

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 13050 by Cleo R. Rubins and Nellie O. Rubins to appropriate water from two tunnels and an unnamed stream tributary via Webber Creek to South Fork of American River in El Dorado County for domestic purposes and irrigation.

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Decision A. 13050 D. 754

Decided August 15, 1952

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In Attendance at Investigation Conducted by the Division of Water Resources at the Site of the Proposed Appropriation on October 5, 1951:

Mrs. George E. Jenkins	Representing the applicants
Calvin C. Abel	Protestant
George E. Jenkins	Prospective purchaser of applicants' property
Roy Turja	Jenkins' son-in-law
Jean Turja	Jenkins' daughter
Ernest Carlson	Deputy Sheriff
A. S. Wheeler	Senior 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 applicants seek to appropriate from 3 sources, designated respectively as Tunnel No. 1, Tunnel No. 2 and Unnamed Spring, and all

situated within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 24, T10N R11E, MDB&M. The amounts applied for from the 3 sources are respectively 0.057, 0.029 and 0.014 cubic foot per second. The water is to be used for domestic purposes and irrigation. Domestic use is to extend year-round and to include household use, stockwatering and domestic garden irrigation; irrigation from about March 1 to about November 30. A four acre orchard is to be irrigated, also a 4 acre pasture, both located within the E $\frac{1}{2}$ NW $\frac{1}{4}$ of the above-mentioned Section 24. According to the application the land to be irrigated has no other water right or source of water supply than the one therein applied for. The project includes a concrete dam, 4 feet high by 6 feet long, 705 feet of 1 $\frac{1}{2}$ inch pipe leading from Tunnel No. 2 to Tunnel No. 1, 50 feet of 1 $\frac{1}{2}$ inch pipe connecting Unnamed Spring with Tunnel No. 1, and 2250 feet of 2 inch pipe leading from Tunnel No. 1 to the place of use.

Protest

Calvin C. Abel protests that the diversion proposed by the applicant will deprive him (the protestant) of a supply which he needs and uses for domestic purposes and irrigation. He asserts a riparian right to waters in the stream fed by Tunnel No. 1 and he asserts an appropriative right to the same waters, based upon use for more than 30 years. He states that his use as of 1950 includes the domestic requirements of a family of 10 persons and the irrigation of a 3 acre vegetable garden, 1 acre of alfalfa, and some 290 fruit and nut trees. He states further that first use on his property was made in 1915, that such use was at the rate of 11 gallons per minute from May to October, both inclusive, and at the rate of 600 gallons per day during the other months, and that his

diversion heads within the SE $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 24, T10N R11E, MDB&M. He states finally that the applicants, without permission, have installed a pipeline across his (the protestant's) property, that the protest is not directed against the applicants' proposal to divert from Tunnel No. 2 or from the Unnamed Spring and that the protest may be disregarded and dismissed if the applicants (1) restore the output of Tunnel No. 1 to its original channel and delete that tunnel from their application and (2) remove their pipeline from his (the protestant's) lands.

Answer

The applicants answer the protest by denying that the diversion proposed in the application will deprive the protestants of water but assert on the contrary that the protestant's supply is ample. They deny that any stream is fed by Tunnel No.1, or that the protestants or their predecessors have appropriated water from that tunnel. They assert that prior to May, 1950 water from Tunnel No. 1 flowed through a miners' ditch, that said ditch is entirely on their property, that the only time that the protestant received water from Tunnel No. 1 was when he cut the miners' ditch, that the protestant has cut the miners' ditch twice since May, 1950, that they (the applicants) immediately repaired said cuts, that the protestant's predecessor never used water from Tunnel No. 1, and that no part of their pipeline is located on the protestant's land.

Field Investigation

The applicants and the protestant having stipulated to an informal hearing as provided for in Section 733(b) of the California Administrative Code, Title 3, Waters, a field investigation was conducted at the site of the proposed appropriation on October 5, 1951 by an engineer of the Division. The protestant was present and the applicants were represented during the investigation.

Records Relied Upon

Application 13050 and all data and information on file therewith.

Discussion

Information collected during the field investigation of October 5, 1951 is to the effect that Tunnel No. 1 was dug about 76 years ago, is about 800 feet long and is known as the old Tennessee Mine Tunnel; that its adit is located near the head of the small draw on which the protestant's diversion works are located and about 1000 feet upstream from those works; that the tunnel was producing about 1000 gallons per day when visited; that said flow was being trapped in the applicants' regulating reservoir, 60,000 gallons in capacity, 50 feet below the tunnel; that a pipe line leads from the reservoir to the applicants' place of use; that overflow from the reservoir proceeds down the channel of the draw to an old ditch said to have been constructed at about the time the tunnel was dug; that the ditch also leads to the applicants' place of use; that, reportedly, the ditch has been used continuously since its construction; that at present the upper portion of the ditch is used to convey water to a 1000 gallon reservoir used by the applicants for stockwatering; that the last-mentioned reservoir overflows into a draw tributary to the one on which the protestant's works are located; that overflow when it occurs consists in part also of water from "Unnamed Spring" which is piped to the regulating reservoir at the tunnel; and that the yield of "Unnamed Spring" was estimated to be approximately 500 gallons per day.

With reference to Tunnel No. 1 the report of the field investigation contains the following passage:

"In digging the tunnel fissures are encountered in the rock formation thru which the tunnel passes and the water emanating from the tunnel comes from such fissures. The water in the fissures may originate several miles from the tunnel and may be waters which would never have constituted a part of the flow in the draw - - - had not the tunnel been dug."

With reference to the protestant's development the report of investigation contains information to the effect that the protestant has constructed a dam in the draw from Tunnel No. 1; that the dam creates a reservoir of a capacity of about 0.9 acre-feet; that from the reservoir a pipeline leads to the protestant's place of use which consists of a fully plumbed house, a 1 acre orchard and/or garden and 1 acre of alfalfa, indicating a total consumption of about 17,000 gallons per day; and that the protestant also has 2 dug wells, respectively 15 and 12 feet deep, below his dam and beside the draw, that water is available at all times in the wells and that pumps have been installed and water piped from the wells to his place of use.

Statements by or on behalf of the applicants, during the investigation, according to the report, were to the effect that the applicants' predecessors in interest used the tunnel water continuously, their use having begun about 76 years ago, and that since purchasing the property in 1945 the applicants have used that water all the time. A statement by the protestant, according to the same report, was to the effect that he and his predecessors have regularly used the tunnel waters, ever since 1915; whereas

the Jenkins (said to be in the process of buying the applicants' property) stated that the only times the protestant secured tunnel waters was when he cut the applicants' ditch, or disconnected their pipeline or when there was overflow from their stockwatering reservoir.

Another item of information disclosed by the field investigation is that the applicants' works, including their pipeline, lie wholly to the east of the property line between applicants and protestant and not at all upon the protestant's land.

The protestant's claim of a riparian right to the use of water from Tunnel No. 1 is unconvincing. True, the waters emanating from Tunnel No. 1 enter the small draw to which the protestant's lands are riparian. However a riparian right can only attach to the natural flow of a stream, and the flow contributed by Tunnel No. 1 appears to be mainly if not wholly artificial.

The protestant's claim of an appropriative right to the waters in question is unconvincing also. To initiate an appropriative water right in 1915, the year within which the protestant asserts that use of water on his property began, it would have been necessary to file an application under the provisions of the Water Commission Act, and no such application appears to have been filed. In the absence of any clear indication of an appropriative right to divert from Tunnel No. 1 it must be inferred that no such right exists.

Summary and Conclusions

Unappropriated water appears ordinarily to exist in the sources from which appropriation is sought under Application 13050. Water emanating from Tunnel No. 1 appears to be water of artificial

origin, to which riparian claim cannot attach. No valid appropriative rights to the use of said water appear to exist. The objections contained in the protest against Application 13050 are directed against appropriation of waters from Tunnel No. 1 only and not against appropriation of waters from the other sources named in that application. No bar to the approval of the application is apparent.

In view of the circumstances summarized this office is of the opinion that Application 13050 should be approved and permit issued, subject to the usual terms and conditions.

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ORDER

Application 13050 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 13050 be approved and that a permit be issued to the applicants, 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 15th day of August 1952.



A. D. Edmonston

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State Engineer