

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Application 25741)
ALTON E. AND MARGARET L. WILDER) DECISION: 1595
Applicant) SOURCE: Unnamed Springs
APPLICATION 26045) Tributary to
LEROY W. AND ELEANOR D. WILDER) Klamath River
Applicant) COUNTY: Humboldt
AND APPLICATION 26046)
WARREN W. AND GENIE WILDER)
Applicant)
BENJAMIN H. WILDER, ET AL:)
Protestants)

DECISION APPROVING APPLICATION 25741 IN PART

AND

APPROVING APPLICATIONS 26045 AND 26046

BY THE BOARD:

Alton E. and Margaret L. Wilder having filed Application 25741, LeRoy W. and Eleanor D. Wilder having filed Application 26045, and Warren W. and Genie Wilder having filed Application 26046, all for permits to appropriate unappropriated water; protests having been received; a hearing having been held in Eureka on October 24, 1980 before the State Water Resources Control Board; applicants and protestants having appeared and presented evidence; the evidence received at the hearing having been duly considered; the Board finds as follows:

Substance of the Applications

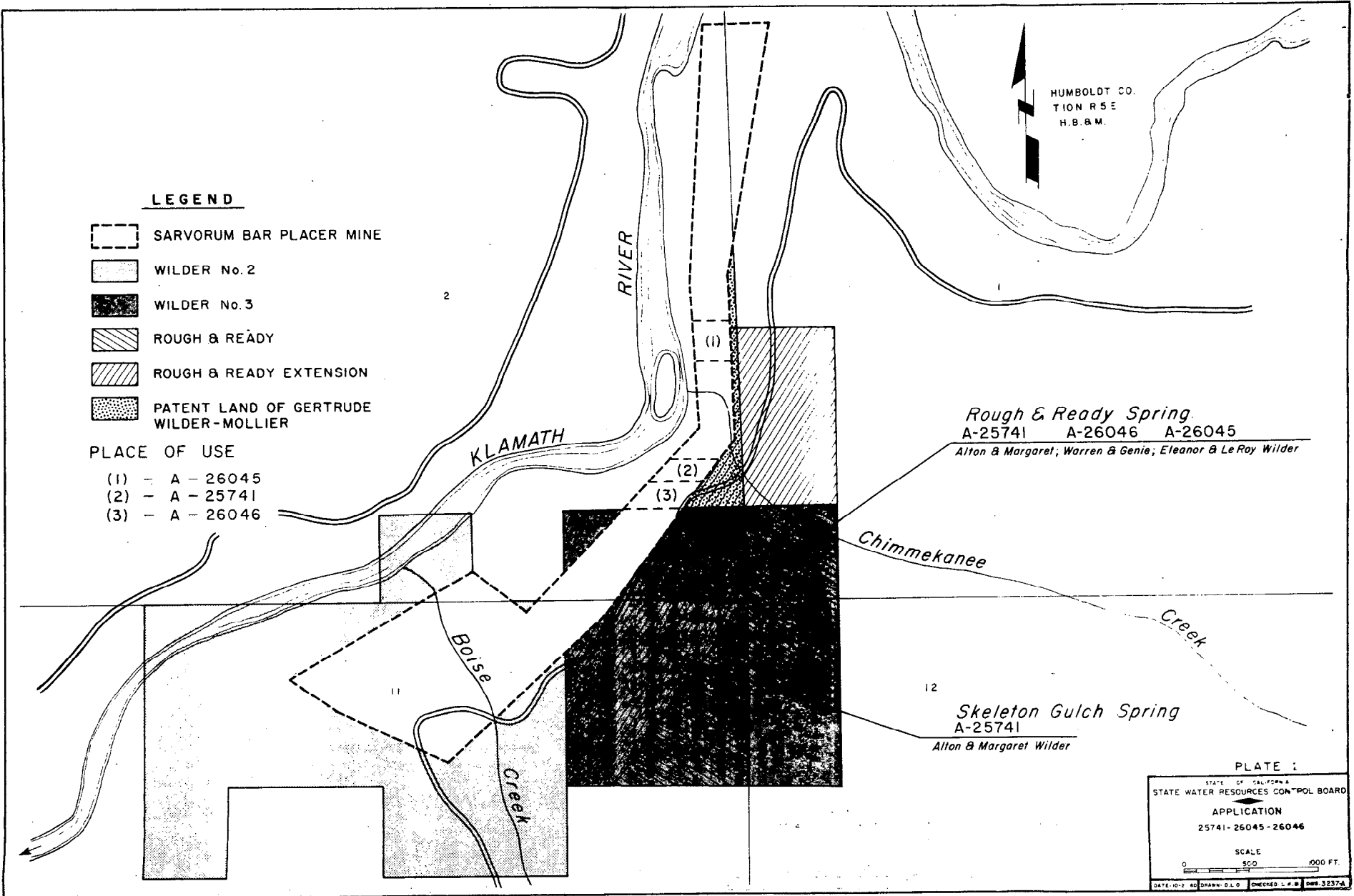
1. Application 25741 is for a permit to appropriate 404 gallons per day (gpd) from April 1 to November 1 for irrigation, and 428 gpd from January 1 to December 31 for domestic purposes. Two points of diversion are requested, being within the SW $\frac{1}{4}$ of SW $\frac{1}{4}$ of Section 1, T10N, R5E, HB&M and the NE $\frac{1}{4}$ of NE $\frac{1}{4}$ of Section 11, T10N, R5E, HB&M.

2. Application 26045 is for a permit to appropriate 404 gpd from April 1 to November 1 for irrigation and 255 gpd from January 1 to December 31 for domestic purposes. The point of diversion is within the SW $\frac{1}{4}$ of SW $\frac{1}{4}$ of Section 1, T10N, R5E, HB&M.







3. Application 26046 is for a permit to appropriate 404 gpd from April 1 to November 1 for irrigation and 428 gpd from January 1 to December 31 for domestic purposes. The point of diversion is within the SW $\frac{1}{4}$ of SW $\frac{1}{4}$ of Section 1, T10N, R5E, HB&M.

Applicants' Projects

4. Applications 25741, 26045 and 26046 all request rights to divert water from Rough and Ready Spring (Spring) through an existing 1-1/2 inch gravity pipeline. Under Application 25741, an additional point of diversion is requested from a spring known as Skeleton Gulch. The point of diversion on Skeleton Gulch was abandoned during the hearing. The places of use described in the applications are all within the Sarvorum Bar Placer Mine, a patented mining claim. Plate I shows the mining claims and surrounding area.



LEGEND

-  SARVORUM BAR PLACER MINE
-  WILDER No. 2
-  WILDER No. 3
-  ROUGH & READY
-  ROUGH & READY EXTENSION
-  PATENT LAND OF GERTRUDE WILDER-MOLLIER

PLACE OF USE

- (1) - A - 26045
- (2) - A - 25741
- (3) - A - 26046

HUMBOLDT CO.
T I O N R 5 E
H. B. & M.

Rough & Ready Spring

A-25741 A-26046 A-26045

Alton & Margaret; Warren & Genie; Eleanor & Le Roy Wilder

Chimmekanee

Creek

Skeleton Gulch Spring

A-25741

Alton & Margaret Wilder

PLATE :

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

APPLICATION

25741-26045-26046

SCALE

0 500 1000 FT.

DATE: 10-2-40 DRAWN: D.L.O. CHECKED: L.F.B. DES: 3257-A

Protests

5. Protests were filed against the applications by Everett G. Wilder, Benjamin H. Wilder and Bertha Wilder-Hewitt. The protestants contend that: (1) Rough and Ready Spring rises and sinks within the boundary of the Rough and Ready Mining Claim (Mining Claim) which they possess and that the State Board has no jurisdiction over the spring's water; (2) they possess all surface rights on the Mining Claim and the applicants have no right of access to the spring; and (3) other sources of water are available to the applicants. Further, the protestants indicate they have plans for using the spring for mining and irrigation.

Background

The Applicants

6. In 1953 and earlier years Albert Wilder owned the patented Sarvorum Bar Placer Mine (Sarvorum Patent). Until 1953 the Sarvorum Patent was supplied water via the Boise Creek Ditch consisting of some 1-1/2 miles of ditches and flumes. When flooding occurred during the winter of 1952-53, the ditch was rendered inoperative.

7. The spring is situated within the Mining Claim which adjoins the Sarvorum Patent. The Mining Claim was also within the possession of Albert Wilder and his wife Lillian in 1953. In early 1953, after the Boise Creek Ditch became inoperative, a pipeline was installed to bring water from the spring to the dwellings of Albert and Frederick Wilder (a son) on the Sarvorum Patent. The pipeline was installed by Albert's sons, Llewellyn and Frederick Wilder. Figure 1 shows Wilder family relationships.

WILDER RELATIONSHIPS

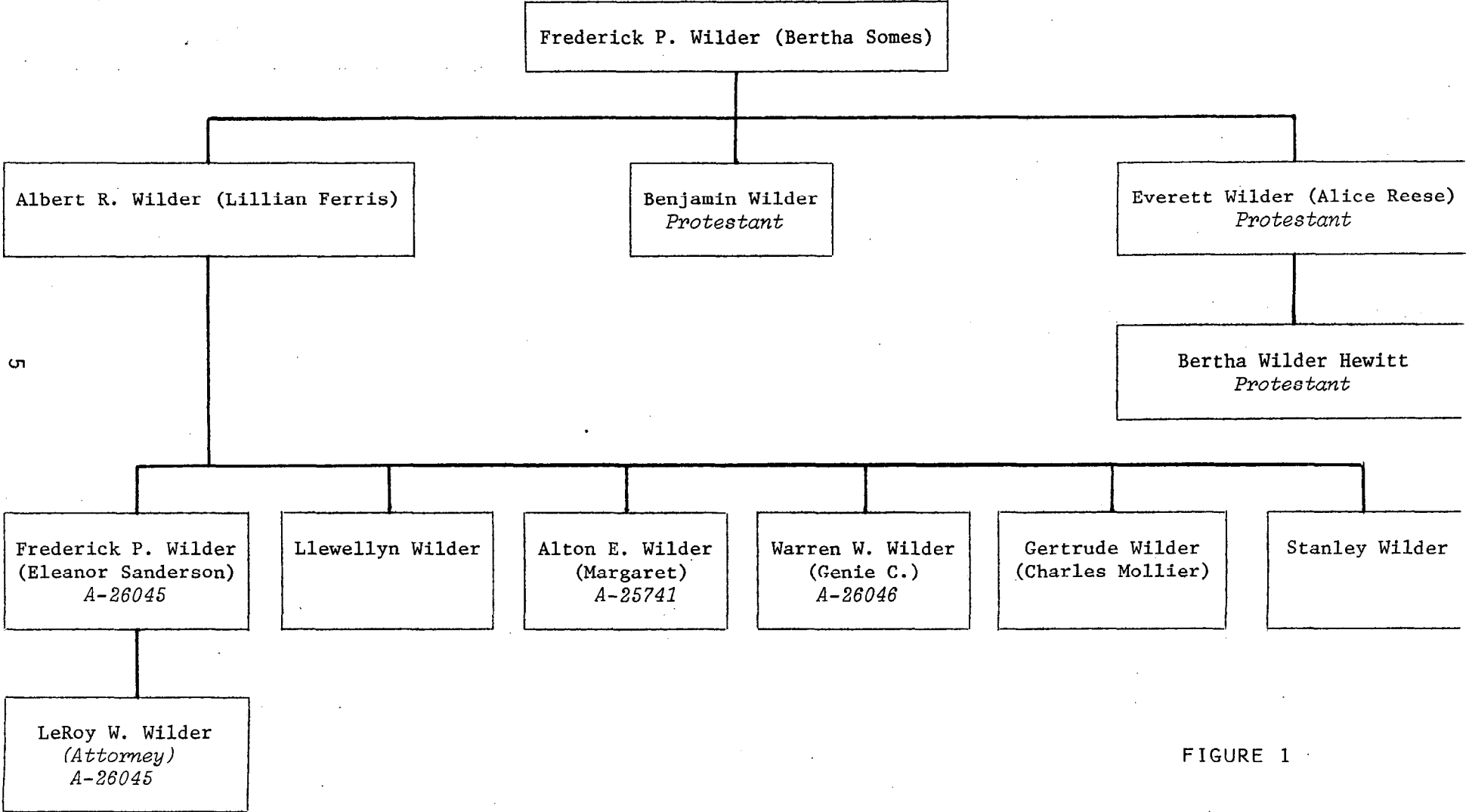


FIGURE 1

8. At the time the pipeline was being installed, Albert and Frederick signed the following agreement:

"This is to certify that I, Albert R. Wilder owns no interest in the 90 joints, or 1800 ft., of one inch galvanized water pipe that Fred P. Wilder is now installing across my land, and he has the privilege of removing same with all fixtures and connections at any time he may wish to do so, but I Albert R. Wilder has the right to use the water for irrigating and household purposes as long as the pipe remains on the land." (Staff Exh. #1)

9. By three quitclaim deeds dated September 24, 1953, Albert Wilder divided the Sarvorum Patent into three parcels and conveyed them to three of his sons, Llewellyn, Frederick, and Warren. Each deed conveys a one-third interest in the Boise Creek Ditch and water right. No mention is made of rights to the use of water from the spring on the Mining Claim, (D.B. 265, pp. 554, 557 and 560)*.

10. Warren Wilder and his wife, Genie, filed Application 26046. Llewellyn Wilder and his wife conveyed his parcel of the Sarvorum Patent to the Molliers. This conveyance included the one-third right to the Boise Creek Ditch and water right; it also included "a one-half interest in the Tank and Pipe from the water system being used from Rough and Ready Mine" (D.B. 825, p. 525). On July 27, 1970, the Molliers conveyed a portion of this parcel to Alton and Margaret Wilder. The conveyance only included "...an undivided 1/4

*D. B. stands for Deed Bank

interest in and to the water and water rights located in the Rough and Ready Placer Mine..." (Applicant's Exh. 9). Alton and Margaret Wilder filed Application 25741 in this matter. Finally, on May 8, 1978, the Mollier's conveyed "...1/4 of the 1/2 interest from the water system being used from Rough and Ready Mine" to Warren W. and Genie C. Wilder (Applicant's Exh. 8).

11. Upon the death of Frederick Wilder, a life estate in the Sarvorum Patent was distributed on December 29, 1978 to LeRoy W. Wilder (among others) who, with his mother, Eleanor, filed Application 26045 (Applicant's Exh. 5).

12. Llewellyn testified that it was assumed that he and Frederick (Albert's sons) acquired a one-half interest each in the spring when they were conveyed their interests in the Sarvorum Patent (RT pp. 24, 25 and 35). Warren appears to agree with this testimony (RT p. 63). To summarize then, as between the applicants, the heirs of Frederick (LeRoy and Eleanor) claim a one-half interest in the spring, Alton and Margaret claim a one-quarter interest and Warren and Genie claim a one-quarter interest.

The Protestants

13. On July 16, 1957, about four years after installation of the pipeline to the spring, Albert Wilder and Lillian, his wife, conveyed the Mining Claim to Stanley Wilder (a son). No mention is made of water rights. (D.B. 453, p. 81). Stanley conveyed the Mining Claim on December 3, 1963 to Everett and Benjamin Wilder, protestants to these applications. The deed reserved three acres of land to Stanley "...along with all necessary water for domestic purposes" (D.B. 764, p. 192). Bertha Wilder-Hewitt, protestant, is Everett's daughter.

Discussion

14. Protestants contend that the State Board has no jurisdiction over the spring because it does not contribute to other streams by surface or subsurface means. The Board has jurisdiction over water flowing in a known and definite channel, whether surface or subterranean, to the extent it has not been previously appropriated or is not being used upon riparian lands (Water Code Sections 1200 and 1201). That the water in a channel does not join other water does not oust the Board's jurisdiction (Water Code Section 1201). The test is whether the watercourse is of sufficient length to make water accessible to more than one landowner. Further, only springs where the water rises and sinks within a privately-owned parcel is deemed to belong solely to the owner of the parcel (State v. Hansen (1961) 11 Cal. Rptr. 335, 189 Cal. App. 2d 604). Although there can be no private ownership of springs on public lands and the right to the use of such water must be acquired by appropriation (Simons v. Inyo Cerro Gordo Mining & Power Co. (1920) 192 Pac. 144, 48 Cal. App. 524), the possessor of a mining claim has been determined to be possessed of a sufficient interest in the land to be entitled to use water flowing through the claim as a riparian.* While no case in point has been identified, apt analogy requires the conclusion that a mining claimant has the sole right to the use of spring water that rises and sinks on his mining claim.

*A mining claimant acquires riparian rights subject to prior appropriative rights to the use of water (Irwin v. Phillips (1855) 5 Cal. 140; Act of 1866, c. 262, 9, 14 U.S. Stats. 251, 43 USCA 661).

15. Whether the water from the spring meets the requirement for jurisdiction is a close question. The channel is not pronounced. Where it leaves the Mining Claim and enters the Sarvorum Patent it has been altered by the Boise Creek Ditch and probably by the floods of 1952-53 and 1964 (RT 49). During winter months excess water from the spring is intercepted by the ditch just above a washed out portion and then flows to the Klamath River. (RT 80 and 81). During drier months the flow diminishes. Testimony indicates that the spring supplies about 1/2 miners inch or about 8,000 gallons per day during periods of low flow (RT 106 and 112), a flow that would reach the Boise Creek Ditch but for extremely porous soils. Testimony also indicates that the spring contributes to the Klamath River either as surface or subterranean flow (RT 74 and 125). We conclude, therefore, that the Board has jurisdiction over the water of the spring.

16. The flow from the spring is not used, currently, for any purpose by the holders of the Mining Claim. The low flow from the spring is enough to satisfy the three applications and the water is unappropriated. The total amount of water sought by the applications for water from the spring is less than 2,400 gpd. The holders of the Mining Claim, however, have a paramount claim to use the water as riparians.

17. The protestants have indicated they may use water from the spring on certain portions of the Rough and Ready Mining Claim and on other mining claims. Use of the spring water on other claims is not a riparian use nor is the use of water from one watershed in another watershed on the Mining Claim an exercise of riparian rights (Rancho Santa Margarita v. Vail (1938) 11 Cal. 2d 501, 81 P. 2d 533).

18. The protestants claim they possess all surface rights on the Mining Claim and that the applicants have no right of access to the spring.

The applicants contend they have the right of access to the spring. The Board's regulations provide:

"The Board will not undertake to determine title to land or the right to occupy or use land or other property. A dispute concerning applicant's title or right to occupy or use land or other property necessary for consummation of the proposed appropriation is not cause for denial of an application and a protest based solely upon such disputed title or right will ordinarily be rejected as not presenting an issue within the board's jurisdiction; provided that the board may temporarily defer action on an application pending judicial determination of applicant's title or right to occupy or use property when in the board's judgment such action is justified." (23 Cal. Admin. Code 745).

This Board has no jurisdiction to decide issues pertaining to possession of land. We note, however, that the pipeline was installed at the time Sarvorum Patent and Mining Claim were possessed by Albert Wilder and that use has been continuous since the Mining Claim was conveyed in 1957. Finally, it is interesting that one of the protestants (Benjamin Wilder) was hired in 1964 to transport materials to repair the pipeline (RT 40-42). Inasmuch as the Board has held a hearing and received evidence concerning these applications, we should not defer action on the applications pending judicial determination of the applicants' right of access to the Spring.

19. The protestants contend that other water is available to satisfy the needs of the applicants. It appears that during periods of low flow, water is available from the Klamath River underflow, from groundwater and from Boise Creek. The applicants do not need a permit from this Board to take water via a well from percolating groundwater.

The applicants may also use water from the Klamath River or the Klamath River underflow if their parcels of the Sarvorum Patent adjoin the river or overlie the underflow. Records do indicate there is unappropriated water year-round in the Klamath River. The right to use water from Boise Creek has lapsed for nonuse (Water Code Section 1241), and the applicants would have to file an application for unappropriated water with this Board. The easement required for the ditch has probably been abandoned as well. The availability of other water is not of itself sufficient reason to deny the applications.

Environmental Considerations

20. This Board's decision authorizes a project which constitutes only a minor modification to land, water and vegetation, and such projects are thereby exempt from the provisions of the California Environmental Quality Act (Public Resources Code, Section 21000 et seq.) in accordance with Section 15304, Chapter 3, Title 14, California Administrative Code.

Conclusions

21. Having considered the entire record in this matter we conclude that: (1) the Board has jurisdiction over the water issuing from the Rough and Ready Spring, (2) there is unappropriated water available for appropriation, (3) the proposed use is beneficial and that permits should be issued pursuant to the following order:

ORDER

IT IS HEREBY ORDERED that Skeleton Gulch be denied as a point of diversion, and that Application 25741 be approved for diversion from Rough and Ready Spring only. The permit shall contain all applicable standard permit terms (6, 9, 10, 11, 12, 13)* in addition to the following conditions:

1. The water appropriated shall be limited to the quantity which can be beneficially used and shall not exceed:
 - (a) 428 gallons per day by direct diversion from January 1 to December 31 of each year for domestic use and;
 - (b) 404 gallons per day by direct diversion from April 1 to November 1 of each year for irrigation.
2. This permit shall not be construed as conferring upon the permittees right of access to the point of diversion.

IT IS FURTHER ORDERED that Application 26045 be approved subject to all applicable standard permit terms (6, 9, 10, 11, 12, 13)* in addition to the following conditions:

1. The water appropriated shall be limited to the quantity which can be beneficially used and shall not exceed:
 - (a) 255 gallons per day by direct diversion from January 1 to December 31 of each year for domestic use and;
 - (b) 404 gallons per day by direct diversion from April 1 to November 1 of each year for irrigation.
2. This permit shall not be construed as conferring upon the permittees right of access to the point of diversion.


*The Board keeps a list of standard permit terms. Copies of these are obtainable upon request.

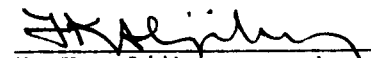
IT IS FURTHER ORDERED that Application 26046 be approved subject to all applicable standard permit terms (6, 7, 8, 9, 10, 11, 12, 13) in addition to the following conditions:

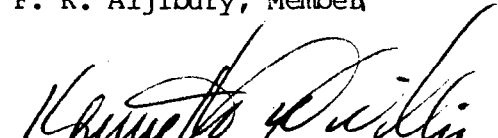
1. The water appropriated shall be limited to the quantity which can be beneficially used and shall not exceed:
 - (a) 428 gallons per day by direct diversion from January 1 to December 31 of each year for domestic use and;
 - (b) 404 gallons per day by direct diversion from April 1 to November 1 of each year for irrigation.
2. This permit shall not be construed as conferring upon the permittees right of access to the point of diversion or to any part of the existing conveyance system.

Dated: December 15, 1983


Carole A. Onorato, Chairwoman


Warren D. Noteware, Vice-Chairman


F. K. Aljibury, Member


Kenneth W. Willis, Member



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