

BEFORE THE DIVISION OF WATER RESOURCES

DEPARTMENT OF PUBLIC WORKS

STATE OF CALIFORNIA

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In the Matter of Application 11674 of California Water and Telephone Company to Appropriate Water from Carmel River, Tributary to Pacific Ocean in Monterey County, for Domestic, Industrial and Municipal Purposes.

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Decision A. 11674 D 582

Decided July 7, 1948

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APPEARANCES AT HEARING HELD AT SALINAS, APRIL 14, 1948:

For the Applicant

California Water and
Telephone Company

(Bacigalupi, Elkus & Salinger,
(by Tadini Bacigalupi and

(Judson, Martin, Ferrante & Street,
(by W. L. Hudson

For the Protestants

California State Fish and
Game Commission

Leo Shapovalov, Biologist

Rancho Del Monte)
Water Company)

Robles Del Rio Carmelo)
Water Company)

(Noland and Lawson
(by Stanley Lawson

Fred W. Nason)

Martin Girotti)

For Parties who have not filed formal Protests:

Mabel Berwick Mason

Eugene Harrah

Unattached fisherman

Clifford Le Neva

S. McClurg

In propria persona

EXAMINER - GORDON ZANDER, Principal Hydraulic Engineer, Division of Water Resources, Department of Public Works, for EDWARD HYATT, State Engineer.

Also Present: Spencer Burroughs, Principal Attorney, Division of Water Resources, Department of Public Works.

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O P I N I O N

GENERAL DESCRIPTION OF THE PROPOSED DEVELOPMENT

Application 11674 was filed on behalf of California Water and Telephone Company by HARRY REINHARDT, Vice-President, on December 30, 1946.

The source named under this application is Carmel River, which discharges into Pacific Ocean near the City of Carmel. The amount of water applied for was originally 25 cubic feet per second, year round, for immediate utilization and 19,000 acre-feet per annum to be collected at any time during the year, for temporary storage and later utilization. The water is wanted for domestic, industrial and municipal purposes. The points of diversion are two in number: direct diversion from the natural flow (originally contemplated) and re-diversion of waters accumulated in storage are proposed at a location described as being within the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 23, T 17 S, R 2 E, M.D.B. & M.; and diversion under this application to storage is to be effected at a location within the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 8, T 18 S, R 3 E, M.D.B. & M. These locations are at San Clemente Dam and Los Padres Damsite, respectively. The proposed conduit is a pipe line made up of sections of riveted and sections of

welded steel pipe. It extends from San Clemente Reservoir to Forest Lake Reservoir, which is some 3 miles northerly of Carmel; its length is given as 107,650 feet, and its total fall 252 feet.

The Los Padres Reservoir as contemplated will hold approximately 4,000 acre-feet but, according to the application, is a part, only, of a contemplated, continuing development to be carried on as the needs of the service area require. Water released from Los Padres Reservoir is to be allowed to flow down the natural channel of Carmel River to the point of re- diversion at San Clemente Dam, a distance of about 6 miles. The Los Padres Dam, as proposed for present development, will be 140 feet in height (streambed to overflow level) and 500 feet in top length; it is to be of earth, to have a 13 foot freeboard, and to flood an area of 80 acres.

According to the completion schedule written in the application, the construction of the presently proposed unit will be completed by the close of 1949 and the water will be fully utilized by 1975.

The place of use designated in the application is Carmel Valley in Monterey County, including the cities of Carmel, Pacific Grove and Monterey and contiguous unincorporated areas.

Estimates as to future diversions at San Clemente Dam commensurate with growing demand, are appended to the application. According to these estimates, demand for the 5 year period beginning in 1967 is expected to average 13,020 acre-feet per annum under one set of assumptions, 9,948 under another and 9,264 under a third. The estimate of 13,020 acre-feet per annum includes a special provision for anticipated requirements following the establishment of a Navy Graduate School at Del Monte.

PROTESTS

The California State Fish and Game Commission protests upon the grounds that the proposed appropriation will result in the destruction of steelhead, the property of the State of California; that such destruction is threatened because the quantity of water to be diverted (25 cubic feet per second) is greater, at times, than the total flow of the stream. This protestant bases its claim of a right to the use of the water in question, upon Section 525 of the Fish and Game Code, which it quotes in part as follows:

"The owner of any dam shall allow sufficient water to pass through a fishway or in the absence of fishway allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam"

Steelhead are alleged to be naturally present and to spawn in the stream under consideration. The protest, it is stated, may be disregarded and dismissed if the following clause is inserted in such permit as may be issued:

"Permittee shall for protection of fish life at all times release into natural stream channel immediately below the point of appropriation and immediately below the point of diversion (San Clemente Dam) the amount of water flowing in the river above point of appropriation, up to a maximum of 10 cubic feet per second; and shall release from storage at both points a minimum of 2 cubic feet per second when natural flow is less than this amount."

Subsequently this protestant signified, by Inter-Departmental Communication dated March 3, 1948 that the following modified clause would suffice:

"Permittee shall for protection of fish life at all times release into the natural stream channel immediately below the point of appropriation and immediately below the point of diversion (San Clemente Dam) the amount of water flowing in the river above the point of appropriation up to a maximum of 10 cubic feet per second."

In answer to the California State Fish and Game Commission, the Applicant argues that the protest does not state how the alleged destruction of steelhead will result nor how the release of water in the amount demanded will prevent such destruction; that in furtherance of its project based on rights initiated prior to July, 1914 the applicant has diverted waters of Carmel River to the extent of the summer flow thereof and that the appropriation now proposed will in no way affect the diversion of such summer flow; that the current project applies to the utilization of flood waters and that the amount of water available for steelhead will not be diminished thereby; that a suitable fish ladder has been and will be maintained; that the protestant's proposal as to releases during low stages is impracticable in view of the many pumps in operation downstream at that season; that to provide storage enough to maintain the releases proposed would be prohibitively expensive; and that the cost thereof would devolve upon the applicant's consumers instead of upon the sportsmen benefited.

Edson Abel, for and on behalf of Reuben S. Tice and 15 other individuals, protests that the domestic and irrigation water supplies of those individuals are dependent upon the continuance of the flow of Carmel River, both surface and underground; that the rights of the parties represented are based on use begun prior to December 19, 1914 and upon riparian claims; that the use has included the irrigation of 772 acres or more and corresponding domestic use; and that diversions head at various points from 3½ to 13 miles upstream from the mouth of Carmel River. This protest was supplemented to include 8 more names in the list of individuals represented, located on the same reach of the river, their diversions aggregating some 207,000,000 gallons (635 acre-feet) annually.

Answering the Edson Abel protest, the applicant alleges that such water rights as these protestants may have are subsequent to and subordinate to its own, by virtue of certain deeds executed by present or former landowners in favor of the applicant's predecessors in interest. The deeds referred to are said to have granted and released the riparian rights of the grantors, and the right to appropriate waters of Carmel River. The applicant alleges further that the flow of Carmel River is in excess of the Protestants' reasonable requirements, and that their rights therefore will not be injured by the appropriation now proposed.

Rancho del Monte Water Company protests that the proposed appropriation will endanger its water supply, impairing it both in quantity and in quality. This protestant bases its claim to use of water upon riparian ownership and long continued use. The protest mentions a 12 inch well, 88 feet deep, drilled in 1929, having a capacity of 24,000 gallons per hour and serving with household and irrigation water a group of 15 families located on a tract in Carmel Valley some 12 miles easterly of the City of Carmel. It contends that the proposed appropriation will deplete the water content of the alluvial fill from which this well is supplied. This protestant states that its objections may be disregarded and dismissed if the proposed diversion is reduced to 6,000 acre-feet per annum. It desires provision also for the release of such portion of the natural flow as will insure the maintenance of a satisfactory ground water level. It desires assurance also that the quality of the water available to it will not deteriorate.

In answer to the Rancho del Monte Water Company protest, the applicant asserts that such rights as this protestant may have in Carmel River

waters are subsequent and subordinate to its own; that water rights relating to the lands which the applicant serves were conveyed by deed in 1882 to the applicant's predecessor in interest; and that rights covering the protestant's present operations have not been acquired by the initiation of a more recent appropriation or otherwise.

Robles del Rio Carmelo Water Company likewise protests that the proposed appropriation will endanger its water supply, from the standpoints both of sufficiency and of purity. Its claim to a water right is based upon riparian ownership and long continued use. Continuous operation is asserted since incorporation of the protestant company in 1932. The tract of land served is said to comprise some 651 acres in and about Robles del Rio (approximately 14 miles above the mouth of Carmel River). Water is derived through 2 wells, offset 140 feet and 90 feet, respectively, from Carmel River, and is used for domestic purposes and limited irrigation. The protestant places probable deliveries during 1947 at a total of 2,852,673 cubic feet (65.5 acre-feet). This protest may be disregarded and dismissed, it is stated, if the amount named in the application is reduced to 6,000 acre-feet per annum. This amount, the protestant argues, is more in keeping with the applicant's reasonably prospective use. This protestant desires that provision be made for the release of such portion of the natural flow of Carmel River as will insure the maintenance of a satisfactory ground water level, and desires assurance that the quality of the water will not deteriorate.

The applicant answers Robles del Rio Carmelo Water Company by asserting that all water rights attaching to lands now served by that protestant were conveyed by deed to a predecessor in interest to the applicant; that

subsequent to such surrender of rights no appropriation rights have been acquired, that there is a surplus flow in Carmel River over and above the reasonable requirements of owners of prior vested rights; and that the amount which it is proposed to divert under the application at issue is 3,200 acre-feet per annum now and increasing quantities in future, as requirements grow.

FRED W. NASON objects to the proposed appropriation because, he alleges, it will interfere with the regular flow of water in Carmel River, as it passes through his property, which flow he considers necessary to him for domestic use, stock water and irrigation. He claims riparian and prescriptive rights, and asserts that he has land on both sides of Carmel River, below the proposed point of diversion, for a distance of 600 feet, within which reach he has been diverting water for over 20 years. He states that his protest may be disregarded and dismissed if it is provided that enough water will be allowed to flow down to his property, as it has in the past.

The applicant answers the Fred W. Nason protest by stating that with the exception of not over 40 acres, this protestant's land is non-riparian to Carmel River and is not entitled to water diverted from that stream; denying that injury will result from the proposed appropriation; and asserting on the contrary that storage in the proposed reservoir and release therefrom to the San Clemente Reservoir will assure this protestant a more adequate and reliable supply than he has enjoyed heretofore.

Martin Girotti protests because of his alleged belief that the proposed appropriation will prevent the regular flow of Carmel River through his property. He claims that his property fronts on Carmel River for a distance of some 375 feet, that he operates a resort known as the Princess Camp and

that Carmel River is his sole source of water supply. He claims a riparian right and usage for approximately 12 years. He describes his diversion point as lying within Section 4 of T 18 S, R 3 E, M.D.B. & M. He desires assurance that he will have sufficient water for his uses as he has had in the past; and agrees that his protest may be disregarded and dismissed if it is provided that a sufficient amount of water will be allowed to flow to him.

The applicant answers Martin Girotti by admitting him to be the owner of approximately 9 acres of land riparian to Carmel River; denying that he will be injured by the proposed appropriation; denying that he possesses any rights to Carmel River except by virtue of riparian ownership; and asserting that its plan of operation which contemplates storage in the upper reservoir and release to the lower reservoir during low water periods will assure this protestant a more dependable supply than that presently existing.

Martin Flavin protests that the proposed appropriation will diminish the winter and spring flow of Carmel River and lessen the quantities of water accumulating in ground storage at such times; also that the proposed impounding and subsequent release of water will cause irregular fluctuations detrimental to his accustomed use for agricultural and domestic purposes, with his installations therefor and with the crossing and recrossing of Carmel River and utilizing his lands on both sides thereof during times of high water. He states that some use of water has been made for many years for agricultural purposes; that in past but not recent years such use has included irrigation; that since 1930 use has been for domestic purposes, stockwatering and alfalfa irrigation. He states that his protest may be disregarded if the natural flow of the stream is not affected by the use made.

The applicant answers the Martin Flavin protest by stating that of this protestant's holdings, 240 acres but no more, are riparian; that the

protest is not specific as to how, when or where water has been used or what injury would result from the proposed appropriation; that rights arising from riparian ownership are an insufficient basis for the objections which this protestant has expressed; and that surplus waters exist in Carmel River, over and above the reasonable requirements of all holders of prior vested rights.

HEARINGS HELD IN ACCORDANCE WITH THE WATER CODE

Application 11674 was completed in accordance with the Water Code and the Rules and Regulations of the Division of Water Resources and being protested was set for public hearing under the provisions of Article 13, Section 733(a) of the California Administrative Code on Wednesday, April 14, 1948, at 10:00 o'clock A.M. in the Board of Supervisors Auditorium in the County Court House in Salinas, California. Of this hearing the applicants and the protestants of record were duly notified.

GENERAL DISCUSSION

Available stream flow records are limited to those accumulated by the applicant company and introduced in evidence, in the form of a summarized tabulation, as Applicant's Exhibit No. 3. That tabulation sets forth the discharge in acre feet for each month from January, 1938 to December 1947, both inclusive. The figures therein presented apply to Carmel River at Carmel Dam, the latter being situated, according to the transcript, one half mile below San Clemente Dam, the point of redirection described in the application at issue. This location is upstream from the Rancho del Monte Water Company and Robles del Rio Water Company projects and from the group of protestants represented by Edson Abel; and downstream from Protestants Nason, Girotti and Flavin. The figures indicate that annual discharge has varied from a maximum of 199,044

acre-feet in 1942 to a minimum of 5,049 acre-feet in 1947 and has averaged 81,684 acre-feet per annum. Of the latter amount only 1,963 acre-feet, or 2.4% have been discharged, on average, during the 4 month periods beginning June 1 and ending September 30 of each year. According to the rainfall data presented in Applicant's Exhibit No. 5, the years 1938 to 1947 averaged some 12% wetter than those (22 in all) during which rainfall was recorded at San Clemente Dam. According to applicant's Exhibit No. 2, 126 square miles of watershed lie above San Clemente Dam. This watershed being more elevated is probably more productive; however, 131 additional square miles of watershed drain into Carmel River below San Clemente Dam and the bulk of this lower lying watershed also contributes to the supply from which the lower protestants divert. Discharges of Carmel River below the lowermost protestant are not of record, but in the light of such information as has been presented, the inference suggests itself that the abstraction of 19,000 acre-feet, in an average year, as proposed in Application 11674, will not result in insufficiency of supply to any lower user.

Quality of the water enters into this case as well as quantity, to the extent that both Rancho del Monte Water Company and Robles del Rio Carmelo Water Company have complained that the diversion proposed by the applicant will result in deterioration in quality of the ground water from which they derive their supply. At the hearing testimony was presented on their behalf, together with supporting data, to the effect that the alluvium from which these protestants pump is charged by waters contributed both by Carmel River and by its important tributary, Tularcitos Creek; that water from the former source is satisfactory in quality but Tularcitos Creek water is too hard for domestic consumption; that the quality of the admixture deteriorates as the season advances and also varies according to the proportions contributed by the two streams; and that

further reduction of the Carmel River supply will consequently cause further deterioration of the protestants' supplies.

The applicant elected early in the hearing to amend its application by deleting Paragraph 2a thereof and by reducing the season of diversion to storage to the months of October to May inclusive. This amendment was accepted by the Examiner, on behalf of the Division, and the application now stands simply as an application to store 19,000 acre-feet of water per annum in Los Padres reservoir, such storage to be collected between October 1 and May 31 of each season.

Two of the protests - those by Edson Abel on behalf of Reuben S. Tice et al. and by Martin Flavin - were settled on the basis of stipulations filed with the Division and those protests accordingly were dismissed, prior to the hearing.

Considerable discussion was had at the hearing as to the justification of the applicant in initiating an appropriation of so large an amount as 19,000 acre-feet per annum. Arguments on behalf of the protestants were to the effect that a much smaller amount would satisfy any logically predictable demands. The protestant water companies - Rancho del Monte and Robles del Rio Carmelo - had stated in their protests that their objections would be withdrawn if the amount applied for should be reduced to 6000 acre-feet per annum. The applicant contended that the testimony and data submitted seemed reasonably convincing to them; that prediction with certainty of future conditions was impossible; and that they felt it their duty to their customers to initiate an appropriation sufficiently large to meet any possible conditions, including, for example, fish industry expansion and military development, that they might be obliged later to face. The outcome of this difference of opinion was a stipulation, introduced

at the hearing by the applicant's counsel and agreed to by counsel for Rancho Del Monte Water Company, Robles del Rio Carmelo Water Company Fred W. Nason, and Martin Girotti, providing in effect that the application be approved in the amount of 19,000 acre-feet per annum with the further proviso that of these 19,000 acre-feet the applicant shall develop and store no more than 6,000 acre-feet per annum until such time as the Division, after a hearing, may authorize the use of an additional amount, such hearing to be held at any time, after due notice to all interested parties, at the desire of the Division or upon request by any of the parties to the present proceeding.

In addition to appearances at the hearing by or on behalf of parties who had protested formally, certain other interested parties appeared and were heard. These parties were Mabel Berwick Mason, represented by Eugene Harrah; Clifford Le Neva, on behalf of unattached fishermen; and one S. McClurg. Mrs. Mason volunteered information relating to early development on Carmel River and voiced a general objection to diversion of waters thereof to the disadvantage of local users. Mr. Le Neva sought information as to the effect of the proposed appropriation upon fishing. Mr. McClurg raised questions as to how restrictions, embodied in a permit, may be enforced. Mrs. Mason's objections were in effect a re-expression of objections set forth in the protest by Reuben S. Tice, et al., of which Mrs. Mason was a signer—a protest which had already been adjusted by stipulation as mentioned in an earlier paragraph. The remarks of Messrs. Le Neva and McClurg were not deemed to constitute a protest against the application at issue.

After disposal, in the manner outlined, of the objections above discussed, the protest by the California State Fish and Game Commission,

only, remained in opposition to the application. Differences between the Applicant and the Protestant were not composed at the Hearing, and procedural and technical questions arose which appeared either definitely without the jurisdiction of the Division, or impracticable to settle without further research. It was thereupon agreed at the Hearing that the parties concerned - the applicant and the Fish and Game Commission - should make one more effort to reach a settlement by stipulation and then, should negotiations fail, submit the matter by the filing of briefs. Subsequent to the Hearing, the Fish and Game Commission consented to the dismissal of its protest provided that a clause, worded substantially as the following, be inserted in any permit eventually issued:

"Permittee shall maintain a flow of not less than 5 cubic feet per second in the channel of Carmel River directly below the outlet structure of the Los Padres Dam at all times during which water is being stored under this permit, provided that said amount of 5 cubic feet per second may be reduced temporarily from time to time for operating purposes upon and in accordance with a prior agreement between California Water and Telephone Company and the Division of Fish and Game of the State of California; and provided further, that in case of operating emergency requiring immediate action by the Company for the prevention of, or repair of, damage or loss to its system or to others, the Company may release less than the aforesaid minimum flow during the period of said emergency.

"Permittee shall install and maintain a rated weir with a staff gage as part of the outlet structure or fish ladder for the measurement of flow."

The applicant having agreed to the insertion of the clause above quoted, in a permit, if issued, the protest of the California State Fish and Game Commission was dismissed, subject to the condition stated.

SUMMARY AND CONCLUSIONS

There are times unappropriated waters in Carmel River at the locations at which the applicant proposes to appropriate, which may be taken and used without injury to the protestants or other vested rights. The application, as amended, should be approved subject to the usual terms and conditions, and to the inclusion, in the permit, of clauses covering the agreements entered into by the applicant and by various protestants with reference to a temporary limitation upon the amount of the diversion authorized and with reference to the protection of fish life.

ORDER

Application 11674 having been filed with the Department of Public Works, as above stated, protests having been received, a public hearing having been held and the State Engineer now being fully informed in the premises:

IT IS HEREBY ORDERED that Application 11674, as amended, be approved subject to such of the usual terms and conditions as may be appropriate and subject also to the following terms and conditions to-wit:

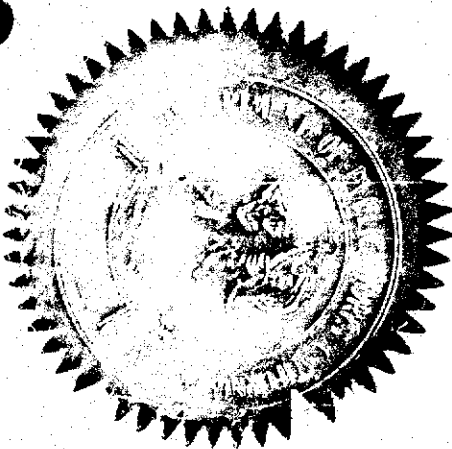
Of the 19,000 acre-feet per annum hereinabove specified in Paragraph 2(b) of the application, permittee shall develop and store an amount of water not to exceed 6,000 acre-feet per annum until such time as the Department acting through the State Engineer may, after further hearing held either by the Department upon its own initiative or upon the motion of any of the parties participating in the hearing of April 14, 1948, or their successors in interest, and after due notice to the interested parties, authorize the storage and use of an additional amount of water.

Permittee shall maintain a flow of not less than 5 cubic feet per second in the channel of Carmel River directly below the outlet structure of the Los Padres Dam at all times during which water is being stored under this permit, provided that said amount of 5 cubic feet per second may be reduced temporarily from

time to time for operating purposes upon and in accordance with a prior agreement between California Water and Telephone Company and the Division of Fish and Game of the State of California; and provided further, that in case of operating emergency requiring immediate action by the Company for the prevention of, or repair of, damage or loss to its system or to others, the Company may release less than the aforesaid minimum flow during the period of said emergency.

Permittee shall install and maintain a rated weir with a staff gage as part of the outlet structure or fish ladder for the measurement of flow.

WITNESS my hand and the seal of the Department of Public Works of the State of California this 7th day of July, 1948.




Edward Hyatt, State Engineer