit trees, and to mining use by a 5 ton ball mill in 1932-33 and a 15 ton stamp mill since about September, 1935. No conclusive or satisfactory evidence was presented as to the normal discharge of Middle Fork of Humbug Creek during the period from about February 1st to about August 1st. One would infer that during the months of January, February and March, and even later immediately following storms there is a flow in the stream exceeding the capacity of the ditch in question, which has a box flume 12" x 12" for a short distance at the head and will probably carry more than is here applied for. We would infer that the discharge of the creek decreases gradually as the summer approaches and that by August 1st it has reached a point where it will no longer flow through to the Callick property. During these intervening months however (i.e. March to August) we would infer that the flow of the creek quite generally exceeds what has been beneficially used heretofore by Mr. Johnston.

Mr. Johnston asserts a riparian right in the waters of Middle Fork of Humbug Creek and this claim was not contested. He also testified that he had

placer ground which he could and would operate if water were available, and there was no evidence to the contrary. However, the practice of the Division with respect to prospective use by riparian owners is well established. The Division will not deny an application to appropriate upon a showing of prospective use by a riparian owner. Article XIV, Section 3 of the Constitution of the State of California declares that it is in the public interest that the waters of the State of California be placed to the highest beneficial use of which they are capable. When not in use by riparian owners or by prior appropriators the waters of the streams of California are subject to appropriation and use by others provided they can gain access to the source. Therefore when not in use by Mr. Johnston under valid claim of riparian right the waters of Middle Fork of Humbug Creek are, so far as the record shows, available for appropriation and use by Mr. Callick under Application 8364. If necessary to protect his riparian right against an adverse use by Mr. Callick under Application 8364, when the waters in question are not needed and used by him, he has recourse through injunction.

CONCLUSION

It is concluded that the flow in Middle Fork of Humbug Creek during the period for which a permit is sought under Application 8364 exceeds any past use which has been made by W. A. Johnston, the protestant in this case. While he claims, and may well have riparian ground on which he could use the full normal flow of the creek during this period, the fact is that he has not as yet so used the same and that the applicant W. J. Callick began about 1928, and continued on through the years 1929, 1930, 1931, 1932, 1933, 1934 and until about April 1935, to divert the waters of the stream above him and convey the

said waters to and across the Johnston property without leave or hindrance by Mr. Johnston. It is a matter which this office cannot undertake to determine whether or not by adverse use Mr. Callick has obtained a right by prescription to use of the ditch in question and the waters of Middle Fork of Humbug Creek which is good as against Protestant Johnston. We are of the opinion that unless one of the parties will initiate and prosecute diligently a suit to determine this point the doubt as to right of way should be resolved in favor of applicant.

O R D E R

Application 8364 having been regularly filed and completed, having been duly noticed, a protest having been filed, a hearing upon the protest having been called and held as required by the Water Commission Act and the rules and regulations of the Division of Water Resources, and the Division now being fully advised in the premises:

IT IS HEREBY ORDERED that Application 8364 be approved and that a permit be issued as applied for subject to the usual terms and conditions.

WITNESS my hand and the seal of the Department of Public Works, State of California, this 6th day of February, 1936.

EDWARD HYATT, State Engineer

BY HAROLD CONKLIN

Deputy

(Seal)

KNB:MF