

Before the Division of Water Resources
Department of Public Works
State of California

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In the Matter of Application 9735 of M. & T. Incorporated
and Application 9736 of Parrott Investment Company to
Appropriate from Big Butte Creek in Butte
County for Irrigation Purposes

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Decision A. 9735, 9736 D. 480

Decided

July 16, 1941

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O P I N I O N

General Description of Projects

Under Application 9735 of M. & T. Incorporated it is proposed to appropriate 50 c.f.s. from Big Butte Creek from June 1 to October 15 of each season for the irrigation of 3620 acres of land within Sections 1, 11, 12, 13, 14, 24, and 25, T 21 N, R 1 W, and Sections 6, 7, 18 and 19, T 21 N, R 1 E, M.D.B.M. The point of diversion is located at the intake of the Parrott Ditch within the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 4, T 21 N, R 2 E, M.D.B. & M.

Under Application 9736 of Parrott Investment Company it is proposed to appropriate 50 c.f.s. from Big Butte Creek from June 1 to October 15 of each season for the irrigation of 17,427 acres of land within Sections 1, 2, 3, 4, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35 and 36, T 20 N, R 1 W, Sections 35 and 36, T 21 N, R 1 W, Section 31, T 21 N, R 1 E, Sections 6, 7, 18, 19, 30 and 31, T 20 N, R 1 E and Sections 2, 3, 4, 5, 6, 7 and 8, T 19 N, R 1 W, M.D.B.M. The point of diversion is the same as that specified in Application 9735.

These applications were filed for the purpose of extending the season of use specified in Application 8565 of W. & T. Incorporated and Application 8559 of Parrott Investment Company, the applicants claiming that not only have they put to beneficial use the 50 cubic feet per second specified in Applications 8565 and 8559 from April 1 to June 1 of each season but that they have also put to beneficial use 50 cubic feet per second from June 1 to October 15.

Protests

Durham Mutual Water Company claims a right to the use of the waters of Butte Creek which right is based upon a Court Decree filed May 25, 1920 in the Superior Court of California in and for the County of Sutter. The right claimed is for an amount of water equivalent to $\frac{40}{108}$ of the flow of Butte Creek at its minimum stage (or approximately 40 c.f.s.) from March to November of each season for agricultural purposes. Protestant alleges in effect that it has never had a supply adequate for its needs from July 1 to October 1.

E. L. Adams and Herbert W. Whitten in a joint protest claim the right to use water from Butte Creek by virtue of riparian ownership and appropriative right initiated under Applications 2576 and 2909 which stand upon the records of this office in the names of E. L. Adams, Federal Land Bank of Berkeley and Herbert W. Whitten and Application 2805 which stands upon the records of this office in the names of E. L. Adams and Herbert W. Whitten. These protestants claim that more than 4000 acres of land are irrigated under these applications and object to the approval of Applications 9735 and 9736 upon the grounds of possible interference with their prior vested rights.

Bee F. Compton claims a right to the use of water from Butte Creek which is based upon the Court Decree of May 25, 1920 described in the

protest of Durham Mutual Water Company. She claims $\frac{3 \frac{1}{3}}{108}$ c.f.s. of the natural flow of Butte Creek. No allegation of injury is set forth in the protest.

Stipulation by Applicants and Protestants

The Butte Creek Adjudication Proceeding covering the determination of the rights of the various claimants to the use of that portion of Butte Creek and its tributaries above the Western Dam near Nelson in Butte County was initiated in accordance with the provisions of Section 25 of the Water Commission Act on June 15, 1939 and during the period from July 20 to October 10, 1939 a field investigation was conducted by the Division which included measurements of the water supply and of the various diversions from the stream system, a study of the duty of water on the irrigated lands and supplemental surveying of the diversion systems and irrigated areas.

The results of this investigation were incorporated in a Report on the Water Supply and Use of Water prepared on March 20, 1940 and claims of right were submitted to the Division which were published in an "Abstract of Claims, December 1940". Some of these claims were contested among which were Proof 95 of Parrott Investment Company and Proof 99 of M. & T. Incorporated which included the claim of rights initiated under Applications 9736 and 9735 respectively.

As the Division was fully informed of the rights and claims of the applicants and protestants and the available water supply it was suggested that a decision might be rendered by the Division upon the information already before us without the necessity of a public hearing provided that the interested parties would so stipulate. To this the applicants and protestants agreed and stipulations under Regulation 12B of our "Rules

and Regulations with Respect to Protests and Hearings" were signed by them and approved by the State Engineer and the Division is now in a position to proceed in the matter without formal hearing.

The records relied upon in the determination of this matter are as follows:

- (1) Complete file on Application 9735.
- (2) Complete file on Application 9736.
- (3) Report on Water Supply and Use of Water on Butte Creek and Tributaries above the Western Dam, Butte County, California, March 1940.
- (4) Abstract of Claims - Butte Creek and Tributaries above the Western Dam, Butte County, California, December 1940.
- (5) Proof 95 of Parrott Investment Company and correspondence relative thereto (Butte Creek Adjudication Folder 10).
- (6) Proof 99 of M. & T. Incorporated and correspondence relative thereto (Butte Creek Adjudication Folder 10).
- (7) Transcript of hearing held Tuesday May 13, 1941 in the Matter of the Determination of the Rights of Various Claimants to the Waters of that Portion of Butte Creek and its Tributaries Situate above the Western Dam near Nelson in Butte County, California (contests 8 and 9).
- (8) Continuous Record of Daily Discharge in Cubic feet per Second of Parrott Ditch from Butte Creek at Head for the Period July 1 to September 30, 1940, prepared by Division of Water Resources.
- (9) Continuous Record of Daily Discharge in Cubic feet per Second of Henricks Canal at B. W. 12 above Junction with Butte Creek Canal for the Period July 1 to September 30, 1940, prepared by the Division of Water Resources.

Applications 9735 and 9736 Involved
in Proofs 95 and 96 of Butte Creek
Adjudication Proceedings

Proof No. 95 as set forth in the Abstract of Claims, Butte Creek Adjudication, December 1940, describes the claim of the Parrott Investment Company to water from Butte Creek through the Parrott Ditch by appropriation as follows:

"5.00 cubic feet per second - priority February 19, 1936, during the period from January 1 to December 31 of each year for domestic and stock watering purposes, and
45.00 cubic feet per second - priority February 19, 1936, during the period from April 1 to October 15 of each year for irrigation purposes. Claims that construction was commenced and completed prior to 1912; that Application No. 8559 was filed February 19, 1936, and Permit No. 4743 has been issued thereon, and that Application No. 9736 was filed September 23, 1939, all in accordance with the provisions of the Water Commission Act; and that the water claimed has been applied to beneficial use since 1928 for said purposes on the lands of claimant hereinbefore described under Proof No. 94."

"Remarks"

"(1) Claims that the right set forth is in the process of consummation under the provisions of the Water Commission Act, and that the ultimate irrigable acreage will be 17,427 acres" (the place of use described in Application 8559, Permit 4743 and Application 9736).

"(2) Claims that continuous flow equivalent of the rights above set forth in said proof No. 95 is 25.0 cubic feet per second because water is ordinarily available for about one-half of the irrigation season, and that the maximum rate of diversion is 50.0 cubic feet per second for one-half the time between April 1 and October 15, whenever water is available, and 5.00 cubic feet per second for the remainder of the year".

"(3) Claims prescription for said amounts of water as against all claimants from Butte Creek below the Parrott Dam."

"(4) Claims to have used since 1928 a major portion of the 24.0 cubic feet per second not otherwise allotted by judgment in the case of Central California Investment Company v. John Crouch Land Company et al., Superior Court, Sutter County, entered on May 25, 1920, and other waters allotted by said judgment but subsequently abandoned."

Proof No. 99 as set forth in the Abstract of Claims, Butte Creek Adjudication, December 1940, describes the claim of M. & T. Incorporated to water from Butte Creek through the Parrott ditch by appropriation as follows:

"5.00 cubic feet per second - priority February 27, 1936 during the period from January 1 to December 31 of each year for domestic and stock watering purposes, and 45.00 cubic feet per second - priority February 27, 1936 during the period from April 1 to October 15 of each year for irrigation purposes. Claims that construction was commenced and completed prior to 1912; that Application No. 8565 was filed February 27, 1936; that Permit 4744 has been issued thereon, and that Application No. 9735 was filed September 23, 1939, all in accordance with the provisions of the Water Commission Act; and that the water claimed has been applied to beneficial use since 1928 for said purpose on the following described lands." (Here follows a description of the 1997.5 acres on which the water has been used)

"Remarks"

"(1) Claim that the right above set forth is in the process of consummation under the provisions of the Water Commission Act and that the ultimate irrigable area will be 3620 acres" (The place of use described in Application 8565, Permit 4744 and Application 9735).

"(2) Claims the continuous flow equivalent of the rights above set forth in said Proof No. 99 is 25.0 cubic feet per second because water is ordinarily available for about one-half the irrigation season, and that the maximum rate of diversion is 50.0 cubic feet per second for one-half the time between April 1 and October 15, whenever water is available, and 5.00 cubic feet per second for the remainder of the year."

"(3) Claims prescription for said amount of water as against all claimants from Butte Creek below the Parrott Dam."

"(4) Claims to have used since 1928 a major portion of the 24.0 cubic feet per second not otherwise allotted by judgment in the case of Central California Investment Company v. John Crouch Land Company, et al., Superior Court, Sutter County, entered on May 25, 1920, and other waters allotted by said judgment but subsequently abandoned."

Objections Against Proofs 95 and 99

Proofs 95 and 99 were contested by Bee P. Compton, et al, upon the following grounds:

"(1) That such proof is based upon a permit from the Division of Water Resources, and one to be later issued, which permit and any permit to be further issued, subjected and will subject any such appropriation to 'vested rights'; insofar as such proof is adverse to proofs filed by undersigned, including the percentage of flow of the creek contained therein up to capacity of the ditches of the undersigned; said proof is contested because it is in conflict with the vested rights of the undersigned."

"(2) The claim of prescription contained in said proof is contested outright."

"(3) As to claim of use of 24 cubic feet not allowed in the Central California Investment Company suit; such claim is contested outright."

Proofs 95 and 99 were contested by the U.S. Plant Introduction Garden, Durham Mutual Water Company, Ltd., Herbert W. Whitten, and E. L. Adams upon the following grounds:

"Object to paragraph (3) under Remarks in each of said Proof Nos. 99 and 95, because said claimants have not acquired prescription against the undersigned owners of diversions and water rights below the Parrott Dam as set forth in their respective proofs of claim in the above entitled proceeding."

Proofs 95 and 99 being contested the matter was set for hearing at Chico on May 13, 1941. Of this hearing the claimants and contestants were duly notified.

Result of Hearing Held at Chico
May 13, 1941 in Connection With Proofs 95 and 99

At the hearing held at Chico on Tuesday, May 12, 1941, it was stipulated by Mr. Herbert W. Whitten who appeared on behalf of contestants Durham Mutual Water Company, E.L. Adams and himself and by Mr. Jerome D. Peters who appeared on behalf of Bee P. Compton et al, that the matter of the amounts of water to which each were entitled would be left with the Division provided that the claimants would withdraw their claim to prescriptive rights and with the understanding that the 1920 Court Decree would

be recognized. Mr. William L. McGinness appearing on behalf of claimant M. & T. Incorporated and Parrott Investment Company withdrew the claim of prescription and the claimants and contestants were assured by the Division that attention would be given to the 1920 decree insofar as it is operative.

As to Applications 9735 and 9736 those present at the hearing were apparently agreeable to the approval of these applications upon being informed that the right to use water after June 1 would be subject to all the other rights on the stream (Transcript, p. 15).

Unappropriated Water Available for
Appropriation Under Applications 9735 and 9736

The water which the applicants seek to appropriate and the water which they have already appropriated under their Applications 8559 and 8565 is diverted from Butte Creek at the intake of the Parrott ditch.

Table 18 of the Butte Creek Report sets forth the daily diversions from Butte Creek from June 22 to October 4 inclusive. These daily diversions consist of foreign water brought into the Butte Creek watershed by the Pacific Gas and Electric Company from releases from Philbrook Reservoir and appropriated by M. & T. Incorporated and Parrott Investment Company under their Applications 5109, 5110, 8187 and 8188, the water which the Dayton Mutual Water Company has a right to divert through the Crouch lateral (which is estimated at approximately 10 c.f.s.) and the water which the applicants are now using and for which they have initiated a right to appropriate by the filing of Applications 9735 and 9736.

Table 15 of the Butte Creek Report sets forth the daily discharges of the Hendricks canal above its junction with Butte Creek Canal which discharges consist of the foreign waters brought into the Butte Creek watershed by the Pacific Gas and Electric Company from its releases from its Philbrook Reservoir.

Tables 18 and 15 are for the year 1939. Similar tables have been prepared by the Division for the months of July, August and September 1940 and from these four tables the following table has been prepared by deducting from the amount of water diverted at the intake of the Parrott Ditch, the 10 cubic feet per second which is the estimated amount to which the Dayton Mutual Water Company is entitled and the amounts of foreign water in the Hendricks canal less 5% estimated conveyance loss.

Diversions by E. & T. Co. Inc. and Parrott Investment Company
During Months of July, August and September, 1939 and 1940.

<u>Date</u>	<u>1939</u>			<u>1940</u>		
	<u>July</u>	<u>August</u>	<u>September</u>	<u>July</u>	<u>August</u>	<u>September</u>
1	2.3	4.4	0	10.5	6.0	0
2	1.4	7.1	0	10.2	6.0	0
3	4.1	5.9	0	4.2	5.5	0
4	3.4	5.9	0	4.5	5.5	0
5	0.3	3.3	0	6.4	5.5	0.7
6	0	3.9	0	4.7	6.5	0
7	5.7	4.7	0	4.7	6.1	0
8	14.1	3.8	0	7.3	6.1	0
9	8.7	4.1	0	7.3	6.1	0
10	28.4	2.5	0	8.7	5.6	0
11	32.7	1.0	4.0	7.7	5.6	0
12	27.7	1.7	1.8	7.5	5.6	0
13	19.4	1.8	6.7	8.3	8.9	0.2
14	11.4	0	4.8	8.3	5.7	0.7
15	2.0	0	4.1	8.3	5.7	0.2
16	0	0	13.0	8.0	6.7	0
17	0	0	5.7	7.5	6.1	0
18	0	0	19.6	7.2	5.9	0
19	0.4	0	21.0	8.3	6.1	0
20	2.7	0	22.0	7.8	6.1	0
21	4.2	0.6	18.0	9.3	6.1	0.2
22	2.4	0	11.0	4.7	6.1	0.5
23	1.5	0	4.2	2.1	5.6	3.2
24	2.9	0	1.5	4.0	5.6	0
25	2.9	0	3.5	4.8	0	0
26	2.9	0	5.7	5.7	0	0
27	2.7	0	10.3	8.2	0	0
28	2.7	0	12.8	6.0	0	0
29	2.9	0	13.3	6.0	0	0
30	3.2	0	0.9	6.0	0	0
31	4.4	0	--	6.0	0	--
Mean	6.4	1.6	6.1	6.8	4.7	0.2

The above table indicates that even in a dry season such as that of 1938-39 when the precipitation at Chico was 14.65 inches or 61% of a 69 year mean of 24.04 inches (see Table 4 of the Butte Creek Report) there was water available for appropriation by the applicants. Apparently however the seasonal precipitation is not indicative of the amount of water which may be available for appropriation during the period from June 1 to October 15 as there was apparently more water available for use by the applicants during the season 1938-39 than there was during the season 1939-40 when the seasonal precipitation at Chico was 31.33 inches which is 130% of the 69 year mean.

It would appear that the availability of water for appropriation under Applications 9735 and 9736 is largely dependent upon the schedule of use of water by the other appropriators of water from Butte Creek and there may be times when larger amounts than those designated in the above table may be made available for use by the applicants.

The waters of Butte Creek are in the process of adjudication and the diversion of the waters will be made under the direction of a water master whose duty it will be to see to it that the earlier priorities on the stream will be satisfied before any diversions under Applications 9735 and 9736 can be made. Such being the case it is the opinion of the Division that permits be issued in approval of these two applications subject to the usual terms and conditions. While the amounts of water sought by the applicants appear to be excessive, any reduction in the amounts named in the permits may be made at time of license.

ORDER

Applications 9735 and 9736 for permits to appropriate water having been filed with the Division of Water Resources as above stated, pro-

tests having been filed, and a stipulated hearing having been held in accordance with Regulation 12B of the Rules and Regulations of the Division of Water Resources with respect to Protests and Hearings and the Division of Water Resources now being fully informed in the premises:

IT IS HEREBY ORDERED that Applications 9735 and 9736 be approved and that permits be granted to the applicants subject to such of the usual terms and conditions as may be appropriate.

WITNESS my hand and seal of the Department of Public Works of the State of California, this 16 day of *July* 1941.

EDWARD HYATT, STATE ENGINEER

By HAROLD CONKLING

Deputy

(Seal)

WES:m