

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 12893 by Adolph G. Sutro to Appropriate Water from Pilgrim Creek Tributary to San Luis Rey River in San Diego County for Irrigation Purposes.

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Decision A. 12893 D. 727

Decided December 17, 1951

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Appearances at Hearing Held at Sacramento on August 2, 1950:

For the Applicant

Adolph G. Sutro

Phil D. Swing, Attorney at Law

For the Protestants

City of Oceanside

No appearance

Carlsbad Mutual Water
Company

C. G. Watters, Jr., Superintendent,
Carlsbad Mutual Water Company

Ellen D. Whelan

Stephen C. Johnson

Ellis Zahniser and
Golda Zahniser

Arthur F. H. Wright, Attorney at Law

EXAMINER - GORDON ZANDER, Principal Hydraulic Engineer, Division of Water Resources, Department of Public Works, for A. D. EDMONSTON, State Engineer.

Also present

Dr. J. B. Askew, County Health Officer, San Diego County

E. A. Reinke, Chief, Bureau of Sanitary Engineers, State Department of Public Health

J. A. Harmon, Supervising Sanitary Engineer, State Department of Public Health

G. C. Zuckweiler, State and County Health Department Chief Sanitarian

Paul C. Ward, Senior Sanitarian, State Department of Public Health

Harold Miller, National Pollution Control Board

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OPINION

General Description of the Project

The application initiates an appropriation of 3 cubic feet per second, year round, from Pilgrim Creek, a tributary of San Luis Rey River, in San Diego County. Diversion is proposed at a point within Lot 7 of Section 33, T10S R4W, SBB&M. A dam 3 feet high by 18 feet long, constructed of earth, stone and wood, is to effect the diversion. The water is to be used for the irrigation of 50 acres of alfalfa, 202.15 acres of general crops and 20 acres of pasture, located within Sections 28 and 33 of the same T10S R4W. Irrigation is to extend throughout the year. The applicant claims also a riparian right.

Protests

The City of Oceanside protests that the proposed diversion will lessen the flow of San Luis Rey River through or under land which that city owns, which flow is needed and is used in increasing quantities for domestic, municipal and irrigation purposes. It asserts that the proposed diversion will also stimulate the intrusion of salt water from the ocean, thereby rendering the ground water supply of the locality unfit for use. The protestant City claims an old appropriative right, also a right based upon Application 8418 Permit 5229. It claims to have used water continuously since 1890, diversions during 1948 having amounted to 2838.8 acre-feet. It asserts diversion points located within Sections 4 and 18 of T11S R4W and within Section 13 of T11S R5W, SBB&M. It states that the protest may be disregarded and dismissed if diversions by the applicant are limited to times when the surface flow exceeds 25 cubic feet per second at a bridge across San Luis Rey River on County Highway A-9 and when the basins between the proposed point of diversion and said bridge are fully recharged.

The Carlsbad Mutual Water Company protests that the proposed

diversion will contribute to the depletion of the flow required to recharge Mission Basin, the company's principal source of supply for domestic use and irrigation. It asserts that a recorder well designated as "State #11-5W local designation #3 and USGS 13E" indicates the water table to be below sea level, and that the proposed diversion may lower the water table further, resulting in the ruin of Mission Basin due to intrusion of sea water. It claims both riparian and appropriative rights, including rights under Application 8205 Permit 5228. It claims that its original plant was completed prior to December 19, 1914, that its use for domestic, irrigation, recreational and municipal purposes in 1948 was 3559 acre-feet, that it serves the Town of Carlsbad on an area of 2000 acres, inhabited by 5000 people, and that its diversion heads within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 18, T11S R4W, S8B&M. It states that its protest may be disregarded and dismissed if the applicant's diversions are limited to years of abnormal stream flow and to periods when Mission Basin is completely charged, and provided that any permit granted the applicant is made subject to the protestant company's present rights.

Ellen D. Whelan protests that the amount applied for by the applicant exceeds the average flow of Pilgrim Creek and that surpluses do not exist in that stream beyond the reasonable requirements of down stream riparians and appropriators. Protestant Whelan claims a riparian right and a right based upon prior usage, estoppel and prescription. She asserts that she diverts from 3 wells supplied by percolation from Pilgrim Creek, the wells being located within Sections 5 and 6 of T11S R4W, and that she has also, since 1942, diverted surface flow from Pilgrim Creek near its junction with San Luis Rey River. She states that she and her predecessors have diverted approximately 1200 acre-feet annually for the irrigation of 300 of the 887.7 acres that she owns, the irrigated area being planted to alfalfa, sudan grass and corn. Her surface diversion, she states, is used for recreational purposes and the irrigation of

100 acres around Lake Whelan in Section 6 of the township mentioned.

Ellis Zahmiser and Golda Zahmiser protest, asserting that no water flows the length of Pilgrim Creek except during the rainy season, that the only water flowing in Pilgrim Creek is effluent from Camp Pendleton, which effluent is subject to control by the federal government. These protestants claim riparian rights and rights based upon beneficial use. They state that for the 2 years last past, at times during those years, they have used all of the waters in question, for irrigating their riparian, agricultural lands. Their diversion point, they assert, is located within the SW $\frac{1}{4}$ of Section 33, T10S R4W, SBB&M.

Answers

The applicant in answering the protests by the City of Oceanside, the protest by the Carlsbad Mutual Water Company and the protest by Ellen D. Whelan contends and alleges that none of these protestants will be injured by the proposed diversion for reasons in each instance as follows:

"1. The water applied for under said Application is 'foreign' water diverted and being diverted from the Santa Margarita River by the United States Navy Department and after use by it, discharged into and abandoned in Pilgrim Creek and is not any part of the natural water or flow of said Pilgrim Creek or of said San Luis Rey River in which Protestant claims water rights; that Applicant's rights under any permit issued under this Application may be restricted and limited to such 'foreign' water, in which protestant has no interest or title.

"2. Furthermore, the natural flow of said Pilgrim Creek is and has been for a long time into Foss Lake and that the natural waters of said Pilgrim Creek do not now reach and have not for a number of years reached the San Luis Rey River or the said Mission Basin of San Luis Rey River."

In answer to the Zahmiser protest the applicant denies that the granting of the application will injure the protestants' riparian rights, inasmuch as any permit granted will be subject to vested rights; contends that

the protestants have no right to the use of the effluent from Camp Pendleton; alleges that these protestants have not used the effluent from Camp Pendleton flowing in Pilgrim Creek during the past 2 years; and alleges that the lands upon which the Protestants Zahniser have been using waters of Pilgrim Creek, if any, are not riparian to that stream.

Hearing Held in Accordance with the Water Code

Application 12893 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 public hearing under the provisions of Article 733(a) of the California Administrative Code, Title 23, Waters, on Wednesday, August 2, 1950, at 10:00 o'clock A.M. in the Supervisor's Hearing Room, Civic Center Building, San Diego, California. Of the hearing the applicant and the protestants were duly notified.

General Discussion

The applicant's testimony (pages 17 to 19 of transcript) is to the effect that sewage, discharged into Pilgrim Creek from the two Camp Joseph H. Pendleton sewage disposal plants, on September 22, 1949, aggregated 1 300 000 gallons per day (2.01 cubic feet per second), and that on July 31 of the following year it was about the same. The applicant had previously stated, in his answers to the protests, that the water bearing the sewage in question originates in the Santa Margarita River. Protestant Zahniser testified at the hearing (pages 21 and 22 of transcript) that the flow of Pilgrim Creek during the month preceding the hearing had averaged something over 400 000 gallons per day (0.62 cubic foot per second). The applicant later testified (page 43 of transcript) that on September 22, 1945 the entire supply of effluent was coming down the creek and that more recently the flow has been nearer to 450 000 gallons per minute (0.70 cubic foot per second).

While the testimony mentioned in the preceding paragraph indicates that a summer flow has recently existed in Pilgrim Creek, that flow being made up mainly of sewage from Camp Pendleton and ranging from some 0.62 to 2.01 cubic feet per second in amount, testimony fails to establish whether or not the diversion of waters of that stream as proposed in application 12893 would injure down stream users. In answer to the question, "Is there - - - and has there been surplus water in this creek - - - -?" (page 16 of transcript) the applicant testified, "Yes". However his testimony does not refute nor does the testimony of the protestants' witness support allegations in the protests to the effect that abstractions of water from Pilgrim Creek will lessen the supply available to down stream users and tend to permit intrusion inland of saline waters from the ocean. At the hearing the protestant City of Oceanside was unrepresented, the testimony of the protestant Carlsbad Mutual Water Company's only witness was in effect a plea that the application be denied because of alleged probability that the Navy will discontinue the release of sewage into Pilgrim Creek, and no testimony or statement was offered on behalf of Protestant Whelan. Protestant Zahniser's testimony, beyond his testimony as to the flow of the creek, previously mentioned, was to the effect (pages 27 and 28 of transcript) that he has used water both from wells and from Pilgrim Creek during the last 3 or 4 years, for irrigation.

According to the USGS quadrangles (San Luis Rey and Morrow Hill, 1:24000) Pilgrim Creek discharges into San Luis Rey River. From the junction of those streams as a reference, the sewer outfalls and the parties' diversions, proposed or actual, scale roughly as follows:

Sewage Outfall No. 1:	6.5 miles upstream
Sewage Outfall No. 2:	4.0 miles upstream
Sutro	: 3.1 miles upstream
Zahniser	: 2.5 miles upstream
Whelan	: 0.0 to 1.0 mile upstream
Carlsbad M.W. Co.	: 2.0 miles downstream
Oceanside	: 3.0 to 4.5 miles downstream

Application 8205 Permit 5228, a claimed basis of protest by Carlsbad Mutual Water Company, relates to an appropriation of 5 cubic feet per second, year round, and 1022 acre-feet per annum collected between November 1 and April 30, from San Luis Rey River, for domestic purposes and irrigation, the water to be pumped from wells located within Section 18, T11S R4W, SBB&M and to be used in or near the Town of Carlsbad. The permit contains special clauses, among others a clause restricting pumping to times when the water table at the intake of the project is safely above sea level.

Application 8418 Permit 5229, referred to in the protest by the City of Oceanside, relates to the appropriation by that city for municipal purposes of not to exceed 12.5 cubic feet per second, provided that total diversions under the same appropriation shall not exceed 1250 acre-feet in a single year. The permit contains other clauses with a view of safeguarding against intrusion of ocean water.

Decision 432, rendered in connection with action on Applications 8156 (by Fallbrook Public Utility District, not a party to the matter now at issue), 8205 and 8418 contains much information about the water supply of San Luis Rey River, the utilization of that supply, and related matters. Among the conclusions reached in Decision 432 are the following:

"Diversions under Applications 8205 and 8418 should not be permitted to lower the ground water level in Mission Sector to less than 10 feet above mean sea level at the pumps of permittee, unless the static water level between said pumps and the ocean is such as to insure against intrusion of sea water should further recession occur."

* * * *

"To insure against unreasonable interference with use of water under rights which are paramount to those under Applications 8156, 8205 and 8418 suitable limitations and conditions should be inserted in any permits issued approving such applications, which limitations and conditions should be subject to modification from time to time as development proceeds on San Luis Rey River, or as additional information becomes available and diversions under said permits should be under the supervision and control of the Division of Water Resources."

The conclusions quoted attest to the seriousness of the ocean water menace and to the special necessity of protecting senior, down-river rights against inopportune diversions from upstream, junior appropriators in situations in which interference threatens.

In supplementation of the information obtained at the hearing of August 2, 1950 a field investigation was made by Engineer Heacock of the Division on March 2, 1951. According to the report of that investigation the Navy Department has commissioned a firm of engineers to prepare plans for the reclamation of sewage from the Camp Pendleton sewage disposal plants, the plans to be completed about April 1 and the project to be completed about June 1, 1951; the plan includes reclaiming the effluent from the lower of the two disposal plants along Pilgrim Creek and transporting it through a pressure line to the Santa Margarita watershed, the system to be designed for a capacity of 2 cubic feet per second, and regulatory storage to be provided. The report

further states that present flow at the plant, measured ahead of the Imhoff tank varies from about 0.5 to about 0.8 cubic foot per second and will increase as the camp is built up; and that under the plans all of the effluent will be used in the Camp Pendleton reservation and none of it will discharge into San Luis Rey River. Finally, the report states, Pilgrim Creek, above the point of entry of the effluent was discharging approximately 0.75 cubic foot per second, following 3 days of rain, the plant operating engineer stating in that connection that flow in the creek is very intermittent and occurs only following periods of fairly heavy rainfall.

The Navy project outlined in the preceding paragraph evidently has not progressed as rapidly as planned, the effluent having been reported on November 28, 1951 as still flowing down Pilgrim Creek.

Water users in Mission Basin obtain water for their needs by pumping from underlying ground waters, which in turn must depend for replenishment upon the flow, surface and/or subsurface, of San Luis Rey River, as well as upon rainfall. Surface water flowing in San Luis Rey River in excess of the quantity that will percolate to the ground water obviously is surplus. It wastes into the ocean. The extent to which such wastage has occurred in recent years is indicated by the following figures taken from the records of flow of San Luis Rey River at Oceanside, as published in the USGS Water Supply Papers.

<u>Water Year</u>	<u>Flow occurred between</u>	<u>Total runoff (acre-feet)</u>
1929-1930	May 4 and June 5	2880
30- 31	No flow	Zero
31- 32	December 29 and May 23	41100
32- 33	January 20 and May 27	4780
33- 34	No flow	Zero
34- 35	January 16 and May 15	5200
35- 36	February 16 and April 24	1540
36- 37	December 30 and June 29	103100
37- 38	December 31 and June 23	74910
38- 39	December 16 and May 20	19270
39- 40	January 6 and May 22	11400
40- 41	December 17 and July 9	82280
41- 46	Flow not recorded	
46- 47	No flow	Zero
47- 48	No flow	Zero
48- 49	No flow	Zero
49- 51	Data not yet published	

The mere fact that wastage into the ocean occurs in some seasons does not of course ensure that ground water levels are then adequate. Wastage into the ocean from San Luis Rey River may mean merely that the current rate of runoff from the watershed exceeds the rate at which the ground is able to absorb water from that stream. Such wastage is, however unappropriated water which may be taken and used at some point or points upstream without injury to any purser from ground waters underlying the basin.

As to water flowing at Applicant Sutro's proposed point of diversion when San Luis Rey River is not wasting into the ocean the information strongly suggests that the diversion and utilization of such water in the manner proposed would not materially injure the holder of any prior right and that such flow is therefore unappropriated, notwithstanding the water shortages experienced by downstream users. The protestant City of Oceanside undoubtedly holds a prior right to divert from wells fed from San Luis Rey River, yet its wells are some 4 miles downstream from Applicant Sutro's proposed intake, the channel of Pilgrim Creek is reported (in the Zahniser protest and by the

operating engineer of the sewage disposal plant) to carry water only during the rainy season, Pilgrim Creek (according to the applicant's answer to protests) flows into Foss Lake and not into San Luis Rey River, and any of the water filed upon that may travel underground will be so dispersed before arrival at protestant's wells that its benefit if any to the protestant may be supposed to be negligible. The protestant Carlsbad Mutual Water Association's situation in relation to the applicant's project is much the same as that of the City of Oceanside. It cannot be seen that either of these protestants will be materially injured by the consummation of the applicant's project. The protests by the Zahnisers and Ellen D. Whelan insofar as they are based upon riparian ownership are not valid because the waters filed upon are foreign waters to which riparian rights on Pilgrim Creek cannot extend. Rights alleged by the protestants Zahniser and by Protestant Whelan to be based upon prior use, estoppel and/or prescription are unsupported by testimony and are not otherwise apparent.

Summary and Conclusions

From the information above outlined it appears that the natural flow of Pilgrim Creek at the applicant's proposed intake is negligibly small except after rains, that said natural flow is augmented by foreign water in the form of sewage effluent released into Pilgrim Creek above the applicant by the authorities operating Camp Joseph H. Pendleton, that the flow of Pilgrim Creek augmented by said sewage effluent is of the order of some 0.62 cubic foot per second in amount, that that flow in future may increase if Camp Pendleton grows in population or may vanish if a project, now in progress, to reclaim and utilize the sewage within the boundaries of Camp Pendleton is carried out in full, that the use proposed by the applicant is a beneficial use, that the Zahniser protest and the Whelan protest are insufficient to bar approval of the application inasmuch as riparian rights

do not extend to foreign waters and other rights asserted by those protestants are unsupported, and that the protestant City of Oceanside and the protestant Carlshed Mutual Water Company, because of the distance downstream of their intakes and the topographic and hydrographic conditions obtaining, cannot be materially injured and hence lack adequate grounds of protest.

For the reasons summarized in the preceding paragraph it is the opinion of this office that the protests against Application 12893 are an insufficient basis for the denial of the application, that unappropriated water exists in the source filed upon, that such water may be taken and used beneficially in the manner proposed by the applicant without injury to the protestants and that the application should be approved, subject to the usual terms and conditions.

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ORDER

Application 12893 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 12893 be approved and that a permit be issued to the applicant 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

A. D. Edmonston
State Engineer

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