

STATE OF CALIFORNIA
DEPARTMENT OF PUBLIC WORKS
BEFORE THE STATE ENGINEER AND
CHIEF OF THE DIVISION OF WATER RESOURCES

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In the Matter of Application 11259 by Gilbert E. Haney to Appropriate Water from Cold Springs Creek, Spring Brook Creek and an Unnamed Spring Group, all Tributary to East Branch of Chowchilla River in Mariposa County for Domestic and Irrigation Purposes.

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Decision A. 11259 D. 610

Decided August 4, 1949

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APPEARANCES AT HEARING HELD AT MADERA, FEBRUARY 16, 1949

For the Applicant:

Gilbert E. Haney

In person

For the Protestants

L. R. Berlin
Roy C. McMaster
Sam Milton

Robert O. Curran
L. A. MacNicol
L. A. MacNicol

EXAMINER - Gordon Zander, Principal Hydraulic Engineer, Division of Water Resources, Department of Public Works, for EDWARD HYATT, STATE ENGINEER.

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OPINION

General Description of the Proposed Development

Application 11259, filed January 10, 1946, names three sources, i.e. Gold Springs Creek, Spring Brook Creek and an unnamed spring group, all tributary to the East Branch of Chowchilla River, in Mariposa County. The amount of the appropriation sought is 5 miners inches, from any or all of the three

sources, to be diverted from January 1 to December 31, inclusive. The use to which the water is to be applied includes domestic use, irrigation and stock watering. The proposed points of diversion on the first and second of the sources named are to be located within the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 23 and the point of diversion on the third source is to be within the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 24, all being within T 5 S, R 20 E, M.D.B. & M. Diversions from Cold Springs Creek and from Spring Brook Creek are to be effected by means of small sandbag dams; water from the unnamed spring group is to be collected in a wooden box. A regulatory reservoir 100 feet by 100 feet by 4.5 feet is to be provided. Water will be conveyed from the points of diversion by pipe lines 2 inches in diameter and, respectively, 1000 feet, 800 feet and 1800 feet long. The place of use is described as lying within Lot 9 of Section 23, and within the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 24, T 5 S, R 20 E, M.D.B. & M. A domestic supply is wanted for 2 residences housing in all 7 people, as well as a home garden; the live stock to be watered includes 15 cattle, 10 hogs and 100 chickens; the area to be irrigated will include a 4 acre orchard, 8 acres of general crops and 8 acres of pasture. Irrigation is expected to begin about May 1 and end about November 1.

PROTESTS

The California State Fish and Game Commission protested the application on the grounds that trout would be destroyed but subsequently withdrew its protest on September 13, 1946.

Sam A. Milton protested for the alleged reason that the proposed appropriation will deprive him of water to which he is entitled for irrigation, domestic and stock watering purposes. Protestant Milton claims a right to use water from the sources in question, based upon riparian ownership and also upon an old appropriative right to take and use water from all of the three sources named. He represents that water was first used on the property in 1882 and has been used

continuously since then by the original appropriator, successors in interest, heirs or renters. He claims to divert at points respectively within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 23 and within the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 25, T 5 S, R 20 E, M.D.B. & M. He states that his protest may be disregarded and dismissed if the applicant will limit his project to diversion from Spring Brook Creek only.

L. R. Berlin protested as a downstream diverter, apprehending interference by the proposed appropriation with his use under prior rights to a supply for irrigation of garden, farm crops and meadow and clover pasture. Protestant Berlin demanded a (further) hearing, because of the non-attendance of Protestant Milton at the investigation already held, and because the owners of the property affected were not earlier notified.

Roy C. McMaster, as guardian of the Estate of Betty Louise Tetzlaff, a minor, protested, claiming that the proposed appropriation will result in injury to the Conway Ranch, now owned by Betty Tetzlaff. He explains that the Conway Ranch is in process of sale to Lee R. Berlin and wife, that those prospective purchasers refuse to consummate the sale, claiming that the proposed appropriation amounts to a material failure of the consideration involved. This protest is intended by Protestant McMaster as a supplement to the protest earlier filed by Samuel A. Milton, the property, including appurtenant water rights, on which the two protests are based, being the same.

In answer to the protest by Sam A. Milton the applicant states that as between riparian owners priority of use establishes no priority of right, hence his right is as good as the protestant's riparian right; that he questions the validity of the protestant's alleged appropriative right; that the protestant did not divert water from Spring Brook Creek during 1943, 1944, 1945 or 1946; that there is no evidence of development of the unnamed spring group or of past use

of water therefrom; that the protestant's alleged appropriative rights insofar as any existed have been lost by three years of non-use.

In answer to the protest by Roy C. McMaster the applicant asserts that a part if not all of the water claimed by the protestant has been lost by non-use; that the spring group has never been developed, that there is no indication that water from Spring Brook Creek was ever used on the Conway place and that water from Cold Springs Creek was unused for a five year period; that water is always available above and below the protestant's point of diversion when the creek is entirely dry at the applicant's point of diversion; and that water ceases to flow from the spring group and Spring Brook Creek to the Conway place long before irrigation becomes necessary.

The applicant elected not to answer the protest by L. R. Berlin, the purchase by that protestant of the Conway property not having been consummated.

HEARING HELD IN ACCORDANCE WITH THE WATER CODE

Application 11259 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, February 16, 1949 at 10:00 o'clock A.M. in the Supervisors' Board Room, County Court House, Madera, California. Of this hearing the applicant and the protestants were duly notified.

General Discussion

Prior to expiration of the protest period as announced in the advertising notices, only two protests were filed against Application 11259 and one of these - a protest by California State Fish and Game Commission - was withdrawn. The other protestant - Sam A. Milton - and the applicant both stipulated to a settlement of the matter on the basis of an informal hearing. An investigation at the site

of the proposed appropriation was made by Associate Engineer Biscoe Kibbey on September 17, 1947. The informal hearing however was not completed due to an objection which was raised to the effect that certain interested parties had not been notified of the application and had therefore been denied the privilege of protesting and of participating in the field investigation. These parties forthwith were allowed to submit protests, their protests were received and considered and they were given an opportunity to stipulate to an informal hearing. Due to the failure however of these parties to stipulate the matter was set for formal hearing, as stated in an earlier paragraph.

At the time of Engineer Kibbey's inspection, conditions are reported to have been as follows: Cold Springs Creek was dry at the proposed point of diversion but carried 0.5 miner's inch 1/4 mile downstream and 2 miner's inches 1/2 mile downstream from that point. Cold Springs Creek at the proposed point of diversion was said to have flowed throughout the summer of 1943. Spring Brook Creek was dry throughout. At the spring group the usual flow appears to be about 0.25 miner's inch which sinks within from 150 to 400 feet and it is believed that a flow of 0.5 miner's inch could be developed. The Conway Ranch, adjoining the applicant's land on the south, is riparian to both Cold Springs Creek and Spring Brook Creek; the house and premises were in a somewhat dilapidated condition, and unoccupied. According to a neighbor, no one lived on the place from 1933 to 1939 and there was no use of water. Old orchards appeared not to have been watered for many years. A sawmill which formerly used water when available from Spring Brook Creek was no longer in operation, the understanding being that all timber on the place had been logged off.

At the formal hearing of February 16, 1949 the following additional information was brought out by testimony. L. H. Crumb familiar with the locality

since about 1922 described the Conway Ranch as "dry-farmed" except for a little gardening, irrigated from springs; stated that the ranch was unfenced on one side and open to range stock; that Cold Springs Ranch and the Conway place are one and the same; that the family from Cold Springs Ranch moved into town about 1924 after which there was no one on the ranch except "the Frisbies" who lived there a year or two but did not use water for irrigating; that the Civilian Conservation Corps established a camp on the Conway place in 1932 or thereabouts which moved away however because of scarcity of water; that cattle have ranged on the Conway place at various times; and that Applicant Haney's place was formerly owned by a Mr. Egleton. Mr. Robert Egleton testified that he sold Applicant Haney the place the latter now owns in 1943; that he occupied that place for nearly ten years prior to the sale; that during that period there were cattle on the Conway place, that that place was unfenced sufficiently to exclude cattle, that no irrigating was done; that the C.C.C. Camp was maintained on the Conway ranch for not over four months; that no one lived on the Conway place from about 1933 until about 1939. Alice Millerd testified to being familiar with the Conway Ranch and vicinity having lived there the greater part of 40 years, that she knows of no irrigation on the property until 1943 when her husband plowed a small piece on which Mr. Milton put in a garden; that water issuing from the spring group cannot reach the Conway place during the irrigation season because it soaks into the ground before traveling that far; that water from Spring Brook Creek has never to her knowledge been used for irrigation or domestic purposes on the Conway Ranch; that it was used for a time at a sawmill but that such use was discontinued because of insufficiency of supply; that Spring Brook Creek always dries up early in the season. Observations made and recorded by Applicant Haney as to the flow of Cold Spring Creek at his proposed point of diversion were

introduced. These observations while too meager in detail to enable quantities to be calculated closely, indicated that in 1946 the flow was substantial until about July 1, diminished gradually through July, and became negligible on August 4. James D. Westfall, a cattle man, testified that he has been familiar with the Conway ranch for 65 years; that he has leased it since the 1920's, for stock grazing, that irrigation from Cold Springs Creek was practiced during the 1890's; that Cold Springs Creek has occasionally gone dry to the extent that the channel became a succession of water holes; that he used the old Conway ditch to the extent of keeping it clear and running water through it and onto a small flat. Betty Isaacs (formerly Betty Tetzlaff) testified to having lived on the Conway Ranch from 1940 until 1947; that there was a garden of 7½ acres, producing corn, tomatoes and beans, irrigated from Cold Springs Creek; that the water supply usually failed by the end of August; that the garden was replanted to clover which was irrigated during 1943, 1944 and 1945; that for irrigation the water supply came from Cold Springs Creek; that the growing of vegetables was discontinued because of insufficiency of water. Georgia Mae Milton, daughter of George Conway and divorced wife of Sam Milton, testified to having owned Cold Springs ranch since her father's death in 1932 or 1933; that the place was leased for many years to Mr. Westfall; that the old Conway ditch has been kept in condition; that before the garden was planted that site produced green pasture grass, which was irrigated; that upon separation from her husband in 1947 she turned the ranch over to her daughter (Betty Tetzlaff); that the domestic supply on the Conway ranch was obtained in part from a spring near the house and in part from Cold Spring Creek; that between 1939 and 1942 she and her husband kept the ditch in condition and irrigated natural grass. Lee Berlin testified to having lived on the Cold Springs Ranch since about November, 1947; that he irrigated the clover field by means of the old ditch leading from Cold Springs Creek. Mr. Frank S. Hatch testified that he

had prospected on Cold Springs Creek, that except for disconnected potholes the channel of the creek is dry in summer time. Other testimony was introduced which however was either in confirmation of the testimony above summarized, or was not closely relevant to the issues.

The data are too meager to afford a close estimate of the amount that any of the sources will yield, and each of the sources presents a somewhat different problem. Cold Springs Creek appears to be the best producer of the three and is the only one from which, according to the testimony, water has recently been applied to beneficial use. The limited observations of flow of Cold Springs Creek indicate that that stream yields a relatively plentiful supply until early July but diminishes sharply thereafter, and that Cold Springs Creek "makes" below the applicant's proposed point of diversion, the flow having been nothing at that point on September 17, 1947, but two miner's inches one half mile downstream therefrom. As to Spring Brook Creek, no current or recent beneficial use of water appears to have been made, hence the entire flow of that stream would appear to be subject to appropriation. The amount of such flow is not known definitely but the size and nature of the watershed indicates that it may be moderately substantial. The amount that may be developed from the unnamed spring group is wholly unknown but the present use of water from that source is nil hence no objection to the approval of an application to appropriate therefrom need be considered.

Present or recent beneficial use on the Conway Ranch apparently consists of domestic use and the irrigation of a 7.5 acre field, for which water is obtained in part from springs but mainly from Cold Springs Creek. For this use the flow of Cold Springs Creek appears more than sufficient in a normal year until some time in July. Until that time which may be supposed to vary somewhat with the season, surpluses occur and no valid grounds are seen upon which objections

to the diversion of such surpluses for beneficial use may properly be based. The flow of Cold Springs Creek at the applicant's proposed point of diversion apparently ceases some time in July or early August, but according to Engineer Kibbey's observations approximately two miner's inches of water "makes" below that point and is available for the Conway Ranch during the latter part of each season. No showing has been made to indicate that such "made flow" in Cold Springs Creek together with the flow of the springs on the Conway Ranch is inadequate to meet the reasonable needs of protestants during the latter part of each season. The protests of Sam A. Milton, L. R. Berlin and Roy C. McMaster against Application 11259 are therefore dismissed as insufficient.

SUMMARY AND CONCLUSIONS

There are at times unappropriated waters in the sources from which the applicant proposes to appropriate, which may be taken and used without interference with existing rights. The uses to which the applicant proposes to put the waters upon which he has filed are beneficial uses. The application should be approved and permit issued, subject to the usual terms and conditions.

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ORDER

Application 11259 having been filed with the Division of Water Resources as above stated, protests having been filed, a public hearing having been held, and the State Engineer now being fully informed in the premises:

IT IS HEREBY ORDERED that Application 11259 be approved and that a permit be issued to the applicant 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 4th day of August, 1949.


Edward Hyatt, State Engineer.