

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 13923 by Tanner Brothers, a Partnership,
to Appropriate Water from Cowell Creek Tributary to San Antonio Creek
in Calaveras County for Irrigation Purposes.

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Decision A. 13923 D. 753

Decided August 15, 1952

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*Void
see D 775*

In Attendance at Investigation Conducted by the Division of Water Resources
at the Site of the Proposed Appropriation on August 22, 1951:

Norval Tanner) Norman Tanner)	Applicants
Mr. Siegfried	Representing the applicants' engineers
Gerald G. Spencer	Representing the protestant Fricot Ranch School, California Youth Authority
Woodrow L. Gomes	Protestant
Ed. Letora	Representing Hengen Brothers, Protestants
Grace Ponte	Representing herself and N. F. Ponte
Frank Oneto	Representing Oneto Brothers, Protestants
Meriel R. Letora	Protestant
John A. Huberty	Protestant
Walter R. Huberty	Protestant
Virgil M. Airola	Representing Rose N. Wiebe, et al., Protestant
A. S. Wheeler	Senior Hydraulic Engineer, Division of Water Resources, Department of Public Works, Representing the State Engineer.

Also present: Robert J. Romaggi and Mary Letora.

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General Description of the Project

The applicant seeks to appropriate 1 cubic foot per second from April 1 to October 1 and 124 acre-feet per annum, the latter to be collected between December 1 and April 15 of each season. The source named is Cowell Creek, a tributary of San Antonio Creek which in turn flows into the south fork of Calaveras River. Diversion is proposed at a point within the ~~NE1/4~~ of Section 1, T4N R14E, MDB&M. Direct diversion is to be effected by means of a 500 gallons-per-minute pumping plant, storage by means of an earth dam 30 feet high (to overflow level) by 215 feet long. The dam is to create a reservoir 12 acres in surface area and 110 acre-feet in capacity. The conduit is to be a 6 inch diameter steel pipeline, 2000 feet long and 500 gallons per minute in capacity. The proposed place of use is a 110 acre orchard located mainly within Section 36 of T5N R14E, MDB&M, but also extending into the adjoining Sections 1 and 6. Irrigation is to extend from about April 1 to about September 30. The applicants claim no other water right or source of water supply.

Protests

The Calaveras Cement Company protests that the proposed diversion will interfere with the exercise of its claimed right to divert 2 cubic feet per second, year-round, from the south fork of Calaveras River. It claims appropriative rights under water Permits 2737 and 7547, describes its diversion

point as being located within the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 32, T4N R12E, MDB&M and states that its protest may be disregarded and dismissed "if Applicant will not divert any natural flow when the flow is at or below 0.50 sec. ft."

John A. and Walter R. Huberty protest the application, stating in part:

"Riparian use has been prior to the land survey on a portion of the land and for more than fifty years on the remainder. Water has been in continuous use for livestock purposes for drinking and for natural subirrigation along the San Antonio Creek which provides summer feed for livestock."

They state that their protest may be disregarded and dismissed "if the diversion for storage does not begin before December 1st and ends by April 1st of each year and if the natural flow of the San Antonio Creek is not disturbed during the period of May 1st to October 30th of each year." The protest also contains statements to the effect that the protestants have riparian rights on San Antonio Creek in Sections 2 and 3 of T3N R12E, MDB&M, that San Antonio Creek is not generally an all year stream, that the applicants are asking for too late a closing date for filling of the reservoir, and that if the proposed direct diversion is made from Cowell Creek the flow of San Antonio Creek will be affected to such an extent that during a major portion of the dry season of each year the protestants' requirements would not be met.

The Fricot Ranch School, California Youth Authority protest the application for the alleged reason that there is not enough unappropriated water in Cowell Creek to satisfy the application and therefore that further diversions from that stream would deprive it (Fricot Ranch School) of an adequate supply. This protestant claims a riparian right and a right based upon use commenced prior to December 19, 1914, its diversion heading within Section 9, T4N R14E, MDB&M. Present use is said to include a domestic supply for 210

persons, irrigation of 100 acres of vineyard, orchard, shrubbery, pasture and lawns and the watering of small livestock. The protestant states in part:

"The total supply of water for this school is taken from the San Antonio Creek of which Cowell Creek is a major tributary. Our records of past years indicate that there is not as much water flowing in San Antonio Creek below its juncture with Cowell Creek as existing water rights demand during a large portion of the time between April 1st and October first. These records are available at the Div. of Water Resources, Sacramento and show an 18 year average minimum flow of 1 cu. ft. per second from 1924 to 1941."

The protest, according to another statement therein, may be disregarded and dismissed "if the applicant will permit a minimum of 10 cu. ft./sec. to flow past his point of diversion the year round and limit his usage and storage accordingly."

A group of 7 protests was submitted by the attorney of those protestants, Mr. Virgil M. Airola, the substance of the protests being as follows

Protestants:

1. Meriel Letora
2. Oneto Bros.
3. N. F. Ponte
4. N. F. and Grace Ponte
5. Hengen Bros.
6. Woodrow L. Gomes
7. Rose R. Wiebe, John B. Roberts and Orvis Roberts

Reason for protest: apprehension that the proposed diversion will deprive protestant of water to which entitled under an existing right.

Bases of claimed rights: usage since prior to December 19, 1914, riparian ownership and in one case (Letora), prescription.

Extent of use:

1. Irrigation of trees, grasses, garden produce and general crops on ranch property within Section 24 of T4N R13E and Section 19 of T4N R14E, MDB&M. Amount used: all water available up to 150 miner's inches, between April 1 and November 1.

2. Irrigation of 20 acres of garden, fruits and produce from May 1 to September 30; stockwatering year round.
3. Stockwatering, year round.
4. Irrigation of 9 acres of alfalfa and clover from May 1 to September 30, also stockwatering, year round.
5. Irrigation of 20 acres of alfalfa and clover from May 1 to September 30, also year round domestic use and stockwatering.
6. Irrigation of 15 acres of mixed grasses and garden from May 1 to September 30, also year round domestic use and stockwatering.
7. Irrigation of 2 acres of garden and fruit trees from May 1 to September 30, also year round domestic use and stockwatering.

Location of diversion points:

1. Within SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 19, T4N R14E, MDB&M.
2. Within NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 10, T3N R12E, MDB&M.
3. Along entire course of San Antonio Creek.
4. Within SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2, T3N R12E, MDB&M.
5. Within NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 33, T4N R13E, MDB&M.
6. Within SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 6, T3N R13E, MDB&M.
7. Within SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 31, T4N R13E, MDB&M.

Each of the 7 protests of this group contains the following passage:

"This protest may be disregarded and dismissed if applicant will agree not to store any of the natural flow between April 1 and December 1 of each year and will bypass at the outlet of the impounding reservoir a constant flow of water equal to the natural flow of water in San Antonio Creek at the junction thereof with Cowell Creek when the flow in San Antonio Creek is 250 miner's inches or less at said junction and will bypass sufficient water to bring the combined flow to 500 miner's inches at all times while the flow in San Antonio Creek is more than 250 miner's

inches at the said junction of said San Antonio and Cowell Creeks when the combined flow therein at that point is 500 miner's inches or less, provided, however, that the amount of water which applicant shall by-pass shall not be less than 20 miner's inches at any time while there is any stored water impounded in applicant's reservoir."

Answer

The applicants' answers to one or another of the various protests include statements as follows:

"The storage of unappropriated waters in the season of excessive runoff cannot affect a riparian right to the beneficial use of the flow of a stream."

"The applicant does not dispute nor intend to interfere with the protestant's right."

"The applicant also has a riparian right - - - -"

"The application is for appropriation of unappropriated water only and therefore could not interfere with prior appropriative rights."

"Applicant cannot agree that the closing date of July 1 for storage is too late since U.S.G.S. stream gagings at Fourth Crossing on San Antonio Creek show a flow of over 8 c.f.s. on July 1, 1950."

"Applicant cannot agree to maintain the flow below junction of Cowell and San Antonio Creeks at 500 miner's inches when the flow in San Antonio Creek is more than 250 miner's inches."

"Applicant will not agree to bypass any waters except the natural flow of Cowell Creek when such impounding will interfere with prior rights."

"Protestant does not indicate the amount of water claimed for use under riparian right."

"Applicant will agree to not divert water to storage when the flow of Cowell Creek above the point of diversion is less than 0.50 c.f.s."

Field Investigation

The applicants and the protestants having stipulated to an informal hearing as provided for in Section 733(b) of the California Administrative Code, Title 23, Waters, a field investigation was conducted at the site of the proposed appropriation on August 22, 1951 by an engineer of the Division. The applicants were present and all of the protestants were present or represented during the investigation.

Records Relied Upon

Application 13923 and all data and information on file therewith.

Discussion

According to the report covering the investigation of August 22, 1951, the watershed tributary to the applicant's proposed point of diversion is about 2 $\frac{1}{2}$ square miles in extent and heavily wooded. It is moderately elevated and rainfall at Arnold (within the same small watershed) is reported to average about 45.6 inches. According to the report of investigation the flow of San Antonio Creek at the proposed point of diversion on August 22, 1951 was about 0.2 cubic foot per second.

In the course of the investigation of August 22, 1951 the situation was discussed generally by the parties present. The discussion developed that the protestants are agreeable to the withdrawal of their protests, if:

1. Direct diversion is eliminated from the application,
2. Diversion to storage is limited to periods extending from December 1 to April 15, and
3. A special clause be placed in any permit issued providing for the by-passing of sufficient stream flow to maintain a minimum flow of 12.5 cubic feet per second in the source above the Fricot Ranch School diversion and the by-passing of all flow after April 15.

The applicants thusfar have not seen fit to strike the direct diversion feature from their application. In this connection the applicants' engineers, by letter dated September 13, 1951, commented as follows:

"As any appropriative right granted under this application would be subject to all prior rights, we see no particular reason for deleting it from the application and it would at least serve as public notice of the intention to make use of the water."

No record of the flow of San Antonio Creek appears to exist. However, according to USGS Water Supply Paper 1121, Calaveras River at Jenny Lind has discharged an average of 247 second-feet from its 395 square miles of tributary watershed, over a 39 year period. That indicates an average runoff of 0.625 second-feet per square mile. Furthermore, according to Table 93, on page 238 of Bulletin No. 5 (Flow in California Streams) it appears that the distribution of seasonal runoffs of Calaveras River, as shown by USGS records is as set forth in the 2nd column of the following tabulation, in which also have been entered calculated values of the average runoff per square mile of watershed and of the probable monthly flows, based on those averages, at two selected points, viz. the applicants' proposed intake and the protestant Fricot Ranch School's intake.

Average Runoff, by Months					
Month	Percentage of annual total	Second-feet per square mile of watershed	Acre-feet per square mile of watershed	Second-feet at applicants proposed intake	Second-feet at Fricot School intake
January	34.2	2.56	153.9	5.8	62.2
February	25.2	1.89	113.4	4.3	46.0
March	23.7	1.78	106.6	4.0	43.3
April	5.5	0.41	24.7	0.92	10.0
May	2.6	0.195	11.7	0.44	4.7
June	1.0	0.075	4.5	0.17	1.8
July	0.3	0.023	1.4	0.05	.6
August	0.0	0.0	0.0	0.00	0.0
September	0.1	0.008	0.5	0.02	0.2
October	0.6	0.045	2.7	0.10	1.1
November	1.6	0.12	7.2	0.27	2.9
December	5.2	0.39	23.4	0.88	9.5

Obviously the assumption that the monthly mean runoffs at selected points such as the applicant's proposed intake and the Fricot School intake may be ascertained by multiplying the area of watersheds tributary thereto by the average runoff per unit of area as determined for the much larger watershed above the Jenny Lind gage cannot lead to results that are better than very roughly approximate. However the figures arrived at thereby and tabulated above suggest strongly that the flow of Cowell Creek during the summer months is insignificant and that even in April and May it is probably less than the amount that the applicant seeks to appropriate. The figures also suggest that the flow of San Antonio Creek at the Fricot School intake ordinarily diminishes by about mid-April to an amount no more than enough to meet the protestants' asserted needs. The figures therefore point to the probability that water may be diverted as proposed by the applicant until about mid-April of a normal season without injury to downstream users, but not thereafter.

The protestants' apprehension that on-stream storage, above their respective points of diversion, will interfere with the passage to them of the flow necessary to satisfy their asserted rights is not unusual in situations of the sort. Clearly it is the applicant's obligation, if his application is approved, to so equip and operate his installation as to pass the full flow of the stream to lower users when he is unauthorized to divert or collect it, and to pass such amounts during an authorized collection period as may be necessary to satisfy prior downstream rights. To impress this obligation upon the applicants and to allay the protestants' apprehension it is fitting that an appropriate special clause be inserted in any permit issued.

Summary and Conclusions

Unappropriated water appears ordinarily to exist from December 1 to about April 15 in the source from which appropriation is sought under Application 12923. Such water may be taken and used beneficially in the manner proposed without injury to downstream users, provided that direct diversion is limited to periods extending from April 1 to April 15 and that the storage reservoir is operated with due regard to the rights and requirements of parties downstream. The responsibility for such operation rests with the applicants.

In view of the situation presented it is the opinion of this office that Application 12923 should be approved and permit issued, subject to the usual terms and conditions, with diversions thereunder for direct application to beneficial use without storage limited to periods extending from April 1 to April 15 of each season, and subject to a special term and condition apprizing all concerned that it is the applicants' responsibility to pass downstream all water which enters the proposed reservoir insofar as said water may be required at points downstream for the satisfaction of prior rights.

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ORDER

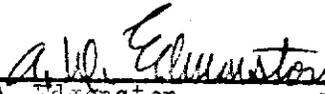
Application 13923 having been filed with the Division of Water Resources as above stated, protests having been filed, a stipulated hearing having been held and the State Engineer now being fully informed in the premises:

IT IS HEREBY ORDERED that Application 13923 be approved in the amount of 1 cubic foot per second to be diverted from April 1 to April 15 for direct application to beneficial use without storage and 124 acre-feet per annum to be collected between December 1 and April 15 of each season

for later application to beneficial use, and permit issued to the applicants, subject to such of the usual terms and conditions as may be appropriate and subject also to the following special term and condition, to wit:

Permittees shall install, maintain and operate facilities to ensure that all water entering their reservoir insofar as such water is required for the satisfaction of prior rights will pass downstream unhindered by any of their works.

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
State Engineer

