

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 13543 by Melvin T. Agnew to Appropriate
Water from an Unnamed Stream in Napa County for Domestic and
Recreational Purposes.

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Decision A. 13543 D. 713

Decided August 27, 1951

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Appearances at Hearing Held at Napa on April 10 and June 5, 1951:

For the Applicant

Melvin T. Agnew

L. L. James, Attorney at Law,
by Clarence H. Higgins

For the Protestants

Emanuele Damonte)
Sam Haus)

Palmer and York, Attorneys at Law,
by Lowell Palmer

EXAMINER - HARRISON SMITHSONIC, Supervising Hydraulic Engineer, Division
of Water Resources, Department of Public Works, for A. D. HANMONSTON,
State Engineer.

Also Present: Kenneth L. Woodward, Assistant Hydraulic Engineer,
Division of Water Resources, Department of Public Works.

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OPINION

Description of the Project

The application contemplates an appropriation of 9 acre-
feet per annum, to be collected between November 1 and March 31 of each
season from an unnamed stream tributary to Pope Creek, in Napa County,

for domestic and recreational purposes. The water is to be impounded at a point within the ~~NE 1/4~~ of projected Section 18, T9N R5W, ~~SE 1/4~~, by an earth storage dam, 10.32 feet high and 320 feet long. The resulting reservoir is to have a surface area of 1.5 acres and a capacity of 9.0 acre-feet. The water is to be used for household purposes and for the irrigation of approximately $\frac{1}{2}$ acre of garden and orchard. Contemplated recreational uses include swimming, boating and fishing. The place of use lies in the same quarter quarter section as the dam.

Protests

Emanuel Demonte protests as a riparian owner and user of water for subirrigation. He states that his point of diversion is 2000 feet downstream from the applicant's dam, that he waters cattle from the stream, such use beginning in May of each year, and that he also diverts for domestic purposes. He states that his protest may be disregarded and dismissed if the applicant agrees to maintain the normal flow of the stream at all times, limiting his (the applicant's) diversions to flood waters only; and if, also, the applicant's dam is approved by the proper state authority as to stability and safety. He states that the applicant's dam failed in 1948 and that he considers it unsafe in its present condition.

Sam Haug states that he diverts water 500 feet below the applicant's dam, that he uses water for domestic purposes and for subirrigation and that the proposed appropriation would materially affect such use. He states that no material change has been made in the

construction of the dam since its failure 2 years ago and that he believes it dangerous to his property. He states that his protest may be disregarded and dismissed if the proper state authority pronounces the dam safe and stable, and if the applicant's diversions are limited to diversions of flood waters only.

Answers

The applicant answers the protests by stating that his property is riparian to the source filed upon, that the dam described in his application has been in existence some 6 years, that the water which it stores not only supplies his own well but also increases the underground supply of others below him. He asserts that during winter and early spring there are surpluses in the stream and that such surpluses waste in amounts far greater than the amount he seeks to appropriate. He argues that the abstraction of the small amount he has filed on will be of no consequence to the protestants whatsoever. He takes the position that the State has no jurisdiction over his dam in view of its limited capacity, and he asserts that he has acquired a prescriptive right to the extent that water has been impounded above his dam.

Hearing Held in Accordance with the Water Code

Application 13543 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 formal hearing under the provisions of Article 733(b) of the California Administrative Code, Title 23, Waters, on Tuesday, April 10, 1951, at 10:00 o'clock A. M. in the City Council Chamber, Napa, California. Of the hearing the applicant and the

protestants were duly notified. The hearing was continued for good cause until Tuesday, June 5, 1951, and on that date, after due notice to the parties, it was reconvened at the same place and hour as before, and completed.

Discussion

The continuance of the hearing of April 10, 1951, to a later date was necessitated by the sudden illness of Lowell Palmer, Attorney for both of the protestants, and his consequent inability to be present.

The testimony at the hearing when it reconvened on June 5, 1951, included the following:

Applicant's witness Robert H. Dunning, a registered civil engineer, testified (pages 5 to 19 of transcript) in effect that he had examined the applicant's dam, surveyed and mapped it and written a report upon it; that the dam impounds a part of the flow of a small stream on the applicant's property; that the amount capable of being impounded is less than 9 acre-feet, that the reservoir fills during the rainy season, that when the dam is filled overflow reenters the stream, that he recommended that the size of the spillway be increased, that the recommendations were partly carried out, that the spillway was deepened and a 10 inch outlet pipe added, and that in his opinion the dam is safe.

Applicant Agnew testified in effect (pages 19 to 29 of transcript) that he has owned for 3 years the property

that the dam is built upon, that when he bought the place the dam was already there, that the property includes about 98 acres, that he has thereon a house, also sheep and fruit trees, that water for the sheep and fruit trees is obtained from the creek or from a well 150 yards below the dam, that there is usually water in the stream above the dam until middle or late May, that there is water in the creek below the dam now (on June 5), that the dam now lacks 9 inches of being full, that the outlet pipe is now closed, that there is no water on the place except the stream, the reservoir and the well, that there are 16 sheep, a horse and 24 fruit trees, that the failure of the dam in 1948 was the result of a raft drifting across the spillway, that his land is mostly hillside land, that the protestants' lands lie below his, that the first hard rain of the season fills the reservoir, that the reservoir is always full by the first of the year, that water is not piped from the reservoir but that the reservoir feeds the well, that there is always enough seepage from the dam to make the creek run slowly.

Applicant's witness of J. B. Allen testified (pages 29 to 36 of transcript) in effect that he built the dam under discussion, that before the dam was built there was no

water at all on the place after June, that the well is 10 or 15 feet from the creek bed, that before the dam was built the creek was dry by June 1, down to and including the Bussate place, and that there is surplus water in the rainy season that runs down the stream and out to sea.

Protestant Haas testified (pages 36 to 46 of transcript) in effect that his place is immediately adjacent to and downstream from the applicant's place, that the stream in question passes underneath 5 of his buildings, that the stream subirrigates his land, that he has 10 acres of vineyard and walnuts, that in his opinion the applicant's diversion would adversely effect his (Haas') water supply, that the creek usually dries up in May, that the failure of the dam in 1948 necessitated considerable repairing, that his well also is affected by the flow of the stream, that his well has never gone dry, that flow in the stream supports subirrigation, that he has no objection to appropriation by the applicant as long as a normal flow is maintained in the stream, and that in his opinion the holding back of 9 acre-foot would stop subirrigation.

Protestants' witness Conrad Neil, Jr., a registered civil engineer, testified (pages 46 to 57 of transcript) in effect that he has inspected the applicant's dam, that

the dam appears to be substantial and well compacted, that in his opinion the spillway is not adequate and that from the safety standpoint the protest is well founded.

In view of the limited capacity of the reservoir and the limited height of the dam the latter does not come within the jurisdiction, for safety, of the State Engineer. Apprehension by the protestants therefore that the applicant's dam may fail cannot be considered a bar to the approval of the application. Redress in the event of injury due to failure of the dam, should such occur, will lie within a jurisdiction other than that of the Division of Water Resources.

According to Water Supply Paper 1121, U. S. Geological Survey, the discharge of Putah Creek (which Pope Creek enters), near Winters, averaged 458 second-feet from 6.4 square miles, or 0.746 second-foot per square mile of tributary watershed, from 1930 to 1948. According to the St. Helena quadrangle, U. S. G. S., the watershed tributary to the applicant's reservoir therefore may be assumed to produce something of the order of $100/640 \times 0.75$ or 0.13 second-foot of average flow which is equivalent to some 95 acre-feet per annum - large in comparison with the parties' probable needs. Again, the testimony indicates that the applicant's dam which has been in service for several seasons fills by the first of the year and that there is surplus water that runs down the stream and out to sea. Finally, the terms stated in the protests under which the protests may be disregarded and dismissed indicate that the protestants themselves believe that surpluses exist.

Conclusion

The protestants' apprehension that injury may result from some future failure of the applicant's dam is an insufficient bar to approval of the application. The evidence indicates that unappropriated water exists at times in the source from which appropriation is sought and that such water may be taken and used in the manner proposed without injury to the protestants. In view of these circumstances it is the opinion of this office that the application should be approved, subject to the usual terms and conditions.

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ORDER

Application 13543 for a permit to appropriate water 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 13543 be approved and that a permit be issued to the applicant, subject to such of the usual terms and conditions as may be appropriate.

WITNESSED by hand and the seal of the Department of Public Works of the State of California this 27th day of August, 1951.

Original signed by

A. B. Edmonston,
State Engineer

EX-100