

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

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In the matter of Application 7438 of J. D. Grant Company  
to appropriate water from the headwaters of Arroyo  
Aguague in Santa Clara County for irrigation  
purposes.

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DECISION A - 7438 D-354

Decided February 5, 1934.

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APPEARANCES AT HEARING HELD OCTOBER 18, 1933, AT SAN JOSE, CALIFORNIA

For Applicant

J. D. Grant Company

Louis Oneal, Attorney  
Charles Luckhardt, Attorney

For Protestants

Frank L. Foster, et al.

L. D. Bennett, Attorney

City of San Jose

W. L. Pepp

Santa Clara Valley Water Cons. Dist.

Lloyd Mason

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EXAMINER: Harold Conkling, Deputy in Charge of Water Rights, Division of  
Water Resources, Department of Public Works, State of California.

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O P I N I O N

Application 7438 by J. D. Grant Company was filed November 16,  
1932, to appropriate 700 acre feet per annum by means of storage to be col-  
lected from about October 1st to about May 1st of each season from the head-  
waters of Arroyo Aguague at a point within the SE $\frac{1}{4}$  of NW $\frac{1}{4}$  projected Section  
12, T 7 S, R 2 E, N.D.P.&M. tributary to Penstencia Creek in Santa Clara  
County for the irrigation of 200 acres of land located in projected Sections

11, 12 and 13 of said township. The application was completed in accordance with the provisions of the Water Commission Act and the Rules and Regulations; it was duly advertised and being protested was set for hearing as above stated, of which hearing applicant and protestants were regularly notified.

#### PROTESTS

City of San Jose based its protest on interference with its use of water at Alum Rock Park and Santa Clara Valley Water Conservation District states that the approval of the application would interfere with its irrigation and percolation rights of 22 years' standing.

Bank of America by California Lands Inc. its agent, and Frank L. Foster and nineteen other users on Penitencia Creek below where said Creek debouches from the foothills protested the application on the ground that its approval would seriously interfere with their use of water. Foster, et al. irrigate 487 acres and Bank of America 198 acres.

#### DISCUSSION OF PROTESTS

It should here be stated that applicant's project is at the extreme headwaters of the watershed; that the course of the stream filed on does not extend more than approximately  $1\frac{1}{2}$  miles above applicant's dam; that the runoff is occasioned by heavy rains; that light gentle rains furnish very little runoff; and that during the summer season the source is entirely dry. (See transcript, pages 13 to 15 and 39.) Even the name of the stream indicates that it was known by the Spanish as a dry wash for most of the year, hence Arroyo Aguague, which signifies "dry water hole".

Testimony at the hearing by W. L. Popp, City Engineer of San Jose was to the effect that the use of water by the City at Alum Rock Park from the source under consideration has approximated only 15 acre feet per annum

and that by proportion of the watershed area above the point of diversion of J. D. Grant Company to the total area above its (City of San Jose) point of diversion the City's use in the past has been only approximately 3 acre feet per annum from the smaller watershed. The use by the City is practically nil during the winter season when there is any water at applicant's point of diversion and when the use by the City reaches a maximum no water is available at applicant's point of diversion. It therefore appears that protestant cannot be injured by the appropriation proposed.

This protestant filed Application 5156 with the Division of Water Resources on August 14, 1926, and received a permit to appropriate by means of storage 500 acre feet per annum of the waters of the North Fork of Penetencia Creek which is a source entirely separate and distinct from Arroyo Aguague. In his testimony at the hearing Mr. Popp stated that the storage dam had been completed and he indicated that henceforth the City would rely on this source rather than the main Penetencia Creek for its water. It therefore appears that while the protest of the City of San Jose has merit it may be dismissed from further consideration.

Although Santa Clara Valley Water Conservation District entered an appearance at the hearing no testimony was offered in its behalf nor has it since assumed the burden of proof in support of its protest appropriate to a moving party and therefore its protest may be dismissed as without force and effect.

Coming now to Bank of America and Frank L. Foster and nineteen others, one witness, protestant Frank L. Foster, testified that each and every one of the twenty-one protestants now considered irrigate their lands from once to three times each winter during flood season when sufficient water is available; that during some winters not all of the pro-

testants get water and at infrequent periods there have been seasons when no water was available for any of the protestants; but that in the year 1931-32, which was practically a normal year of rainfall, water was used by the protestants and there was waste from Penetencia Creek into Coyote River several times. (Transcript p. 74) Upon conclusion of the testimony of protestant Foster it was agreed between counsel of applicant and protestant that his testimony would be accepted for the twenty other protestants in the group as well (p. 88 of Transcript) and counsel for protestants rested his case.

#### GENERAL DISCUSSION

Penetencia Creek rises in numerous small affluents in the mountainous district from 10 to 12 miles east of San Jose which join in what is known as Halls Valley where the stream is locally known as Arroyo Aguague (meaning "dry water hole"). It is here, at about 2,000 feet elevation above mean sea level that the J. D. Grant Company reservoir and ranch are located. After leaving Halls Valley the stream flows northwesterly about 6 miles as the crow flies where it joins the North Fork of Penetencia Creek (called the East Fork in transcript, p. 65) which latter has its origin in numerous tributary streams from one to two miles easterly therefrom. Presumably the lower portion of Arroyo Aguague above its junction with the North Fork of Penetencia Creek is called Penetencia Creek, although available maps are indefinite on this point. About one-half mile above this junction on Penetencia Creek (or Arroyo Aguague) is located the intake of a 4" pipe line which has in the past supplied Alum Rock Park of the City of San Jose. Under permit from this office San Jose has recently completed a reservoir (p. 65 of Transcript) of 530 acre feet capacity on North Fork of Penetencia Creek about two miles in a direct line a little southeasterly from the

junction of the two streams at a point called Cherry Flat, water from which will be substituted for the 4" pipe line diversion on the main stream (Transcript p. 63). This water is used at Alum Rock Park located from the junction of the streams westerly one mile or so for domestic, irrigation, swimming pool and all uses incidental to a general recreational park.

From the aforesaid junction the stream flows southwesterly about two and one-half miles where it debouches onto the open plain where the first irrigation diversions are made. From this point the stream flows in a somewhat meandering course southwesterly about 3½ miles in a straight line to a point where it joins Coyote River about two miles northerly from San Jose. It is in this latter stretch where the diversions of Bank of America, Frank L. Foster and the other nineteen protestants are located.

Under the terms of a cooperative agreement signed January 1, 1930, between the Santa Clara Valley Water Conservation District and the Division of Water Resources the latter undertook a three-year investigation of the water resources of Santa Clara Valley, the results of which are embodied in "Bulletin 42, Santa Clara Investigation" by this office. At the recent hearing on Application 7438, Bulletin 42, insofar as it relates to Penetencia Creek, was admitted as evidence (Transcript p. 75). This bulletin shows (p. 15) that the periods 1869 to 1931, 1903 to 1926, and 1909 to 1919 were normal as to cumulative totals of rainfall, and that the 15 year period 1916 to 1931 was deficient to the extent of approximately 16% in precipitation. The year 1931-32 was however a year of slightly over normal precipitation according to records of the United States Weather Bureau stations located in and surrounding Santa Clara Valley. (Table 2, p. 17, Bulletin 42)

Three gaging stations were established on Penetencia Creek in connection with the investigation, one at the base of the foothills, one

at Capitol Avenue and one at Peninsular Railway bridge near King Road, located about one-half mile above the junction of Penetencia Creek and Coyote River. During February 1932, Penetencia Creek showed a discharge at the lower station just mentioned of 1170 acre feet. February was the only month of record at this station for the year 1931-32 but this record was extended for the full season by comparison with the flows of other streams of similar characteristics where records were taken. These data show that there was a waste into Coyote River for the year 1931-32 from Penetencia Creek of 2920 acre feet.

Although the recently constructed reservoir of the City of San Jose is on the North Fork of Penetencia Creek the amount which will be stored therein will represent a net deduction from the water available at the lower gaging station on Penetencia Creek. City Engineer Fopp testified however that the reservoir will be operated largely as a flood control and conservation project and that the actual needs of the park will probably not exceed 75 to 100 acre feet annually.

The precipitation season of 1931-32 was practically normal as to rainfall and inasmuch as this season showed a waste of 2920 acre feet from Penetencia Creek after several dry seasons it is concluded that there is normally unappropriated water in Penetencia Creek and that Application 743E should be approved.

#### LIMITING CONDITION

It was admitted by protestant Frank L. Foster that water wasted from Penetencia Creek into Coyote River on occasion, and that when such waste occurred protestants could not be injured. It was also acknowledged by counsel for Bank of America and F. L. Foster, et al., in offering

IT IS HEREBY ORDERED that Application 7438 be approved and that a permit be issued subject to such of the usual terms and conditions as may be appropriate and to the following special clause to wit:

This permit is issued subject to the express condition that diversion shall be made by permittee under this right only at such times as water would otherwise waste or is wasting from Penetencia Creek into Coyote River after natural percolation into the stream bed and rights now exercised by other water users above the mouth of Penetencia Creek are fully satisfied.

WITNESS my hand and the seal of the Department of Public Works of the State of California, this 5<sup>th</sup> day of February, 1934.

EDWARD HYATT  
STATE ENGINEER

BY HAROLD CONKLING  
Deputy

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