

BEFORE THE DIVISION OF WATER RESOURCES
DEPARTMENT OF PUBLIC WORKS
STATE OF CALIFORNIA

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In the Matter of Application 7458 of Frank McArthur to appropriate from Fitzhugh Creek, tributary to South Fork of Pit River, in Modoc County for Irrigation, Domestic and Stock Watering Purposes.

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DECISION A. 7458 D- 373

Decided

March 20, 1935

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APPEARANCES AT HEARING HELD AT ALTURAS, AUGUST 29, 1933.

For Applicant

Frank McArthur

In Propria Persona

For Protestants

George M. and J. E. Clark
W. E. Armstrong

A. K. Wylie
C. S. Baldwin

EXAMINER: Gordon Zander, Supervising Hydraulic Engineer, for Harold Conkling, Deputy in Charge of Water Rights, Division of Water Resources, Department of Public Works, State of California.

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OPINION

GENERAL DESCRIPTION OF PROJECT

Application 7458 was filed by Frank McArthur on December 8, 1932.

As advertised it proposed an appropriation of 1155 acre feet per annum to be diverted from Fitzhugh Creek, tributary to South Fork of Pit River in Modoc County for irrigation, domestic and stock watering purposes. It was proposed to use the water for the irrigation of 1240 acres of land within Sections 7 and 18, T 41 N, R 13 E, and Sections 12 and 13, T 41 N, R 12 E, M.D.B.&M. The season of diversion to storage was to be from November 1st of each year

to June 1st of the succeeding year. Water was to be withdrawn from storage for irrigation use from about May 1st to about October 1st of each year and water was to be used from storage for domestic and stock watering purposes throughout the entire year. The point of diversion to storage is located within the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 23, T 41 N, R 13 E, M.D.B.&M. The point of re-diversion from storage in the Payne Reservoir is located in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 15, T 41 N, R 12 E, M.D.B.&M.

The project under this application consists of an enlargement of the Payne Reservoir constructed under prior Applications 992, 993, 994 and 1252 upon which permits have been issued for an aggregate storage of 1851 acre feet per annum.

PROTESTS

W. E. Armstrong claims riparian rights on Fitzhugh Creek and that his use of water was commenced prior to the effective date of the Water Commission Act. He claims that for more than fifty years the entire flow of Fitzhugh Creek, not heretofore appropriated by applicant under prior applications before the Division of Water Resources, has been diverted and used by him and other users also legally entitled thereto upon their lands situated below the point of diversion of applicant. He claims that there is no unappropriated water in Fitzhugh Creek under normal conditions during the period of diversion designated in Application 7458. He further claims that the right of applicant to divert and store water from Fitzhugh Creek is limited by an agreement entered into in the case of Armstrong, et al. v. Payne, et al., a copy of which was submitted with the protest of George M. Clark and J. E. Clark hereinafter discussed.

George M. Clark and J. E. Clark claim a right to divert 10 cubic

feet per second from Fitzhugh Creek, which right is based upon riparian ownership and appropriative rights initiated prior to the effective date of the Water Commission Act. They allege that there is no unappropriated water in Fitzhugh Creek. They also submitted a copy of a contract entered into between the predecessors in interest of applicant and themselves and Protestant Armstrong and they further allege that applicant is only entitled to receive such waters as are set forth and described in this contract.

HEARING SET IN ACCORDANCE WITH SECTION 1a
OF THE WATER COMMISSION ACT

Application 7458 was completed in accordance with the Water Commission Act and the requirements of the Rules and Regulations of the Division of Water Resources and, being protested was set for a public hearing in accordance with the provisions of Section 1a of said act on August 29, 1933, at 10:00 o'clock A.M. in the Court House at Alturas, California. Of this hearing applicant and protestants were duly notified.

WATER SUPPLY

Water supply records were obtained on Fitzhugh Creek during the course of the Pit River Investigation from November 1928 to September 1931. The gaging station was located below the diversion of applicant, but above all diversions of protestants with the exception of a small ditch of protestant Clark. Records were obtained at the same station in connection with the South Fork of Pit River Court Reference during the irrigation seasons of 1932 and 1933. A summary of the mean monthly discharge during the period of diversion sought by applicant follows:

Month	1928-29	1929-30	1930-31	1932	1933
November	0.89	1.73	1.80	—	—
December	7.49	1.67	2.94	—	—
January	17.8	24.9	10.9	—	—
February	14.1	17.0	1.35	—	—
March	5.82	13.5	3.39	—	—
April	17.6	9.72	3.27	38.6	14.2
May	13.7	12.0	1.82	40.0	16.5

The decree that was entered on October 30, 1934, in the case of W. E. Armstrong, et ux. v. Frank McArthur, et al. provides for an aggregate of allotments below the point of diversion of applicant of 10.4 cubic feet per second from Fitzhugh Creek during the period from April 1st to October 15th and one cubic foot per second at all other times. There is a further provision in said decree to the effect that water to supply the allotments therein provided for W. E. Armstrong from South Fork of Pit River shall first be taken from the flow of Fitzhugh Creek into the East Side Canal, and any deficiency below said allotments, or the prorations thereof, to said W. E. Armstrong in said flow from Fitzhugh Creek shall then be made up by diversion from the waters of South Fork of Pit River.

Records of the flow of South Fork of Pit River at Jones Lane below the lowermost diversion of protestant Armstrong kept by the Division of Water Resources during the months of April and May from 1929 to 1933 show a surplus at this point for the period except in 1931, which was one of the most subnormal years of record. The runoff in 1932 was close to the average over a long period of years.

The flow available for storage expressed in acre feet during the above period of record with full consideration of the adjudicated rights on Fitzhugh Creek follows:

Period	1928-29	1929-30	1930-31	1932	1933
Nov. 1 to May 31	3,090	3,310	940	—	—
Apr. 1 to May 31	—	—	—	3,500	600

There was considerable surplus over and above the requirements of Application 7458 in 1928-29, 1929-30, and in 1932. In the extremely dry year of 1930-31 there was approximately an eighty per cent supply available. The appropriation sought would have been approximately fifty per cent filled in the two months of April and May in 1933.

EXHIBIT "A" OF CLARK PROTEST

Exhibit "A" of the Clark protest is a copy of an agreement entered into on January 10, 1924, between protestants and the predecessors of applicant. It is the contention of protestants that applicant is estopped by the provisions of said agreement from consummating a right for additional storage under Application 7458.

It is outside the province of this opinion to interpret the above mentioned agreement, however, mention is made of the following provision contained therein:

"It is further agreed that this agreement shall be recorded in the office of the County Recorder of said Modoc County, and as between the parties hereto shall stand as a permanent settlement of their respective rights in and to the flow of the waters of said Fitzhugh Creek, as of the date of this agreement; but it shall not affect any rights which may be subsequently acquired by either or any of the parties hereto."

UNAPPROPRIATED WATER IN FITZHUGH CREEK

The runoff records that have been collected on Fitzhugh Creek show considerable surplus water during seasons of normal or nearly normal runoff

conditions. Even in a dry year such as 1931 there was unappropriated water to the extent of about 80 per cent of the appropriation sought in Application 7458 and it is therefore our opinion that said application be approved.

O R D E R

Application 7458 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 Division now being fully informed in the premises:

IT IS HEREBY ORDERED that said Application 7458 be approved and that a permit be granted subject to such of the usual terms and conditions as may be appropriate, and expressly subject to the rights adjudicated by the decree of the Superior Court of California, in and for the County of Modoc in Case No. 3273 entitled "W. E. Armstrong, et ux. v. Frank McArthur, et al."

WITNESS my hand and the seal of the Department of Public Works of the State of California this 20th day of March, 1935.

EDWARD HYATT, State Engineer

By HAROLD CONGLING

Deputy