

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

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In the Matter of Application 8030, Permit 4782, by which
John A. Robison is allowed to appropriate water
from West Branch of Indian Creek in
Siskiyou County for mining and
domestic purposes.

DECISION A. 8030 - D 408

Decided *September 27, 1937*

APPEARANCES AT HEARING HELD August 9, 1937.

For Applicant

John A. Robison

F. W. Doeker,
Attorney at Law.

For Protestant

O. D. Wason

Tabbe, Tabbe & Correia
Attorneys at Law.

EXAMINER: Everett N. Bryan, Supervising Hydraulic Engineer, for
Harold Conkling, Deputy in Charge of Water Rights.

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O P I N I O N

This is a proceeding under the provisions of Sections 16 and 20 of the
Water Commission Act in which the permittee under Application 8030 has filed
a petition to change his point of diversion and said change has been protest-
ed by another permittee of the Division who alleges lack of diligence on the
part of the permittee under Application 8030 and demands that the permit
issued in approval of said application be revoked. The petition was duly
completed and noticed and being protested was set down for hearing in Yreka,
California, at 10:00 A. M. on Monday, August 9, 1937, after due notice to

the parties. Underlying the present proceeding is a past history of bitterness between the parties, a knowledge of which is necessary to a correct understanding of this case.

HISTORICAL STATEMENT RELATIVE TO ORIGIN OF CONTEST

The Classic Hill Ditch, which both parties have sought to obtain and use in connection with the water rights here involved was constructed and operated many years before passage of the Water Commission Act. It diverted out of what is known as West Branch of Indian Creek serving what were known as the Classic Hill Mines. The ditch in years immediately preceding 1933 was apparently not used throughout its length however and its operation appears to have been more or less irregular. One Scott Greening operated the ditch in these years, using the water only a very short distance below the intake, but not diverting to the Classic Hill Mines which are some $3\frac{1}{2}$ miles below the intake.

Immediately prior to October 1933 Greening transferred his interests to C. D. Wason. A. C. Hahn and George B. Riley appear to have been interested with Mr. Wason. Together they began the rehabilitation of the ditch throughout its length in the assumption that both their water rights and ditch rights were secure. Approximately \$4,000 were spent on this work between October 1, 1933 and July 1934. R. E. L. Morton and John A. Robison, his successor in interest under Application 8030, had full knowledge of this work and the plans of Messrs. Wason, Hahn and Riley.

On July 19, 1934, R. E. L. Morton filed Application 8030 seeking an appropriation of four second feet (later amended to $2\frac{1}{2}$ second feet) from West Branch of Indian Creek, the source of the Classic Hill Ditch. He stated it was his intention to use the Classic Hill Ditch which he consider-

ed open to relocation, but the description of location of his point of diversion proved erroneous and it became necessary for him to amend this description in order to make it coincide with the intake of said ditch.

Wason and Hahn vigorously protested this application (No. 8030) and while continuing to assert ownership and control of the Classic Hill Ditch and water rights in an abundance of caution filed an application (No. 8286) to appropriate twenty second feet from West Branch of Indian Creek through the Classic Hill Ditch and applied for and received from the U. S. Forest Service a license for the use of said ditch.

The Division then had pending before it two applications to appropriate from West Branch of Indian Creek through the Classic Hill Ditch. The later applicant was in possession of said ditch and held a license from the U. S. Forest Service for its use. The prior applicant claimed the ditch by reason of his earlier application to appropriate. In accordance with its usual practice the Division gave notice to the parties that it lacked authority to determine ownership of the ditch but would wait a reasonable time for either of the parties to proceed through regular channels to a determination of this issue, with the advice that unless within thirty days appropriate proceedings for this purpose had been initiated the Division would proceed as if the question had not been raised, and further advising Mr. Morten that unless he secured a right in the Classic Hill Ditch or built a parallel ditch his right must of course lapse.

At the expiration of thirty days the Division, having received no notice that steps were being taken to resolve this issue, issued permits in approval of both Applications 8030 and 8286 advising Mr. Morten that it should be understood approval of his Application 8030 conferred no rights in the Classic Hill Ditch.

Mr. Morton was advised by Mr. Wason prior to approval of these applications that he would not consent to a joint use of the ditch. Nevertheless Mr. John A. Robison, agent for Mr. Morton and subsequently his successor in interest, persisted in the hope that some arrangement might be worked out. He had two or three conversations with Mr. Hahn indicating his desire to use the ditch but apparently making no definite or firm offer of settlement except to indicate that if given permission he would bear his share of the cost of operation while he was actually diverting. There was no offer to bear any part of the cost of rehabilitating the ditch in connection with which he was fully advised there had been considerable expense.

Mr. Robison indicated prior to the approval of the Morton application that if unable to secure permission to use the Classic Hill Ditch he would build a parallel ditch. However three days before expiration of the time allowed within which to begin construction he petitioned to change his point of diversion downstream to the intake of an existing ditch diverting upon his own mining claim. It is this petition to change which has been protested by Wason and in connection with which he has alleged lack of diligence on the part of Morton and Robison and seeks revocation of their permit.

The ditch to which Mr. Robison seeks to change is one which likewise has existed for many years and has been subjected to a desultory and intermittent use. Mr. Robison himself diverted through it for a few days in 1934 to the Mayflower Group of Claims which are the place of use described in Application 8030. Since 1934, however, Mr. Robison has not been resident upon the property. Neither has he attempted to operate the property by lease or otherwise although relatives have from time to time with his knowledge and consent resided on these claims and prospected them.

DISCUSSION

The diligence and earnestness of Morton and Robison are in marked contrast with that of Wason and Hahn. Having full knowledge of the plans and purpose of the latter and the very considerable expenditure which they had recently made in connection with their project, Messrs. Morton and Robison sought to take advantage of Wason and Hahn's assumed weakness in title by filing an application to divert through the ditch which Wason and Hahn had practically completed rehabilitating at a cost of some \$4,000.

Morton filed his application to appropriate on July 19, 1934. His application and the maps submitted to accompany it were inadequate and erroneous. In fact, even at this late date were it not for the statements of Mr. Robison and the circumstances surrounding the case, one would assume from the maps and the original application that it was their purpose to divert from the North Fork of West Branch of Indian Creek rather than the South Fork on which Classic Hill Ditch heads.

When weakness in their title became apparent Messrs. Wason and Hahn took prompt and effective steps to remedy the situation. They filed an application to appropriate, completed it, secured a license from the U. S. Forest Service, and proceeded to operate the Classic Hill Ditch and have continued to do so.

On the other hand Robison, who succeeded to the interests of Morton in Application 8080, stated he would build a ditch parallel to the Classic Hill Ditch if given a permit and if unable to secure permission to use the latter. He made some desultory efforts to secure use of the Classic Hill Ditch during the period which elapsed between issuance of his permit (July 27, 1936) and the limit of time within which to begin construction (November 1, 1936). He was apparently on the ground only twice during that period, continuing to reside elsewhere and at some considerable distance. Finally and only three days before

expiration of time within which to begin construction he filed a petition to move his diversion point to the intake of an existing ditch on his own claim which he had himself used more than two years earlier under claim of riparian right. Since that time he has neither resided on the property or attempted to operate it directly or otherwise. We do not consider that Mr. Robison has pressed his development with that diligence and seriousness of purpose which is customary with one engaged in like enterprises. His permit should be revoked and if he wishes to proceed as an appropriator rather than as a riparian owner as he did in 1934 he should do so under a later priority than protestants Wason and Hahn who have demonstrated more than usual diligence, energy and seriousness of purpose.

ORDER

Application 8030 having been approved on July 27, 1936, by the issuance of Permit 4782 in which it was prescribed that actual construction work should begin on or before November 1, 1936, and that the project should thereafter be prosecuted with reasonable diligence; it appearing that the project had not been pressed with reasonable diligence; the permittee having been cited after due notice to show cause why said permit should not be revoked because of failure to comply with the terms and conditions thereof; and the Division being now fully advised in the premises;

IT IS HEREBY ORDERED that Permit 4782 be revoked and cancelled upon the records of the Division.

WITNESS my hand and the seal of the Department of Public Works of the State of California this 27 day of Sept. 1937.

EDWARD HYATT, State Engineer

By Harold Conkling
Deputy

(Seal)
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