

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

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In the Matter of Application 8641 of H.A. and L.A. Ball and  
Application 8856 of C.A. George to appropriate from  
the East Fork of South Fork of Salmon River  
In Siskiyou County for Mining Purposes.

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Decision A. 8641, 8856, D. 416

Decided *April 13, 1938*

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APPEARANCES AT HEARING HELD AT YREKA, AUGUST 10, 1937

For Applicants

H.A. and L.A. Ball

Carter, Barrett, Finley & Carlton  
by Oliver J. Carter

C. A. George

Charles E. Johnson

For Protestant

Virginia Brown

No appearance

EXAMINER: Everett N. Bryan, Supervising Hydraulic Engineer, for Harold  
Conkling, Deputy in Charge of Water Rights, Division of Water  
Resources, Department of Public Works, State of California.

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O P I N I O N

GENERAL DESCRIPTION OF PROJECTS

Application 8641 was filed by H. A. and L. A. Ball on April 21,  
1936. It proposes an appropriation of 25 cubic feet per second from the  
East Fork of South Fork of Salmon River to be diverted from about October 15  
to about July 15 of each season at a point within the SE $\frac{1}{4}$  of SE $\frac{1}{4}$  of Section  
30, T. 39 N., R. 10 W., M.D.E. & M. for hydraulic mining purposes at the

Vera, Jefferson, Consolidated, Annex, Sandy Bar and Jefferson Gold Placer Claims within Wections 14, 15, 21 and 22, T. 38 N., R. 11 W., M.D.B. & M. After use for mining purposes the water is to be returned to the East Fork of South Fork of Salmon River within the place of use,

Application 8856 was filed by C. A. George on December 14, 1936. It proposes an appropriation of 5 cubic feet per second from the East Fork of South Fork of Salmon River to be diverted from about October 15 to about July 15 of each season at a point within the SW $\frac{1}{4}$  of SW $\frac{1}{4}$  of Section 30, T. 39 N., R. 10 W., M.D.B. & M. for mining purposes at the George Placer Mine located within the SE $\frac{1}{4}$  of Section 2, T. 38 N., R. 11 W., M.D.B. & M. After use for mining purposes the water is to be returned to the East Fork of the South Fork of Salmon River at a point within the SW $\frac{1}{4}$  of SE $\frac{1}{4}$  of said Section 2.

The applications were protested by Mrs. Virginia Brown.

#### PROTEST

Virginia Brown claims rights to divert 3250 miners inches (81.25 c.f.s.) of water through the "Joe Janes" "George and Brown" and "Clarence George" ditches which rights are based upon riparian ownership and appropriation initiated prior to the effective date of the Water Commission Act. She alleges in effect that except for a few months during the year there is very little water flowing in the East Fork and that should these applications be approved it would deprive her of water to which she is lawfully entitled for mining, irrigation and domestic purposes. Mrs. Brown also claims the ownership of the land at the proposed point of diversion described in Application 8856.

### HEARING

Application 8641 was completed in accordance with the Water Commission Act and the Rules and Regulations of the Division of Water Resources and being protested was set for public hearing on Tuesday, August 10, 1937 at 10:00 o'clock A.M. in the Courthouse, Yreka, California. Although at the time, Application 8856 had not yet been completed and advertised, it was also set for hearing at the same time and place inasmuch as it was anticipated that it would also be protested by Mrs. Brown, as the two projects were in the same locality. Of this hearing the applicants and protestant were duly notified.

### GENERAL DISCUSSION

No appearance was made at the hearing by Mrs. Virginia Brown. She claimed illness as the cause for failure to appear and seven months subsequent to the hearing submitted a statement from a physician purporting to show that she was confined to her home on the second day preceding the hearing but parties in attendance at the hearing reported that they had seen her on the street that morning. She attempted to interview the examiner privately but was not represented by an attorney or agent at the hearing although it would appear that this could have been arranged.

The testimony presented at the hearing on behalf of the applicants indicated that between the point of diversion described in Application 8641 of H. A. and L. A. Ball and the proposed point of return, there are two or three ditches, the intakes of which are located on the East Fork of the South Fork of Salmon River namely (1) the "James" ditch, the intake of which is located approximately one mile above the confluence of Shadow Creek and the East Fork and is in close proximity to the point of diversion described in Application 8641 (whether above or below was not determined at

the hearing) (2) the "George and Brown" ditch, the intake of which is approximately one-half mile above the confluence of Shadow Creek and the East Fork and (3) the "Clarence George" ditch which heads about one-quarter of a mile above the confluence of Shadow Creek and the East Fork and at the point where Applicant G. A. George proposes to divert under Application 8856.

The record indicates that the "Janes" ditch has been in a state of disuse for approximately 20 years and at the present time is in very poor condition. The "George and Brown" ditch apparently has been in constant use by the George and Brown families for years and has a present capacity when running full of approximately 20 c.f.s. Prior to 1931, the "Clarence George" ditch had been in disuse for some time but in 1931 it was rehabilitated by G. A. George to a present capacity of some 3.0 c.f.s. and it is this ditch which G. A. George proposes to enlarge to a capacity of 5.0 c.f.s. under his Application 8856.

Arthur O'Connor, witness for H. A. and L. A. Ball testified that on or about April 18, 1936, Mr. G. A. Brown, husband of the protestant was using water from the "Clarence George" ditch for mining purposes, and that Mr. George was using the full capacity of the "George and Brown" ditch for mining purposes and that there was no indication of any use by Mrs. Brown except possibly for the irrigation of a small garden.

G. A. George testified that he and his brother F. S. George had been using the "George and Brown" ditch for mining purposes for the last 20 or 25 years and at times Mr. Brown had used it. After rehabilitating the "Clarence George" ditch he had used this ditch for about 3 seasons and then let Mr. Brown use it, taking all of his water through the "George and Brown" ditch.

Mr. G. A. George testified that the "Clarence George" ditch at one time belonged to his father and possibly to Mr. Brown's father also; that within his memory however it had not been used until he had rehabilitated it in 1931; that the intake of this ditch is located upon a mining claim belonging to Mr. Brown and that he had entered into an agreement with him for the use of the ditch. In fact, it appears that by mutual agreement Mr. Brown and Mr. George use water from both the "George and Brown" ditch and the "Clarence George" ditch without experiencing any difficulty in so arranging the diversions that each has obtained the water to which he is entitled.

Mr. George stated that possibly the "Clarence George" ditch did cross the property of Mrs. Brown but that his use of the ditch had been open and notorious and no protest had been made by her against this use. According to Mr. George, Mrs. Brown had used water from both the "Clarence George" and "George and Brown" ditches but the extent of this use was not indicated by him.

Although the record indicates that G. A. Brown, husband of Virginia Brown had entered into an agreement with G. A. George under which George may use the "Clarence George" ditch, Mrs. Brown claims that her husband is not mentally fit to attend to matters of business and furthermore that he had no right to enter into an agreement with anyone for the use of the ditch as she herself owns the mining claim at the head of the ditch.

Although not supported by testimony at the hearing, Mrs. Brown claims that in 1918 Mr. Brown gave her full power of attorney; that subsequent thereto but prior to 1923 J. C. McBroom gave Mr. Brown and herself a deed to the mining claim at the intake of the "Clarence Brown" ditch;

that on June 11, 1923 Mr. Brown gave her a quit claim deed to all of his property; that in 1927, the mining claim at the head of this ditch was relocated in the name of Mr. Brown with the understanding that he would deed the claim to her whenever she wished; that in 1931 G. A. Brown gave C. A. George permission to use the ditch with the understanding that the use would not interfere with any project which Brown might undertake and that on November 8, 1937 almost 3 months after the hearing Mr. Brown had given her the "final deed" to the property.

This matter of right of access is not within the jurisdiction of this office to determine. If the allegations of Mrs. Brown were substantiated by proof it would appear that C. A. George would be without right of access and whether or not he received a permit from this office he would be without a right to divert upon or through the protestant's lands without her consent. If on the other hand, the allegations of his answer to protestant's complaint were substantiated by proof he would be in a position to divert if he had a permit from this office and if he did not have such a permit he would still be without right to divert as applied for. Being without authority to determine the issue, the Division on February 16, 1938 advised that it would suspend action for a period of thirty days to afford the parties at interest an opportunity to proceed to a determination of the matter before a court of competent jurisdiction but so far as we have been advised there has been no move to secure such a determination and accordingly it is felt that we must proceed as if the issue had not been raised. If and when permit is issued, however, Mr. George should be advised that the approval of the application cannot be construed to give any color of right to divert across lands over which he has not previously obtained

the necessary right of access and right of way from the owner.

As to the proposed diversion by H. A. and L. A. Ball, it appears that some negotiations have been underway to change the point of diversion and ditch to a location through a portion of the Brown property but apparently these negotiations have failed and Mrs. Ball testified at the hearing that the ditch which it is proposed to construct under Application 8641 has its intake on a mining claim purchased by H. A. and L. A. Ball from one Frank Reed and throughout the remainder of its length it is to be constructed through Government land, easement having already been obtained from the Forest Service. In fact, the ditch described in Application 8336, Permit 4734 of H. A. and L. A. Ball is to be enlarged under Application 8641 to accommodate an additional 25 c.f.s.

As to the question of unappropriated water, the record clearly indicates that during years of normal runoff there is unappropriated water in the East Fork from about December 1 to about July 15 of each season. At times water is also available during the months of October and November although the flow during these months is not dependable. Such being the case it is deemed advisable to limit the season of diversion in any permits which may be issued in approval of Applications 8641 and 8856 to the period from about December 1 to about July 15 of each season.

Application 8856 of C. A. George was completed and declared in form on November 2, 1937 and advertised under date of December 6, 1937, notice of which was sent to Mrs. Virginia Brown. A protest against the approval of the application was filed by Mrs. Brown on January 3, 1938, in which no new issues were raised aside from those considered at the hearing and it is not deemed necessary to re-open the hearing.

As Mrs. Brown was not present or represented at the hearing and good cause for failure to appear was not shown to the Division within the five day period provided by law, she has not only failed to support the burden of proof appropriate to a moving party but has forfeited her right to further hearing.

O R D E R

Applications 8641 and 8656 for permits to appropriate water having been filed with the Division of Water Resources as above stated, protests having been received, a public hearing having been held and the Division of Water Resources now being fully informed in the premises.

IT IS HEREBY ORDERED that Applications 8641 and 8656 be approved for diversion from about December 1 to about July 15 of each season and that permits be granted to the applicants subject to such of the usual terms and conditions as may be appropriate.

WITNESS my hand and the seal of the Department of Public Works of the State of California this 3th day of April, 1938.

  
State Engineer.

(Seal)

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