

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 13591 by Camilla Love to Appropriate Water from Wilson Creek Tributary to Mono Lake in Mono County for Domestic and Mining Purposes.

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Decision A. 13591 D. 731

Decided January 28, 1952

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IN ATTENDANCE AT INVESTIGATION CONDUCTED BY THE DIVISION OF WATER RESOURCES AT THE SITE OF THE PROPOSED APPROPRIATION ON NOVEMBER 2, 1950:

Malvern E. Hughes	Representing the Applicant
J. E. Bell	Representing the Protestant
J. J. Heacock	Associate Hydraulic Engineer Division of Water Resources Department of Public Works Representing the State Engineer

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OPINION

General Description of the Project

The applicant seeks to appropriate 0.5 cubic foot per second from March 15 to December 1 from Wilson Creek at a point within NW $\frac{1}{4}$ NE $\frac{1}{4}$ Section 31, T2N R26E, MDB&M for domestic and mining purposes. The proposed diversion is to be effected by means of a stone and concrete intake box 3 feet high and 6 feet long. The proposed conduit is a 6-inch seamless steel pipe line, 200 feet long. The place of use is described as lying within the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 31, T2N R26E, MDB&M. The applicant states

that she holds the place of use under unpatented mining claims and that a permit for right of access to the proposed point of diversion has been requested from the U. S. Forest Service. The applicant states further that the mining property to be served is the Golconda group of claims, that the nature of the mines is gold placer and quartz lode, that mining use will include washing, milling and concentrating, that after use the water which will then contain clay, sand and sediment will be discharged into an unnamed gully tributary to Mono Lake. The application covers also a domestic supply for some 10 to 20 persons at the same described place of use.

Protest

Ruby H. Cunningham protests the application. She claims that the diversion proposed therein will injure her inasmuch as all the water of Wilson Creek has been used on her property for many years. Her property, she states, includes the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 30 and Lots 1 and 2 and the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 31, T2N R26E, MDB&M. She claims to have purchased that property on January 26, 1938, from E. W. and Jessie D. Billeb. She claims a water right based upon an appropriation antedating December 19, 1914, upon riparian ownership and upon Applications 7439, 7440 and 7441. She quotes from a letter assertedly written by Everett W. Bryan, Acting Deputy in Charge of Water Rights, on September 6, 1935, as follows:

" . . . an investigation of the protests to Applications 7439, 7440 and 7441 by Ruby H. Cunningham was made by a representative of this office. The report of this investigation indicates that the waters of Wilson Springs which Mrs. Cunningham seeks to appropriate contribute to the flow of Wilson Creek, that the waters of Wilson Creek have been in use since prior to December 19, 1914, on the land of E. W. Billeb, thereby affording a basis for a claim of appropriative right;

that the normal summer flow of Wilson Creek is wholly diverted and put to beneficial use for the irrigation of lands on the said property of E. W. Billeb and that the appropriations proposed by Mrs. Cunningham would decrease the amount available to Mr. Billeb and in fact probably entirely prevent use by him during the summer months from Wilson Creek."

The protestant asserts that she now owns the Billeb lands referred to in the quoted passage and that she has continued the diversion of all of the waters of Wilson Creek on that property, previously exercised by the Billebs.

Answer

In answer to the protest Walvern E. Hughes, on behalf of the applicant, states (by letter of July 14, 1950) that the protestant's reference to an appropriation from Wilson Springs is immaterial, the waters sought under Application 13591 being waters of Wilson Creek; and that the protestant's assertion as to having continued the use of waters of Wilson Creek begun by E. W. Billeb upon the property which she purchased from the Billebs is not a fact. According to the answer the protestant diverted the water which served the Billeb lands to her property at Tioga Lodge, thereby diverting the waters of Wilson Creek entirely out of its watershed and into the watershed of Andy Thompson Creek and discontinuing its use upon the Billeb lands. The answer argues that since the lands of Tioga Lodge are not riparian to Wilson Creek, water cannot be diverted thereto from Wilson Creek under claim of riparian right.

Field Investigation

The applicant and the protestant 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 November 2, 1950. The applicant and the protestant were represented at this investigation.

Records Relied Upon

Application 7439, 7440, 7441 and 13591 and all data and information on file therewith.

Discussion

Wilson Creek according to the report of the investigation on November 2, 1950, is a perennial stream, entering Mono Lake from the west. Above the point where the applicant proposes to divert the Wilson Creek watershed is 1.5 square miles in extent. It is high and steep, elevations ranging from about 6419 feet at Mono Lake to 10 000 feet or more at the Sierra Nevada summit. The watershed is described as having a medium to light cover of timber and brush. Rainfall is reported as upward of 30 inches. Some three-fourths mile south of and parallel to Wilson Creek another stream, Andy Thompson Creek, flows easterly into Mono Lake. Wilson Creek and Andy Thompson Creek are separated by a broad, rounded ridge and on that ridge is situated the so-called Wilson Spring.

During the investigation of November 2, 1950 it was estimated that over 0.6 cubic foot per second was reaching the protestant's point of diversion on Wilson Creek and that about one-half of that amount or 150 gallons per minute was coming from an old mining tunnel on the left slope of Wilson Creek Canyon. The investigating engineer gathered that the flow of Wilson Creek is usually lowest in late summer but that the flow from the mine tunnel is fairly constant. He reported that Wilson Creek debouches from the canyon onto a debris cone, about a half mile from Mono Lake, and that several old channels are evident in a distance of about a half mile along the lake shore, the present flow channel being in the south central part of the cone.

Wilson Spring, the report of investigation states, is a cienega which in a state of nature would be tributary to both Wilson Creek and Andy

Thompson Creek but which at the time of the investigation was being diverted (surface flow at least) into Andy Thompson Creek. According to the report the flow of Wilson Spring can be diverted to either watershed with very little effort.

As to the protestant's use of water, it appears that water is used part time at a cabin, for domestic purposes, diversion therefor being by means of a 1-inch pipe heading some $\frac{1}{4}$ mile upstream from the lake shore; and for the irrigation by flooding of approximately 30 acres of native pasture. According to the report, 5 acres of alfalfa were once irrigated but due to alleged insufficiency of water the alfalfa irrigation was discontinued. The report states that over one-half of the area irrigated lies on a fairly steep hillside and that the soil is of a loose texture requiring a rather large irrigating head.

The applicant's desire, it appears, is to construct initially a 30-ton mill and to enlarge it as circumstances warrant, in future. Waste water from the mill is to be discharged into the old, northerly creek channel, so that silty water will not enter the protestant's domestic diversion. The mill site is described as lying at the upper end of the cone and as being roughly bisected by the old northerly channel of Wilson Creek. The applicant is said to own or control 47 standard sized mining claims, contiguous to each other, lying on both sides of Wilson Creek and forming a block roughly 7500 by 6600 feet in size.

A portion of the 30 acres, referred to in an earlier paragraph as irrigated by the protestant, may also be supplied from Wilson Spring via Andy Thompson Creek. The protestant holds three approved applications to divert from Wilson Spring. These are Application 7439, Permit 5183, covering the diversion of 2 cubic feet per second year round for power; Application 7440, Permit 5184,

to divert 0.125 cubic foot per second, year round for recreational and domestic purposes at the town of Mono Lake; and Application 7441, Permit 5185, for 0.25 cubic foot per second from about April 1 to about October 15 for the irrigation of 10 acres in Lot 1 and 2 acres in Lot 6 of Section 31, T2N R26E, MDB&M. The three projects have been reported complete. The following statement appears in the 1948 progress report on Application 7439, Permit 5183:

"I am the sole user of water from both Wilson and Andy Thompson creeks. Water from Andy Thompson Creek is used on Tioga Lodge property for power, domestic and recreational uses, and for irrigation. Water from Wilson Creek is used for irrigation of my property to the north of Tioga Lodge. During the past two years the water in both creeks has been so very low that I could not divert these springs to Andy Thompson Creek without serious injury to my property located north of Tioga Lodge which is as stated above irrigated by the waters of Wilson Creek."

Some information as to the flow of Wilson and Andy Thompson Creeks is set forth in a report of an investigation made by Engineer Kibbey of the Division in connection with Application 7439 and related applications on August 22 and 23, 1935. That report states in part:

"On Wilson Creek near the west line of the Billeb property, is a good 2-foot weir at which Mr. Billeb has made fairly frequent readings since its installation in December 1932. There is also a 22-inch wooden gate on the Thompson Creek ditch near the south line of the Billeb property at which the depth of water has been taken at intervals over the same period . . . The readings as taken by Mr. Billeb were worked up by the writer, averaged for the various months, and are shown on the accompanying tabulation."

The tabulation mentioned is as follows:

"Average monthly field delivery as calculated from Mr. Billeb's readings:

	<u>Wilson Creek</u>	<u>Thompson Creek</u>
1932 December	.88 cfs	.81 cfs
1933 January	.74	1.15
March	.50	
April	.50	.43
May	.35	.5
June	.30	.42
July	.56	.21
August	.36	.39
September	.39	.46
October	.38	.54
November	.56	.42
December	.47	.75
1934 January	.47	.77
February	.41	.65
March	.63	.48
April	.65	.77
May	.63	.58
June	.45	.38
July	.28	.38
August	.26	.38
September	.37	.58
October	.37	.68
November	.30	.58
December	.33	.58
1935 January	.41	.58
April	.45	.77
May	.86	.95
June	1.14	1.05
July	.51	.85
August	.31	.58 "

According to Engineer Kibbey's report a total of nine acres was then irrigated on the Billeb property (now owned by Protestant Cunningham), the supply coming in part from Wilson Creek and in part from "Andy" Thompson Creek. The land irrigated was stated to be made up of 5 fields, respectively 1.8, 1.0, 3.9, 1.3 and 1.0 acres in extent, and was discussed in that report as follows:

"Field (a) is watered entirely from Wilson Creek. About half of it supports a fair stand of alfalfa, the other half a scattering of alfalfa with native grass.

"Field (b) is also irrigated from Wilson Creek supplemented occasionally with water from Thompson Creek. This field is covered with a green mat of clover and grass and contains a number of shade and fruit trees, permittee's house and a few rent cabins and tent houses. Domestic water is supplied by a 1" pipe - - -.

"Field (c) is watered almost entirely from the Thompson Creek ditch. This is in native grass with a scattering of alfalfa. It evidently suffers from lack of water at times.

"Field (d) lies below the highway - - - - -. Mr. Billeb stated that when sufficient water is available the field is planted to truck and forage - - - - -.

"Field (e) is only irrigated - - - - - when there is a surplus of water and then mainly from Wilson Creek via the dry watercourse. - - - - -.

"All water available is used throughout the year both for irrigation and domestic purposes."

With reference to Wilson Creek the Kibbey report also states:

"Measured just above the first spring in the creek - - - - the flow was 0.19 c.f.s. - - - - . Opposite the mine the flow had increased to 0.5 c.f.s. Near the west boundary of the Billeb property it had fallen to 0.35 c.f.s. and at Billeb's highest point of diversion (also point of distribution) the flow was 0.26 c.f.s."

Other pertinent extracts from the Kibbey report are as follows:

"In the early part of the year when water is plentiful some of it is turned down a dry watercourse from the west boundary to an irrigated patch on the north boundary - - - otherwise the flow passes down to the fields bordering the creek. Acreages irrigated by Mr. Billeb were estimated by pacing - - - - . The slope of the land is steep, varying from 20% to something less. The soil is mainly volcanic ash interspersed with broken shale and the duty of water is extremely low. It is irrigated by small openings in the ditches from which the sidehill is wetted."

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"In connection with Mr. Billeb's use of water it may be stated that no evidence of runoff from the fields was seen. The land is said to have been irrigated as at present for 30 to 40 years past. Statement by an uninterested party who had farmed the place for 3 years was to the effect that while he had raised better crops than Mr. Billeb by a somewhat more careful application of the water he had not been able to cover any more land with the same amount."

The information above set forth indicates that Protestant Cunningham probably holds rights, both riparian and appropriative, to divert waters of Wilson Creek, for domestic purposes and for the irrigation of 30 acres of pasture. It indicates that diligence has been exercised, that the full flow of Wilson Creek has been applied to the land and that the protestant and her predecessor have deemed that supply insufficient.

The tabulation of monthly average field deliveries, calculated from readings recorded by the protestant's predecessor (Billeb) and set forth in an earlier paragraph, indicates that field deliveries during the 30 months of record averaged approximately 0.49 second-foot and ranged from a minimum of 0.28 second-foot to a maximum of 1.14 second-feet. In the light of the information adduced it may be assumed that these deliveries represent all the water that it was practicable to obtain from Wilson Creek. On the usual basis of 1 second-foot to 80 acres, 0.375 second-foot would appear sufficient for the irrigation of 30 acres and 0.49 second-foot obviously exceeds that amount by some 31%. However Engineer Kibbey's statement (in 1935) that "the duty of water is extremely low" and Engineer Heacock's statement (in 1950) that "it is doubtful that there is sufficient water during

the low period of the summer to sustain the 30 acres of irrigation" would seem to justify a use in excess of such usual allowance. The topography and porous soils of the irrigated area indicate a duty not higher than 1 cubic foot per second to 50 acres and a requirement for adequate irrigation of the 30 acres of not less than 0.60 cubic foot per second.

Subsequent to the investigation of November 2, 1950, the applicant requested that Application 13591 be reduced in amount from 0.5 to 0.25 cubic foot per second, contingent upon the withdrawal of the protest. By letter dated December 15, 1950, the protestant's reaction to that proposal was as follows:

"In reply I can only reiterate that my protest was based on the fact that the natural flow of Wilson Creek has always been inadequate for the proper care of the irrigation needs of my property riparian to that creek. It has been necessary to turn some water from Andy Thompson Creek to the north section of my property, that riparian to Wilson Creek, when this could be done, even to the disadvantage of the needs of this property. I do not therefore wish to withdraw protest."

Since the protest was not withdrawn the application was not amended.

In view of the circumstances surrounding the matter of Application 13591 it is the opinion of this office that the efforts of the protestant's predecessor and the protestant, in turn, to exploit and utilize the full flow of Wilson Creek warrant recognition both as due diligence in keeping alive an alleged ancient appropriative right and as the active exercise of such riparian right as may attach to the property. This office is of the opinion further that use by the protestant extends substantially to the full flow of Wilson Creek, that unappropriated water thereon is non-existent and that Application 13591 should therefore be denied.

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ORDER

Application 13591 for a permit to appropriate water having been filed with the Division of Water Resources as above stated, a protest having been filed, a hearing having been held and the State Engineer now being fully informed in the premises:

IT IS HEREBY ORDERED that Application 13591 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 of the State of California this 28th day of January 1952.



A. D. Edmonston
State Engineer

