

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 13761 by E. Clarence Stopp to  
Appropriate Water from the West Branch of Soldier Creek, Tributary  
to Upper Lake, in Modoc County, for Irrigation Purposes.

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Decision A. 13761 D. 756

Decided September 22, 1952

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Appearances at Hearing Held at Alturas on June 7, 1951:

For the Applicant

E. Clarence Stopp

Charles Lederer

For the Protestants

Mervin R. Toney )  
Minnie T. Heard )  
Bide Steward )  
Winnie Steward )  
Kenneth G. Heard )  
J. V. Patch )  
Ethelbert Harris )

(Laurence W. Carr and  
(Laurence J. Kennedy

EXAMINER - HARRISON SMITHERUM, Supervising Hydraulic Engineer, Division  
of Water Resources, Department of Public Works, for A. D. EDMONSTON,  
State Engineer.

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OPINION

General Description of the Project

The applicant seeks to appropriate 0.5 cubic foot per second  
from the West Branch of Soldier Creek, a tributary of Upper Lake, in Modoc  
County, from February 1 to September 30 of each season, for the purpose of  
irrigation. Diversion is proposed at a point within the SE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 6,  
T43N R16E, MDB&M. Diversion is to be effected by means of an earth dam, 3

feet high by 90 feet long. The project includes a regulatory reservoir, 0.3 acre in surface area and 1.5 acre-feet in capacity, also 600 lineal feet of earth ditch of a reported capacity of 0.75 cubic foot per second. According to the application the project has been completed and use, consisting of the irrigation of 30 acres of alfalfa, a 1 acre orchard, 8 acres of general crops and a 1 acre pasture, located within the E $\frac{1}{2}$ SW $\frac{1}{4}$  of the above described Section 6, has already begun. In addition to the amount applied for the applicant claims that a decreed right of 0.3 cubic foot per second from the same source attaches to the same land. A supplement to the application contains the following statements:

"The water to be appropriated under this application originates from springs located along the streambed between the SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 7 and the point of diversion.

"The amount of water is in excess of the customary allowance because of the extremely gravelly and porous nature of the land whereon the ditch is located and use of the water is to be made. The basis of computation is 1 cfs for every 50 acres to be irrigated, consideration being given to the 0.3 cfs decreed under the Soldier Creek Adjudication. The acreage specified is the total amount to be irrigated."

#### Protests

The protests by Mervin R. Toney, Minnie T. Heard, Bide Steward and Kenneth G. Heard are nearly identical. The protestants thereunder all claim decreed rights, assert that the West Fork Soldier Creek Decree covers all water flowing in that stream and that therefore none of such water is subject to appropriation. The protestants also assert in their protests that they use water for irrigation and/or for stockwatering and that any additional diversion, as proposed by the applicant, would affect them adversely, especially late in the irrigating season, when flow is sufficient to supply only a part of the water to which they are entitled.

J. V. Patch states as to the basis of his protest:

"- - - the proposed appropriation - - - will deprive me and my property of necessary waters that are awarded and decreed to my predecessors in interest in and by the decree of the Superior Court of Modoc County in action of San Francisco etc. Co. vs. C. M. Crampton et al., dated November 25, 1928, in which action the predecessor in interest of the applicant was a party."

Protestant Patch states that the water right which he claims is based upon

"The above mentioned decree, riparian rights, prior appropriation and continuous use of water."

As to the extent of present and past use of water he states:

"3.60 cu. ft. per second from east fork and all excess water of Soldier Creek, all of which water has been used for irrigation and for watering stock on land described in paragraph 28 of above decree, viz. all of fractional section 29, T44N R16E; that the east and west forks of Soldier Creek flow through said lands and said lands are riparian to same."

This protestant describes his diversion point as being located within the SW $\frac{1}{4}$  of the Section 29 above mentioned, contends that his entire allotment of water and all of the excess flow of Soldier Creek is needed on his lands and offers supplemental statements as follows:

"Enoch Reynolds, named in paragraph 14 of the decree aforementioned, was the predecessor in interest of the applicant, and the decree is binding on applicant. His proposed increase of diversion is enjoined by said decree, paragraph 60th, and would be a violation of rights of lower users."

"The erection and maintenance of a dam in the stream, 90 feet wide, as proposed by applicant, will substantially increase channel losses and the loss of water by sub-irrigation."

"As a result, more water will have to be turned down the west fork of Soldier Creek to fill decreed water rights on said fork, and thus the flow in east fork will be diminished, causing loss of water to protestant."

Answers

The applicant answered each protest individually. All of his answers contain the following statements:

"The water asked for in the application is spring water rising in the west channel of Soldier Creek."

"The decree does not make water coming from said springs a part of the protestant's allotment of water at any period."

"The decree does not in any way place the protestant on a continuous flow basis from the west branch of Soldier Creek."

The answers to Protestants Toney, Minnie T. Heard, the Stewards and Kennon G. Heard contain also the following:

"If the balance of the spring water was allotted to the protestant after the rotating period the decree would so read."

"The spring water is not sufficient to reach the protestant."

"The applicant being nearer the source of water can make the most beneficial use with a minimum of loss."

The answer to Protestant Patch states in addition to the above-quoted statements to all protestants:

"The water in question cannot at any period reach the protestant."

"The dam in question does not impound but very little more water than the capacity of the ditch. The levee only forms one bank of the ditch, running parallel with the creek bank, and has been in use for some years for diverting the decreed water right."

"Under the past and present administration of the waters of Soldier Creek, the users in the west branch are receiving their full allotment of water at most all periods of rotation and no additional water would have to be turned in from the east channel."

Hearing Held in Accordance with the Water Code

Application 13761 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 hearing under the provisions of Article 13, Section 733(a) of the California Administrative Code, Title 23, Waters, on Thursday, June 7, 1951 at 10:00 o'clock A.M., in the Board of Supervisors Room, Alturas, California. Of the hearing the applicant and the protestants were duly notified.

Discussion

Testimony elicited at the hearing of June 7, 1951 includes the following:

Applicant Stopp testified (pages 7 to 61 of transcript) that he bought and occupied his place, sometimes known as the Enoch Reynolds lands and referred to in Paragraph 14, Page 6 of the Decree, in the spring of 1942, that he has resided on that place ever since, that he has gotten water for irrigation from springs rising in the bed of the west branch of Soldier Creek about one half mile upstream from his point of diversion, that his point of diversion is on Soldier Creek where that stream enters his property, that other users divert Soldier Creek water (as distinguished from the spring water), that some such users divert at points upstream from his intake and others at points downstream, that his diversion of spring water does not hinder downstream users from diverting Soldier Creek water, that there are rotating periods of use of the waters of Soldier Creek, that flood water caused by melting snow as a rule first comes down Soldier Creek between March 19 and April 1, that between those dates the lower users use the water, that from April 1 to April 11 the upper users use the water and so on, the

lower and upper users alternating in the use of water, by approximately 2 week rotation periods, that the rotating system of use has been in effect ever since he purchased the Reynolds lands, that when the upper users have their turn at the water there is no water left in the creek above the spring from which he diverts, that the spring continues to flow, that he continues to divert from the spring while the upper users are diverting the Soldier Creek water, that he moved onto his ranch about July 1, 1942, that the entire flow of the spring was then entering the Reynolds ditch, that he has continued to divert the entire flow of the spring while the Soldier Creek water is being diverted by the upper users, that during the lower users rotation periods he has used about the same amount of water as during the upper users' rotation periods, that during the upper users' rotation periods there is no flow at his intake except the flow from the springs, that in 1950 he filed his application to appropriate water, that in 1950 he used all of the spring-flow until some time after June 18 when his diversion was restricted by Department Order to 0.3 cubic foot per second, that he irrigated about 30 acres until April, 1947, and, after that, about 40 acres, the crops thereon including alfalfa, grain, permanent pasture, garden and orchard, that some 25 head of cattle, a few sheep and several horses were watered, that prior to his filing of an application no one objected to his use of water, that downstream from the springs in Soldier Creek there are various types of soil including gravel and sand, that a small flow going down the creek would first move rapidly, then would sink, then would rise again, that the distance traveled would depend on the amount of flow, that when the flow is small nobody benefits, that Mr. Bergens (Brigance) made some measurements, recorded them and gave him (the

witness) a copy, that during the periods of use by upper users the lower reach of the west branch of Soldier Creek is dry except during flash floods, that his (the witness') diversion was built in 1947, that prior to that he diverted at a point about 400 feet farther down stream, that on June 18, 1950 his diversion was restricted in amount and he was required to pass the remainder of the flow downstream, that he saw that residual flow go underground in one place and then rise again in pools along the channel, that some of that water reappeared on Mervin Toney's land, that when he (the witness) bought the Reynolds place the original diversion ditch was in use, that the water that he is applying for is the same water that he has been using, that his diversion works consist of a ditch with a slide gate for adjusting the flow and a diversion dam 10 or 15 inches high built across the creek channel, that he has diverted the same amount during the lower users' periods of use as during the upper users' periods of use, that he irrigated about 30 acres prior to 1947 and about 40 acres thereafter, that due to improved methods of use, the same amount that once served 30 acres is enough now for 40 acres, and that except during the lower users' rotation periods the channel above the point where water arises has been dry. Oliver Crampton testified in effect (pages 62 to 92 of transcript) that he owns lands along Soldier Creek and is familiar with springs that rise in the west branch of that stream, with the land once owned by Enoch Reynolds, and with the use made of waters in the locality, that at one time he worked on the Reynolds place, that they used to drain the creek and take all the spring water, for irrigation, that he was a party to the litigation over water, that the spring water was discussed at meetings in connection with that litigation, prior to the Decree, that after the Decree the spring water was used on the Reynolds place, that the flow from the springs appears

to have increased over what it was in 1925, that the creek channel below the Reynolds place passes through porous formations and the flow therein diminishes, that the applicant is his son-in-law, and that during the upper users' rotation periods the channel below the Reynolds place is wet in spots.

Victor Scammon testified (pages 93 to 122 of transcript) that he has been a watermaster since the middle of 1938, that his official title is Assistant Hydraulic Engineer, that the records and reports relating to watermaster work are kept in the files of the Division of Water Resources, that those files have been brought to the hearing, that the diversion ditch that was carrying most of the flow from the springs was measured in 1942 and that the flow therein was 0.46 cubic foot per second, that in 1941 at a time when the upper users had the water the ditch below the springs was carrying more than 15 inches, that he visited the Reynolds place and the lower reach of the creek at various times in the exercise of his duties as watermaster, that the height of water in the measuring device was noted but not recorded, that adjustments were made only when the amount of water being diverted was too far out of line, that during times of high flow, usually in April or May, there were periods when the upper users would not use all the water and excesses would reach and pass the Reynolds point of diversion, that in normal times when the upper users were using their water there was no other water at the head of the Reynolds ditch than spring water, that on one visit at a time when there was no flow below the Reynolds intake there was a pool of water at the upper end of the Toney place, that the water in the pool was return flow from irrigated land, that there were pools all the way up the stream to the Reynolds ditch, that there is an artesian well on the Toney place, that in about 1942 he installed a measuring device on the Reynolds place, that the device was set to measure 15 inches, that he adjusted the intake box in the Reynolds ditch a total of 3 or 4 times, that



on one occasion, in 1942 he set the box at 15 inches and told Mr. \*Atkinson that he could divert after the flow had so receded that it could not benefit lower users, that there is a general trend toward economy in the use of water, that during wet cycles more water is available for irrigation and during dry cycles less, and that increased yields from the springs occur in wet cycles.

William G. Brigance testified (pages 123 to 134 of transcript) that he was watermaster in the Soldier Creek area during 1950, and that he made certain flow measurements as set forth in a document which was therewith introduced as an exhibit. Witness Brigance further testified that he made additional measurements as recorded in a book which he produced. It was agreed that Witness Brigance would prepare a written index of pertinent measurements, the index to show with respect to each measurement the date, point of measurement and amount of water. The witness explained that the measurements were made because of Applicant Stopp's expressed interest in filing an application.

William Atkinson testified that he farmed the Reynolds place during the year 1942, that he diverted 15 inches of water through the irrigating season, that he was also on the place in 1938, 1939 and 1940, that the ditch was in bad condition, that it was an old ditch, and that it needed cleaning and enlarging.

Mervin Toney testified that he has lived on the George W. Toney place since about 1927 and on the E. P. Strief place since 1922, that he is also familiar with the Minnie Heard, Crampton and Bide Steward places, that water after being used at the Reynolds place flows over to the other lands mentioned, that in 1949 he was operating the G. W. Toney place and the E. P. Strief place, that more water was available after June 19, 1950 than during

\*Atkinson had potatoes on the Stopp place in 1942.

1949, that water flows from the Reynolds place through his place and on down to lower properties when water is plentiful enough, that the Reynolds ranch is above his property, that water reaches his property from the Reynolds ranch, that his total water supply has been used in accordance with the decree, that more water reached him in 1950 than in 1949, that the channel between the Reynolds ditch and his (the witness') ditch is never dry, that when water reaches his place it generally sinks and rises lower down on the edge of the Steward place after which Mr. Patch picks it up and uses it, that the amount of land irrigated now is about the same as in 1934.

Bide Steward testified (pages 168 to 178 of transcript) that he has operated the property known as the Simon Bennett property and the F. B. Strief place, that he has owned it since 1942, that his place is just north and across the highway from the \*Harris house, that he obtains water from west branch of Soldier Creek by means of a diversion ditch passing through the \*Harris place, that after the rotation period the water flows across his place and is picked up by Mr. Patch, that Mr. Patch diverts by means of a dam into another ditch, that water reaching him from the Heard place goes on to the Patch place, that when water does not flow over the surface of his (the witness') place it reaches the Patch place, such water coming from the old place where Soldier Creek used to come through, that the land slopes in a northeasterly direction, that a channel exists though not shown on map (Exhibit 1) that Mr. Patch uses to conduct water to his land from the west fork.

J. V. Patch testified (pages 179 to 184 of transcript) that he is the present owner of the property mentioned in the Decree as belonging to the San Francisco Loan Cattle Company, that he has lived thereon continuously

\*Presumably "Heard" is meant instead of "Harris".

since 1941, that he has a ditch that diverts from the lower end of the west branch of Soldier Creek on the Bide Steward property, that the ditch and the dam at its head were old when he bought the property, that they do not show on the map, that the water runs through the Steward place because that is the lowest land, that he uses the water so diverted for the irrigation of grain and meadow land, that in 1950 the ditch had water in it continuously, that crops have been raised there every year, that the amount of irrigated land has not changed materially since 1941 although water has been more plentiful in some years than in others, that irrigation was attempted in dry years even when supply was insufficient, that in 1950 there was water in the ditch that crosses his cow pasture, during the entire year.

Mervin Toney upon being recalled as a witness further testified that he first saw the water on the Patch place in about 1934 when he had the place rented and that the dam and diversion works did not then have the appearance of having been freshly made.

Marvin Weigant testified (pages 187 and 188 of transcript) that he owns what is known as the E.E. Cole place adjacent to and north of the Stopp place, that he has lived on his place since 1944, that he has observed that when the upper users are diverting no great amount of water flows down the creek but that there is enough for a continuous flow until late June or early July, that after that time there is just enough water to flow a little way and then sink and then rise again, and that that sequence occurred each year that he was on the place.

Henry Gorzell testified (pages 189 to 195 of transcript) that he lives on a place just below the Mervin Toney place, that he is not acquainted with Soldier Creek but knows where it is located, that he has owned his place since 1944, that the west branch of Soldier Creek passes to the east of

his place, that Rutherford Creek passes through his place, that after the west fork of Soldier Creek enters the Mervin Toney place it has a well defined channel, that he saw water in the west branch of Soldier Creek on October 20, 1950, that he saw water "coming in there" in 1947, that after about June 9 of any year there was no water in the creek.

Mr. Crampton (initials unstated) testified (pages 196 to 207 of transcript) that he was born and raised in Surprise Valley, that he is well acquainted with the Reynolds property, that he is the son of Oliver Crampton, that his (the witness') sister is married to Mr. Stopp, that his (the witness') memory of the west branch of Soldier Creek extends back for some 25 years, that the Reynolds property and the Daniels place take waters from the springs for irrigation, that in 1942 Mr. Stopp moved onto the Reynolds place, that 7 acres were planted to potatoes, that they were diverting the entire amount of spring water, that there was no flow below Mr. Stopp's diversion, that that condition existed every time he (the witness) was there in 1942, up into the winter, that on July 4, 1945 there was some water in the creek below Mr. Stopp's intake but that the spring water was all being diverted, that the condition was the same in 1946 as in 1945, that he visited the Reynolds place when the upper users were diverting, that he observed the channel during the upper users' rotation period in 1943, '44, '45 or '46, that he has been there when there was no water flowing except spring water, that on one occasion in 1944 there was just a pool of water there and another downstream, that he visited the Reynolds place several times each year both during and after the irrigating season and including times when the upper users were diverting, that every time he was there the water was turned onto the Reynolds property, that the water was spring water and could not be used anywhere else, that his visits included times when the lower users were diverting, that at such times he has seen water going down the

creek, that the springs produced about the same amount every time he observed them, that their flow was about the same in 1949 as in 1942, that in 1942 the flow from the springs appeared to be greater while the upper users were diverting, that he knows of no time during the upper users' rotation period when the flow from the springs was not diverted into the Reynolds ditch.

Exhibits introduced at the hearing were as follows:

By the applicant:

- (1) Report on Water Supply and Use of Water from Soldier Creek and Tributaries, Division of Water Rights, December 21, 1925 (by reference).
- (2) Annual Watermaster Reports, Soldier Creek Watermaster Service Area, 1925 to 1938 Inclusive, Division of Water Rights and Division of Water Resources (by reference).
- (3) Annual Watermaster Reports, Surprise Valley Watermaster Service Area, 1939 to 1948 Inclusive, Division of Water Resources (by reference).
- (4) Tabulation of Measurements of E. Clarence Stopp Ditch, signed by W. G. Brigance.
- (5) Letter from Division of Water Resources to Applicant Stopp, dated October 11, 1950 (by reference).

By the protestants:

Decree in San Francisco Cattle Loan Company et al. v. C. M. Crampton et al., Superior Court, Modoc County, No. 2405 (by reference).

By the examiner:

- (1) Three water stage recorder sheets relating to the flow of West Soldier Creek at Toney's.
- (2) Tabulation of flows above Mervin Toney's point of diversion on West Soldier Creek.
- (3) Measurements of flow in Reynolds Ditch leading from West Soldier Creek.

Briefs were filed after the hearing on behalf of the applicant and the protestants, respectively. In the applicant's opening brief it is argued that the protestants contention that the spring water is a part of

Soldier Creek water is erroneous and untenable, that the Court in its Decree distinguished between spring water and creek water, that all of the spring water has been used since the Decree by the applicant, that the long use by the applicant compels the conclusion that the increased flow from the springs constitutes unappropriated waters, that if lower users were entitled under the decree to all or part of the flow from the springs such right has become lost by non-use, that the parties litigant in their discussions at or about the time of the entry of the Decree distinguished between spring waters and creek waters, that none of those parties claimed the right to use the spring waters and that the increased flow from the springs therefore is unappropriated water. The substance of the protestant' brief is contained in the summary of that document, the essentials thereof reading as follows:

"The protests - - - are definitely and conclusively supported by the decree - - -.

"By the terms of said decree - - - there is no unappropriated water in the stream, and this includes the springs.

"No evidence competent to show that any water-user entitled to water under said decree has surrendered or forfeited or lost his rights has been produced or offered - - -.

"Any and all water that may flow in the stream in excess of the several users named in the decree, which would include the "increased" flow, if any, from the springs is awarded to the lands of Patch - - - and all parties to the action - - - are required to permit and allow such excess water to flow down the channel unretarded and unmolested.

"In the absence of any proof - - - showing that the Patch place cannot, and does not, make use of the water thus awarded, there is no basis in law or fact for the claim that there is any unappropriated water in the stream.

"We respectfully submit that the application should be denied."

The applicant's closing brief contains arguments to the effect that if a protestant has ceased to beneficially use water to which entitled that water becomes unappropriated, that an adjudicated right is lost by 3 consecutive years of non-use, that in view of the State policy of putting waters to maximum beneficial use the applicant's putting unused spring water to beneficial use was not wrongful, that the 5 year statute under the general adverse possession law and the 3 year law under the Water Code are statutes of limitations barring protestants from asserting rights to the water in dispute, that the protestants' contention that an adjudication is forever binding is incorrect, that a judgment is not necessarily resjudicata as to rights acquired subsequent to the rendition of the judgment, that the protestants' 'slept on their rights' for the statutory period, that at the time the decree was being formulated the parties and the court recognized a distinction between the spring waters and the creek waters, that despite such distinction and despite the decree the increased spring flow, having been unused for the statutory period by any one else is subject to appropriation, that opposing counsel's contention that the Patch lands can use the excess water beneficially is invalid, that the decree did not allocate the Patch lands any water from the West Fork. The conclusion of the applicant's closing brief reads:

"By uncontradicted testimony, it is clearly shown that Mr. Patch did not use the excess water for a period of more than five years preceding the filing of this application, and, under authorities above cited, this increased flow of the springs, or this excess water, as the case may be has become public water and is subject to appropriation - - -. This applicant, having so made his application and now being the only applicant applying for the same, and it being clearly shown that the waters have been and will be put to beneficial use upon his lands, it is therefore respectfully submitted that applicant's application should be granted."

The court decree of November 28, 1928, on page 6, sets forth with respect to the source from which appropriation is sought and with respect to rights to divert therefrom onto lands now owned by the applicant:

"That the said stream - - - divides and forms two distinct channels, one known as the "West Fork of Soldier Creek" - - -; and that in the - - - channel thereof there are certain perennial springs;

"That - - - Reynolds - - - is the owner of the first right to divert and use, from the waters so flowing from said springs at all seasons of the year, 0.30 cubic feet per second, through the Reynolds Ditch - - - said water being used for domestic and irrigation purposes, and that said Enoch Reynolds has no other right, title, interest or estate in or to any of the waters of said creek."

The decree provides that the so called "general irrigation periods" for the lands and rights involved in that action shall extend from 6:00 AM of March 19 to 6:00 AM of June 19 of each year and that each such period shall be subdivided into 8 "rotation periods" alternately 13 and 10 days in length. It then defines the entitlements of each of the parties to the action then in litigation to divert during general irrigation periods and to divert at times outside of the general irrigation periods. A further provision of the decree is that

" - - - if during any of said time or times there is flowing in said Soldier Creek any water in excess of the amounts required to supply all allotments hereinbefore allotted or decreed for such time or times, that then - - - the said parties to this action shall permit and allow all such excess water to flow down the said channel - - - unretarded and unmolested - - - to the lands of the said San Francisco Cattle Loan Company - - - and said company, or its grantees, shall be the owners of and have the right to divert and use all such excess water that may so flow in said stream at any such time or times - - -"

The 60th paragraph of the Decree (on page 33) reads:

"It is further ordered, adjudged and decreed that each and every party to this action, his or her agents, successors, grantees and assigns, be, and they are hereby perpetually enjoined and restrained



from doing anything in violation of the terms or provisions of their decree, and particularly from diverting any water in excess of the amount awarded or decreed to said person, or diverting any water at any time in violation of the terms hereof, or from doing anything that will obstruct or interfere with any other right in this decree adjudged and decreed."

The Report on Water Supply and Use of Water from Soldier Creek, dated December 21, 1925 and listed among the Hearing exhibits as Applicant's Exhibit No. 1, states with respect to the first diversion below the Reynolds (now Stopp) intake, as follows:

"Diversion 14 is that of the J. F. Cole Estate, on -- the West Fork -- -- in the NE<sup>1</sup>/<sub>4</sub> NW<sup>1</sup>/<sub>4</sub> Section 6 -- --.

"The conduit is a small earth ditch about one-eighth of a mile in length -- --. It is used to irrigate 6.1 acres of garden -- --. The area irrigated is riparian -- --. The water supply for this ditch has its source in springs in the channel of the West Fork which have a steady and dependable supply."

\* \* \* \* \*

"Subsequent to June 11, 1925, after which date no water from the main Soldier Creek was passed down the West Fork, the flow from the springs when Diversion 14 was not in use was entirely dissipated in the channel a short distance below the Cole Garden Ditch intake. Thus after the general irrigation season, Diversions 11 and 14 are the only ones that can make any beneficial use of the flow from the springs in the channel of the West Fork."

The Report on Watermaster Service in the Surprise Valley Watermaster Service Area for the 1951 season, dated February, 1952, contains the following passage:

"After water has ceased to be available at the head of the West Branch of Soldier Creek, it was necessary for the watermaster to regulate the E. Clarence Stopp diversion from rising water in that channel to 0.30 cubic foot per second as provided in the decree. Reregulation was required on numerous occasions in order to pass the water in excess of the decreed amount down the creek to other users who received and were able to use the excess water in spite of Stopp's contention that it would not reach them."

The allotment under the Decree to the San Francisco Cattle Loan Company (predecessor in interest of Protestant Patch) is to be measured, the Decree states (on page 16 thereof), "at the head of the East Fork of said creek." Since obviously no diversion from the West Fork such as that proposed by the applicant can affect the flow at the head of the East Fork, Protestant Patch cannot be injured by the appropriation sought and his protest against the application is therefore insufficient.

The Toney's and the Heards are allotted water under the Decree from both the East Fork and the West Fork. As in the case of Protestant Patch their supply from the East Fork may be dismissed from consideration. From the West Fork they are supplied in part through the Toney Ditch (known by this office as Diversion 15) which heads near the north line of Section 6, T43N R16E and through ditches that head downstream therefrom. The decree provides that the allotment to these parties shall be measured at their respective points of diversion from the creek channel; and the report of December 21, 1925, as quoted in part in an earlier paragraph, states in effect that Diversion 11 and 14 (both of which head above the Toney Ditch) are the only ones that can make any beneficial use of the springs in the channel of the West Fork, after the general irrigation season.

During the first, third, fifth and seventh rotation periods there definitely is no unappropriated water in the West Fork. This is because the supply is allotted in its entirety, under the Decree. During the second, fourth, sixth and eighth rotation periods supply in the West Fork is ordinarily limited to the flow of springs in that stream channel.

Of these springs the report of December 21, 1925, (page 30 of Applicant's Exhibit No. 1) states in part:

"Springs in the channel of the West Fork above Diversion 11 (then Reynolds, now Stopp) furnish a constant supply for Mr. Reynolds sufficient for the irrigation of the alfalfa, garden and orchard. There is insufficient water from the springs to irrigate the grain hay, and consequently this area has been irrigated only from the waters of melting snow in Soldier Creek that discharge from the canyon. Measurements made of the spring flow - - - - are - - -:

<u>Date</u>	<u>Discharge (cfs)</u>	<u>Measured by</u>
7-8-25	0.36	current meter
8-5-25	.40	float
8-31-25	.40	float"

The applicant takes the position that the flow of the springs has increased and that the excess of that flow over the 0.30 cubic foot per second allotted to him under the decree is subject to appropriation. According to the data the springs were yielding 0.36 to 0.40 cubic foot per second on 3 dates of measurement in 1925 and 0.70 and 0.80 cubic foot per second respectively on 2 dates of measurement in 1950. The measurements are too few to establish a trend. Witness Scammon testified in that connection (page 120 of transcript) that spring flow is greater during wet cycles. Irrespective of variations of spring flow the decree limited Reynolds (now Stopp) not to the yield of the spring but to a definite quantity therefrom viz. 0.30 cubic foot per second. Any excess over the amount allotted under the decree that issues from the springs serves at least the useful purpose during even numbered rotation periods of keeping the channel moist between rotations, a definite advantage which downstream diverters now enjoy but which would be lost to them should the applicant himself divert that excess.

As stated in an earlier paragraph the Decree allotted 0.30 cubic foot per second of the flow of the springs, at all seasons of the year to Applicant Stopp's predecessor in interest. It is to be noted however that not only did the decree allot no more than 0.30 cubic foot per second to that allottee but in another paragraph (the 60th) the decree specifically enjoined all allottees against diverting any water in excess of the amounts awarded.

During the season outside of the season of irrigation, i.e. from June 19 of one year to March 19 of the next, the Decree provides (in its 56th paragraph) among other things that G. W. Toney and Mervin R. Toney participate in the twelfth right to Soldier Creek waters in the amounts of 0.45 and 0.30 cubic foot per second respectively, through the Toney Ditch (termed by this office as Diversion No. 15). Seldom, apparently, outside of the irrigation season is the flow of the West Branch sufficient to satisfy these rights or either of them, the bulk of the runoff from the Soldier Creek watershed occurring during the spring months. In 1950 for example daily measurements made some 50 feet above the Mervin Toney intake as arrayed on Examiner's Exhibit No. 2, ranged downward from 0.5 cubic foot per second on July 1 to less than 0.1 cubic foot per second in early September. The water issuing from the springs patently is a part of the flow in the reach that includes the Toney intake and that flow is less than the aggregate of the Toney rights under the Decree, from which facts it follows that unappropriated water is non-existent in the West Fork from June 19, the end of the general irrigation period, to at least September 30, the end of the period of the appropriation sought by the applicant. Between February 1, the beginning date of that proposed appropriation and March 19, the beginning of the general irrigation period, the Toney's decreed twelfth

right again calls for more than the amount by which spring flow exceeds the applicants decreed right.

Summary and Conclusions

During the period within which the applicant seeks to divert under Application 13761 unappropriated water is usually non-existent between February 1 and March 19 because at that time allocations under the Decree usually require the full flow of the source, and the same conditions obtain from June 19 to September 30. During odd numbered rotation periods between March 19 and June 19 the full flow of the stream is usually required to satisfy decreed rights. During even-numbered rotation periods there is no flow in the West Branch below the Stopp intake except the small amount if any by which the flow emanating from the springs in the stream channel exceeds Mr. Stopp's entitlement under the Decree. That small flow keeps or tends to keep the channel primed during those rotation periods and the users at points downstream would be injured by its loss.

For the reasons summarized it is the opinion of this office that unappropriated water is ordinarily non-existent in the source from which it is sought to appropriate under Application 13761 and that that application should therefore be denied.

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ORDER

Application 13761 for a permit to appropriate water having been filed with the Division of Water Resources as above stated, protests having been filed, a hearing having been held and the State Engineer now being fully informed in the premises:

IT IS HEREBY ORDERED that Application 13761 be rejected and cancelled upon the records of the Division of Water Resources.

WITNESS my hand and the seal of the Department of Public Works of the State of California this 22nd day of September 1952.

Original signed by A. B. Edmonston

A. B. Edmonston  
State Engineer

SCW:dm