

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

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In the Matter of Application 10632 of E. C. Jones to Appropriate Water
from an Unnamed Spring in Butte County for Domestic Purposes.

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Decision A. 10632 B. 708

Decided June 11, 1951

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IN ATTENDANCE AT INVESTIGATION CONDUCTED BY THE DIVISION OF WATER
RESOURCES AT THE SITE OF THE PROPOSED APPROPRIATION ON JULY 26, 1943:

E. O. Jones	Applicant
L. G. Hopkins	Protestant
Emojene Hopkins	Protestant
A. S. Wheeler	Assistant Hydraulic Engineer, Division of Water Resources, Department of Public Works, Representing the State Engineer.

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OPINION

General Description of the Project

Application 10632 was filed on April 27, 1943 for a permit to appropriate 2800 gallons per day from an unnamed spring tributary to the South Fork of the Feather River, in Butte County, year-round, for domestic purposes. The proposed point of diversion is described as being located within the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 9, T 19 N R 6 E, M.D.B. & M. The water is to be piped some 700 feet to the proposed place of use, a cabin and garden, located within the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 4, of the same township.

Protest

I. G. and Enojene Watkins protest the application, claiming that the appropriation therein sought will cut off their water supply which their state is obtained from the same spring. They claim that water from that spring has been diverted and used on their property since about 1929. They state that the water is piped some 600 feet to a barn, to an orchard and to a reservoir, and used at the rate of 2800 gallons per day, year-round.

No answer to the protest was received from the applicant.

Field Investigation

The applicant and the protestants having stipulated to an informal hearing as provided for in Section 733(b) of the California Administrative Code, a field investigation was conducted at the site of the proposed appropriation on July 28, 1943 by an engineer of the Division. The applicant and the protestants were present during the investigation.

Records Relied Upon

Application 10632 and all data and information on file therewith.

Discussion

From the report of the investigation of July 28, 1943 it appears that the source filed upon is a developed seep on a mountain side, that development consists of a tunnel driven 30 feet into the mountain, that the flow from the tunnel at the time of the investigation was 3.55 gallons per minute (5112 gallons per day), that the applicant's use probably will not exceed 1800 gallons per day, that the protestants' use is of the order of 7000 gallons per day, most of which comes from another source, and that normally the spring filed upon yields enough to meet the applicant's probable requirements without injury to the protestants.

The investigation also developed that a controversy has arisen over ownership of the land on which the spring is located and that the exact location of the spring is also in dispute. The report of investigation states that both the applicant and the protestants have had surveys made by registered engineers to determine the location of the spring and that the two surveys do not agree. The report of investigation indicated that action upon the application should be deferred pending settlement of the matter of right of access. It appeared to the investigator that court action might be necessary.

Protestants' letter of May 13, 1943 states that their claim was purchased by them in 1942, that it is an old mining claim, that it has a 5 room house, fruit trees, grape vines and a garden spot. According to the letter also the protestants were given to understand at the time of purchase that all water and piping were supposed to belong to the place. The letter also states that E. C. Jones has now piped water from one of their tunnels, cutting off part of their water supply despite their desire to retain their water rights.

By letter dated June 22, 1943 the protestants state that the spring filed upon (by E. C. Jones) is on their mining claim, which is unpatented.

By letter dated June 23, 1943 this office informed the protestants:

"----- you would be in control of the situation if you have a valid mining claim and under these circumstances this office could not approve the application of Mr. Jones unless he is able to make some arrangements with you to enter upon your claim and divert the water."

By letter dated September 6, 1943 Frank S. Robinson, a registered engineer, informed Mrs. L. G. Hopkins of the results of a survey, made by him on August 27, 1943. Mr. Robinson's letter reads in part:

"This places the spring in the southwest quarter of the northwest quarter of the northeast quarter of said Section 9. This is the spring which Mr. Jones has used for the head of his pipe line, which shows on the ground. From the same spring an old pipe line shows running down to your building site."

According to a map submitted by the applicant and based upon a survey by Licensed Surveyor Hugh Stone the spring described in Application 10632 lies 9 feet within the north boundary line of Applicant Jones' Duensing Mining Claim.

By letter dated April 21, 1944 this office informed Applicant Jones:

"----- . You will note that the surveys do not agree as to the location of the spring."

"----- an extension of 60 days from the date hereof is allowed for the purpose of supplying information as to the correct location of the spring. -----"

"The map also shows an overlap in the mining locations and accordingly conclusive evidence as to which is the prior location should also be supplied."

By letter dated August 1, 1945 this office informed Applicant Jones:

"Inasmuch as there is some uncertainty as to the proper location of the spring the application is deemed incomplete in that respect. A reasonable time will be allowed however for you to contact the protestants in order to adjust the surveys. ----- . An extension to September 1 is allowed for this purpose."

By letter dated April 19, 1946 Attorney Arthur B. Hewitt informed this office:

"I have been substituted ---- as Attorney for E. G. and Enojene Hopkins. ----."

"I have in mind commencing a suit ---- to enjoin E. G. Jones from appropriating water from this spring. I think that such a suit will be necessary to adjudicate the respective rights of the parties regardless of the disposition that the Division of Water Resources makes ----."

By letter of May 7, 1946 this office informed the parties' attorneys that in view of the desire to determine the matter of ownership, action on the application would be suspended for the time being.

By letter dated September 12, 1946 Attorney Hewitt informed this office:

"----- an action entitled "A. E. Jones, Plaintiff vs. L. E. and Enojene Hopkins et. al., Defendants is pending in the Superior Court of Butte County ----. ---- the case will be ready to set for trial sometime in October."

By letter dated September 9, 1947 the law office of Clewe and Deahl informed this office that the case (Jones vs Hopkins) would probably be disposed of within 3 months.

By letter dated August 20, 1948 Attorney Clewe informed this office that the litigation is still pending.

By letter dated May 9, 1949 Attorney Hewitt informed this office that the case is in a position to be set down for trial at an early date.

By letter dated November 17, 1949 Attorney Hewitt reported the status of the matter to be unchanged.

A letter addressed on August 7, 1950 to E. G. Jones was returned unopened to this office with a notation on the envelope, "Deceased ---- try A. O. Jones."

A letter addressed on August 30, 1950 to Ernest Clewe, Applicant Jones' attorney of record, requesting verification of the latter's death and inquiring as to the heirs' desires in respect to the application, elicited no reply.

An inquiry addressed on October 17, 1950 to the Public Administrator, Butte County, brought forth the reply that the estate of E. O. Jones, Deceased, is being handled through the law offices of Clewe, Martin and Wade of Oroville and that the administrator is Alonzo E. Jones.

A letter addressed on November 3, 1950 to Alonzo E. Jones contained the following closing paragraph:

"The situation suggests that Application 10632 may warrant rejection and cancellation, for failure on the part of the applicant to exercise due diligence. Please inform us therefore as to any reason for which in your opinion such action should not be taken."

Mr. Alonzo E. Jones visited this office shortly after receipt of our letter of November 3, stated that he had not known of the pendency of Application 10632 and that he would consult the attorney of the E. O. Jones estate and then inform us as to the present state of affairs.

On February 5, 1951 this office again wrote Mr. Alonzo E. Jones, reminding him of his promise of action in connection with the application.

Our letter closed with the following:

"----- we should act on the application without indefinite delay. Unless the present holder of the application is in a position to proceed with development reasonably soon it may be a convenience to all concerned if the application is withdrawn and another application filed when conditions are more favorable. We are reluctant to take summary action in the matter without first ascertaining what the desires of the representatives of the estate may be."

On February 15, 1951 Mr. A. E. Jones wrote this office as follows:

"I rec your letter of Feb 5th and am trying to get E. G. Jones estate fix up and as soon as this is done I will take step toward my Brother application for this water right. And at this time I am asking you as a favor to hold this matter up untill things are more favorable."

On February 26, 1951 this office addressed a letter to Mr. Alonzo E. Jones, the letter containing passages as follows:

"This office cannot comply fully with your request 'to hold this matter up until things are more favorable'. The request is indefinite and as stated in previous letters the matter cannot be deferred indefinitely. ----- The matter will be held open for 30 days longer. ----- If no definite extension is requested within 30 days ----- it will be assumed that none is desired -----."

The letter of February 26, 1951 was sent by registered mail and it was addressed exactly as had been our letter of February 5, 1951. It was however returned by the Post Office, marked "unclaimed".

Section 1052 of the California Water Code reads in part as follows:

"The diversion or use of water subject to the provisions of this division other than as authorized in this division is a trespass -----."

Section 1225 of the California Water Code reads as follows:

"No right to appropriate or use water subject to appropriation shall be initiated or acquired except upon compliance with the provisions of this division."

Section 778 of the California Administrative Code reads as follows:

"It is not the purpose of the Water Code to provide a means whereby a reservation of water may be made by one who has no immediate plans or purpose to proceed promptly and diligently with construction

of the necessary diversion works and beneficial use of the water. The Department is disposed to be liberal in its allowances of time both for completing an application and for making full beneficial use of the water where progress is being made or where a serious effort is being made to overcome obstacles which prevent progress, but the Water Code does not allow the Department to countenance any attempt to place rights in cold storage where there is no intent to proceed promptly with development."

If as alleged by the protestants the source filed upon lies upon their land the applicant's action in piping water from that source to his place of use would appear at variance with the above quoted section of the Water Code. If on the other hand the source is located upon the applicant's land the water apparently would have been his to use by virtue of riparian ownership and the issuance of a permit to him would be seemingly unnecessary.

It is a requirement of the Division of Water Resources (under Section 669 of the Administrative Code) that a point of diversion be accurately located by course and distance from some government corner. In view of the disagreement between surveyors as to the true location of the point of diversion in question - a disagreement now of some 8 years standing - it cannot be fairly considered that the requirement has been met or that the application in that respect is yet complete.

It is the policy of the Division to accept an application for filing before right of access has been secured but to refuse to approve an application when it appears that the applicant will be unable to secure such right. In view of the protestants' vigorous insistence that the proposed point of diversion lies on their property and the lapse of time since the ownership of the property became an issue the prospect that right of access will be established appears remote.

The death of the applicant, uncertainty as to the identity of his successor in interest, the indefiniteness of the request by the administrator of the Estate for deferment of action and, finally, the loss of mail contact with the administrator, in addition to the long unanswered questions as to exactly where the point of diversion is located and who owns the land, collectively point to the undesirability of further deferment of final action. The deferment requested by the administrator "until things are more favorable", if granted, would in effect be placing a water right in cold storage where there is no evident intent to proceed promptly. Such action clearly would be at variance with Section 778 of the Administrative Code, above quoted. In view of all the circumstances it is the opinion of this office that further temporizing in the matter of Application 10632 is unwarranted and that that application should be denied.

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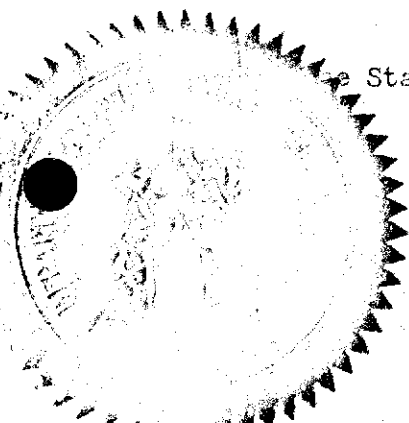

ORDER

Application 10632 having been filed with the Division of Water Resources as above stated, a protest having been filed, a stipulated hearing having been held and the State Engineer now being fully informed in the premises:

IT IS HEREBY ORDERED that Application 10632 be rejected and cancelled upon the records of the Division of Water Resources.

WITNESS my hand and the seal of the Department of Public Works

State of California this 11th day of June 1951.

A circular seal with a serrated edge, containing the text "DEPARTMENT OF PUBLIC WORKS" and "STATE OF CALIFORNIA".

A. D. Edmonston,
State Engineer