

STATE OF CALIFORNIA
DEPARTMENT OF PUBLIC WORKS
BEFORE THE STATE ENGINEER AND
CHIEF OF THE DIVISION OF WATER RESOURCES

Feb 2

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In the Matter of Application 13617 by J.R. Barron to Appropriate
Water from Willow Creek, Tributary via Susan River to Honey Lake in
Lassen County for Irrigation Purposes.

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Decision A. 13617 D. 783

Decided February 1, 1954

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Appearances at Hearing Held at Susanville on October 28, 1952:

For the Applicant

J. R. Barron

Arthur J. Anderson, Attorney at Law

For the Protestants

Pierce McClelland et al.)

Hardin Barry, Attorney at Law

Mary S. Murrer)

Alameda County Ice Cream Company)

Bohnett, Hill, Cottrell & Bohnett
Attorneys at Law

Independent Creamery and Ice
Cream Company)

By C.C. Cottrell

Tule Irrigation District

W. Coburn Cook, Attorney at Law

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

Also present - Leslie C. Jopson, Supervising Hydraulic Engineer,
Division of Water Resources.

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OPINION

General Description of the Proposed Development

Application 13617 initiates an appropriation of 1239 acre-feet per annum from Willow Creek, collected between November 1 and April 1. Two points of diversion are proposed, these being within the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 1, T 31 N, R 11 E, and the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 14, T 31 N, R 12 E, MDB&M, respectively. Both on-stream and off-stream storage are involved, in the amounts, respectively, of 1130 and 109 acre-feet. Reservoirs designated as Barron Acres Reservoirs Nos. 1a, 5 and 6 are to be utilized. These are stated in the application to flood portions of Sections 9, 11, 12 and 14, of the township/mentioned, and to aggregate 500 acres in surface area and 1239 acre-feet in capacity. The project includes a canal 30,000 feet long and capable of carrying 30 cubic feet per second. Irrigation is to extend from about April 1 to about November 1. The land for which the water is wanted is 1506 acres in extent and is either to be planted to general crops or used as pasture. As to other water rights claimed the application states "See Susan River Court Decree Diversion 122-135 on DWR Map." According to the application the applicant disclaims ownership of the land at the proposed point or points of diversion but states:

"As I understand present existing water agreements I have access thereto and my ranch has a half interest in the ditch and diversion and has used it always since ditch and diversion were used. As to water down canal to bottom of land; no one can successfully refuse it as it has been by-passed that way since the Eagle Lake project failed and I pay taxes on the right of way that was allowed per agreements no longer in effect."

Pierce McClelland and thirteen others jointly protest the application,

their protest reading:

"We, the undersigned, users of water in Willow Creek, ... do hereby protest ... for the following reasons:

"1. The application requests the right to store water from November 1 to April 1. Many years it is necessary for us to use water during the months of March for irrigation and, while it is true that our rights come before the rights of any reservoir that has been established recently or will be established, it is extremely difficult to regulate such storage so early in the year. Any reservoir that is built on Willow Creek should not have any later than March 1 dates for storage of water in the spring.

"2. The undersigned have all riparian rights out of Willow Creek and have been using this water for many years. Their lands are located along Upper Willow Creek and in the lower end of Honey Lake Valley near Standish and Litchfield, comprising approximately 6,000 acres of irrigated lands."

Mary S. Murrer protests the application, alleging:

"Applicant has an easement in the Neuhaus Jacobs Ditch across my land to conduct from the point of diversion of Willow Creek to his place of use 2.1 cubic feet per second and not in excess thereof, and any attempt on his part to carry more water in the ditch through my land places an additional burden on me, and is in excess of his right as evidenced by judgments or contracts."

Protestant Murrer claims a right to the use of water on the basis of alleged "riparian right, prior appropriation and prescription or adverse user." As to the extent of present or past use of water by herself or by predecessors in interest she states:

"Since about 1870 the Murrer Ranch on the headwaters of Willow Creek has diverted and beneficially used by means of this ditch taking out of Willow Creek at the point of diversion mentioned at least 2 to 2½ cubic feet per second of water from the natural flow of Willow Creek for beneficial use on the Murrer ranch."

Her diversion point she describes as being located within the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 1, T 31 N, R 11 E, MDB&M.

Alameda County Ice Cream Co. protests that the proposed appropriation would deprive it of needed irrigation water to which it is entitled. It states that its lands are at the end of the Willow Creek flow and that in dry years it might be deprived of receiving any water at all. It claims "riparian rights as land owner on Willow Creek and Susan River." As to the extent of its present and past use, or its predecessors', it states:

"We are now using, and our predecessors have used, water from Willow Creek and Susan River for an uninterrupted period of more than 100 years. We use all available water for irrigation of meadow and alfalfa acreage. We own and cultivate a total of about 680 acres."

This protestant's diversion points are described as being located within Sections 32 and 33 of T 29 N, R 15 E and within Sections 4 and 5 of T 28 N, R 15 E. The protest also contains the following statement:

"Our property is at the end of the flow of Willow Creek and Susan River and borders on Honey Lake. It is obvious that if the appropriation request is granted, we are the property owner most likely to suffer damage. In a dry year, or a series of dry years, the damage to our property would be irreparable. In a dry year the flow of the water through Willow Creek may stop as early as March first but if this appropriation is granted, it is possible that our lands would not receive any water at all from the flow of Willow Creek. In a moderate season's flow, following a dry year, the underlying strata would absorb considerable water and it is possible that with a dry year and then a medium year, our property would be without water from Willow Creek two or more years in a row. The season of requested appropriation, particularly to April first, is tantamount to a request to appropriate other than surplus waters."

Independent Creamery and Ice Cream Co. protests the application, its protest being identical with that of Alameda County Ice Cream Co. except that it claims to own and cultivate a total of about 720 acres and describes its diversions as heading within Sections 31, 32 and 33 of T 29 N, R 15 E, MDB&M.

Answers

The applicant answers each of the protests, except the Mary S. Murrer protest, by stating:

"First: It should be understood that I'm applying for unappropriated water. In other words it is water that is not being used at the season of the year by any one who has a greater right to it than myself and if I desire to spend the time, effort and monies to control the water and use it as the Division ... deems proper, then there is no one who can successfully oppose my efforts

"Second: I also grant that we have all used these waters, first as riparian waters, second as adjudicated waters for many years. My application is not submitted in a manner to change such usage, but rather to add to a better usage of the waters and store the waters when they are not needed or being used"

The applicant's answer to the Mary S. Murrer protest contains the following passages:

" ... I have an easement in the Neuhaus Jacobs Ditch across your land to conduct from the point of diversion ... to my place of use a certain amount of water. Under the adjudication ... a certain amount was mentioned for me as well as for you, but this amount applied to a certain irrigation season only.

" ... it is not my intention to give up any usage rights in the ditch mentioned above after irrigation season and ... I hold a one half interest in the water coming thru that ditch. It is my intention to prove such a right, if necessary, in court

" ... the burden on you to carry more than 2.1 cubic feet per second of water in the ditch through your land does not place an additional burden on you that is not shared by myself in judgments and contracts and that the burden is one I desire and intend to keep as part of the rights and history of my ranch My ranch has an old riparian water right

"I do not know how much water you have been diverting beneficially into the Neuhaus Jacobs Ditch but I do know it is time that the amount you can divert be indicated and diverted during irrigation season and after that half a ditch is what I will settle for ...

"It is my request to the Division ... that they cause the adjudication of water to this ditch to be brought to a final conclusion for our irrigation season as there is no question as to what the ditch rights are for each of us during any other season. It is a half and half deal as all the records will prove.

" ...All I want is what is due me under old contracts and the future right to develop water usage and conservation"

Hearing Held in Accordance with the Water Code

Application 13617 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 the California Administrative Code, Title 23, Waters, on Tuesday, October 28, 1952 at 10:00 o'clock a.m. in the Supervisors' Room, Lassen County Court House, Susanville, California. Of the hearing the applicant and the protestants were duly notified.

Gist of Hearing Testimony

Applicant Barron testified (pages 9 to 22 of transcript) to the effect that his project is as set forth in his application, that winter water is available in his project area and that it is his desire to store that water in order to use it later for irrigation when his land most needs it, that his reservoirs will flood lands in Sections 2, 3, 4, 10, 11, 13 and 14, T 31 N, R 10 E, MDB&M, that he hopes to use the old Tanner Slough Irrigation Company dam but to raise that dam 2 or 3 feet, that the land is so flat that his proposed development is more a system of levees than a system of reservoirs, that his project entails bringing water down the Highline Ditch, sometimes called the Jacobs-Neuhaus Ditch, that of his 2 proposed points of diversion the upper one is within Section 1, T 31 N, R 11 E, at the take-out of the Neuhaus-Jacobs Ditch and the lower one is near the Tanner Slough Association dam which is within the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 14, T 31 N, R 12 E, that the capacity of the Jacobs-Neuhaus Ditch is about 6 cubic feet per second, that he built reservoirs called Reservoirs 3, 5, 4, 1 and 1a, that he began such construction in 1948, that the reservoirs are not finished.

Applicant Barron testified further (pages 27 to 33 of transcript) that he acquired his ranch in 1947, and that in that year the storage water was used by "these Tule people." As to said use and similar use in 1948 he testified:

"The water that they supposedly felt was theirs was used, but ... the only storage possible under that contract is 4 acre feet of water in the ditches running down through my ranch."

Upon being asked why it is impossible to store water in the area he testified:

"For the simple reason it is so flat and the contract purports the water cannot be stored on my big hay meadow. There is water on my big hay meadow today. The dam is open

" ... Tanner Slough Irrigation Association ... cannot prove they have even one acre foot of water out there for the simple reason that ... a third of Willow Creek down through my ranch will leave water on my hay meadow

* * *

" ... that contract is so ambiguous and so indefinite it has no effect whatsoever as a storage area"

* * *

" ... there is a place to store water if the man owning the ground is willing to sacrifice the ground and build the levees in order to do it."

The witness testified further (pages 33-37 of transcript) to the effect that he has built a levee to keep water off his hay meadow, that if he can handle the development himself he can control the water, that in conjunction with the levee a 3,200 gallon-per-minute pump will be necessary, that he hopes to satisfy an obligation to release 38% of the natural flow of Willow Creek by releases from his reservoir and to use the remainder of the natural flow on his upper lands. On cross examination and re-direct examination the witness testified at considerable length (pages 38-92 of transcript), such testimony however containing little of apparent relevancy to the matter at issue.

James W. Mapes testified (pages 93 to 107 of transcript) that he has farmed in the Susan River delta for around forty years, that irrigation in that locality may begin "most any time during the winter when the frost is out", that that time is usually in February, that in some dry years "if we don't get a real early irrigation we don't get much crops", that he therefore objects to storage by the applicant as late as April 1, that water should be available to delta irrigation any time in the winter that they need it, that he has himself made application to appropriate the same waters filed on by Applicant Barron.

M. E. Foster, representing the California Department of Fish and Game, testified (pages 108 to 110 of transcript) that his Department is successor in interest to "the Fleming lands", that he (the witness) has been a member of "the Tule committee", that as far as he knows the committee is "still in force", that the committee was appointed to be in a position to receive any ideas that Mr. Barron might wish to present, that negotiations are still pending, that "Mr. Barron has not approached us with any deal and neither have we approached him", that the committee was appointed $2\frac{1}{2}$ years ago.

Applicant Barron offered additional testimony (pages 110 to 114 of transcript) as follows:

" ... I had submitted a proposal that they (the Tule committee) receive as much water - under the contract - as they could legally store in some other areas, and it was my understanding that the committee ... would ... work it out as to what that group down there would do, and then I would get an answer to it. I had also proposed that I would pay back for the damsite what they had put into it.

" ... I have never withdrawn from that statement. I would pay back the money they are in the dam or I would give them the same amount of storage they can store under this old contract legally and I was under the impression that the committee ... and you gentlemen were going to ... advise me what you would accept

"My original proposals ... I didn't want a levee through the middle. I just wanted to get rid of it and have them accept water on upper ground and not ruin so much good acreage, and since we didn't seem to come to any understanding on it, it was my thought something could be done to force the issue, and if I have got to lose the wonderful ground out there for no water ... I might just as well be privileged to store

" ... my offers haven't changed. If there is any storage there legally under the contract, while I don't believe the contract means a great deal ... I didn't think anyone would care to ruin that area, and I believe there is room for appeal to the Division of Water Resources to help in some way to get rid of it."

Hearing Exhibits

Applicant's Exhibit No. 1 - A marked, oblique, aerial photograph showing relative location of applicant's reservoirs and adjacent lands.

Protestants' Exhibit No. 1 - A purported copy of a contract dated June 30, 1937 and entitled "Contract Covering Easement for Dam and Allocation of Water Impounded," between P. H. and Margarite Walsh, collectively called first party and J. J. Fleming et al., collectively called second party, the body thereof reading as follows:

"For and in consideration of the promises of second party hereinafter contained, first party does hereby grant to second party the right and privilege of erecting, maintaining and using a dam for impounding the unappropriated waters of Willow Creek, together with the right of ingress thereto and egress therefrom for all purposes connected

with the enjoyment of the rights hereby granted over and across the lands of the first party, which are designated upon the map which is hereunto annexed marked Exhibit "A" and made a part hereof. This permission is given upon the following respective conditions which second party agrees to observe and perform, namely:

- "1. That said dam to be constructed by second party upon the lands of the party of the first part shall be constructed at or near the south boundary of the Walsh Ranch as indicated upon said attached Exhibit "A".
- "2. Second party shall not permit the waters impounded by said dam to inundate the present meadow hay land of first party situated southeasterly from the Walsh Home, said limit of permitted inundation being designated as high water line on said attached Exhibit "A".
- "3. Second party shall entirely release all impounded waters each year on or before the tenth day of July.
- "4. Second party shall and will at all times supply the allocation of water to plaintiffs, or the proper proration thereof, in accordance with the Decree of Edna Streshley et al. vs. M. O. Folsom et al., entered by the Superior Court ... in and for the County of Lassen in 1914, entirely from the impounded water, during such time as impounded water is available therefor.
- "5. That during the time impounded water is available for the purpose as set out in No. 4 hereinabove, second party shall permit first party to divert and use the entire flow of Willow Creek available above the reservoir created by the dam referred to herein.
- "6. Second party further promises and agrees that the party of the first part shall in no way be obligated to supply such allocations or prorations of water as mentioned in No. 4 hereinabove."

n.b. The exhibit bears a notation "Map to be attached." However no map is attached nor is there any reference in the files to its receipt.

Applicant's Exhibit No. 2 - An oblique aerial photograph of the applicant's lands and a set of 8 small photographs.

Briefs

The applicant's brief contains, among others, the following passages:

"The protestants ... object ... on the grounds that they have a contractual right to store water in the same area

"Applicant admits the existence of said contract but claims the right to store water in said area over and above the present capacity of the area as defined by said contract; applicant further claims that there is no storage capacity in the area defined by said contract and that the permit to store water heretofore issued to said protestants in same area ... should be revoked because of the lack of storage capacity of the area defined in the contract and on the further grounds that said usage of said land constitutes an impractical way to store water; that the Division ... is therefore acting in excess of its authority in issuing a permit to store water under such circumstances.

"Applicant is willing to give to protestants the same amount of water that a survey will show they can now store in said area from the greater amount applicant will be able to store if the application is granted. The granting of the application will allow applicant to reclaim some 790 acres of highly productive meadow-land from the area that is now inundated and made swamp-land by the present ... permit

"The evidence ... shows that protestants have no storage capacity within which to store the 2600 acre feet of water under their permit The maps ... show the very limited amount of storage available to protestants. The protestants ... failed to show that they had at any time in the past made substantial storage or use of the area covered by the contract.

"In order to supplement ... we are enclosing ...additional engineering work In the event this material is not

considered ... as a proper briefing we hereby move for re-opening of the hearing"

The additional engineering work mentioned in the brief includes the exhibit above designated as Applicant's Exhibit No. 2 and a typed statement by Engineer W. Robert Jennings entitled "Report of Survey Work, Barron Acres Ranch on November 25, 1952." It includes an account of the circumstances under which the 8 numbered photographs in the exhibit were taken and concludes as follows:

"From this day's work and from my previous survey of the area I find this ground to be so flat that a water depth of $11\frac{1}{2}$ inches above the concrete sill of the dam will back water up for over a mile, and will put water at the edge of the hay meadow (and in some cases into the meadow)"

The reply brief of Tule Irrigation District contains passages as follows:

" ... the so-called Eagle Lake Canal ... or the so-called By-pass Canal, does not belong to the applicant "

" ... he directly admitted that the ownership of the right of way of the Eagle Lake Canal is in the Tule and Baxter Creek District."

" ... protestant is not ... objecting to the use of the by-pass canal or diversion ... out of Willow Creek but is objecting to the use of it as a part of a reservoir which will in any way interfere with its use as a conduit. ... if the applicant is granted his permit ... there will be an interference with the use of the by-pass canal for the purpose intended, and ... since it is not the property of the applicant, he is not able to make use of it legally for the purpose proposed. This is our principal objection to the application."

" ... Barron has no right to the use of the diversion dam except for the purposes embraced within the agreement with the lower Tule Confederacy Barron does not have the facilities for diverting the water he desires, nor does he have the facilities for storage unless he uses the by-pass canal to which he has no legal right."

" ... it does not appear that the project proposed by Barron is feasible. It uses up too much good land for shallow storage if he expends ... money in this project he will not be entitled to use that as a defense in any action brought against him to determine the district's complete right to the by-pass canal."

" ... Barron could obtain all the water that he needed from the Tule Irrigation District. There is much better storage in Eagle Lake than on Barron's land, and he would not have to deprive other landowners of this water."

"There will be an inadequate method of measuring out the water which Barron is entitled to store for the parties below."

No reply brief of any other party, nor closing brief, is of record.

Other Available Information

Among other applications that have been filed upon waters of Willow Creek is Application 9123, by Tanner Slough Irrigation Association. Application 9123 initiated an appropriation of 2600 acre feet per annum, the water to be collected between October 15 and May 1 by means of a dam located within the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 14, T 31 N, R 12 E, and utilized in irrigating 8849.8 acres of general crops within T 28 and 29 N, R 15 E, T 29 N, R 14 E, T 31 N, R 12 and 13 E and T 32 N, R 12 E. Application 9123 was protested, heard, approved

and, in 1938, licensed. The status of the project is set forth in Report of Licensee dated October 22, 1951 as follows:

"The original agreement to construct this dam was between Pat Walsh and the Tanner Slough Irrigation Association In the agreement there was set up an area of ground which could be covered with water. Later on Pat Walsh sold this particular ranch to Reed Barron Reed interprets the agreement between the Tanner Slough and Walsh differently than Walsh did. ... there are some low spots at the upper end of where the water would be stored which would run water back on the hay meadow. The agreement says that no water shall be run on the hay meadow. These low spots formerly were sloughs and didn't do any damage to the meadow.

"Mr. Barron feels that about 130 to 140 acre-feet is all that the reservoir will store. As a result for the past three years there has been a constant disagreement between Barron and the members of the Tanner Slough Irrigation Association. This disagreement has been such that very little beneficial use has been made of the water because very little water has been stored, not enough to get much out.

"At a recent meeting of the Tanner Slough Association, they decided that they would, this coming spring, put in the boards and raise their water higher than Mr. Barron says they can raise it. They think possibly that they have a case and it may have to go to court to be settled. This application or license should not be cancelled until such time as Mr. Barron and the Tanner Slough Irrigation Association have arrived at a satisfactory solution or have agreed that the reservoir is not capable of storing water."

It appears that the agreement mentioned in the first paragraph of above quotation is the agreement set forth in Protestants' Hearing Exhibit No. 1.

Other applications, prior to Application 13617, to appropriate from Willow Creek include Application 12142 Permit 7886, J. R. Barron, for 700 acre-feet per annum to be collected between November 1 and April 1 at a point

within Section 1, T 31 N, R 11 E, impounded in "Barron Acres Reservoir Areas 1, 2a, 2b, 3 and 4 and used for irrigation,

Application 12312 Permit 7887, J. R. Barron, for 1000 acre-feet per annum to be collected during the same period and at the same point as under Application 12142, stored in "Barron Acres Upper and Lower Reservoirs" and used for irrigation, and

Application 12750 Permit 7879, Herbert A. Miller, for 3 cubic feet per second from March 1 to April 1 and 25 acre feet per annum collected between November 1 and April 1, for irrigation, the water to be diverted at points within Section 1, T 30 N, R 14 E.

These three applications were protested, heard and approved. In the study upon which the decision in that matter was based it was concluded:

"The circumstances ... indicate that the surpluses which at times exist may be taken and used by the applicants in the manner proposed without injury to the protestants or to other downstream users. The time of occurrence and the amount of such surpluses cannot be determined exactly and will vary from season to season. Reliance for protection against invasion of the rights of lower users may safely rest ... upon the wording invariably appearing in an approved application, limiting the appropriation to unappropriated water and subordinating the appropriation to rights already vested. Additional protection of downstream users in the present instance lies in the fact that the lands and waters involved are within a watermaster district and that during irrigation months diversions by all water users therein are supervised by the Division"

In "Report on Watermaster Service in Susan River Watermaster Service Area ... 1948 Season", on pages 11 and 12, the following passage appears:

"The second controversy which arose during the 1948 season concerned the limit of inundation and the amount of water that can legally be impounded in Walsh Reservoir and involved J. R. Barron and the Tule ranchers. Upon the purchase of the Walsh ranch in 1947 Mr. Barron became a party to a contract with the Tule ranchers which permits the storage of water behind the Walsh dam and upon the Walsh ranch. The contract specifies certain limits as to inundation and period of storage. Mr. Barron has sought through negotiation with the Tule ranchers and by request to the Division ... to eliminate the reservoir in order that the inundated lands can be farmed. The main point of disagreement involves the legal interpretation of the contract regarding the limit of the area of inundation. The contract specifies that the limit of inundation shall be the eastwardly boundary of the hay meadow field. From Mr. Barron's point of view no storage should be permitted above an elevation at which the water surface is at the lowest point along the fence line of the field concerned. The tule ranchers are not in agreement among themselves but the consensus seems to be that storage should be permitted to an elevation which is the general elevation of the ground along the fence line. Some of the tule people further argue that the Walshes apparently interpreted the elevation of the maximum water surface to be the general ground elevation at the fence line since storage in the past was permitted to that elevation.

"In order to obtain data which may be of value in arriving at some mutually agreeable settlement L. C. Jopson, Supervising Watermaster, and C. M. O'Donnell made determinations of the reservoir area and capacity at the maximum stage and at the end of the period of release."

Unfiled notes covering the reconnaissance survey in which the determinations mentioned in the above quoted passage were made, read in part as follows:

"In order to determine the maximum storage for the season, surveys were made of the reservoir ... at the time of the maximum stage and at the conclusion of the reservoir release. From these data the areas of the water surface at, and the capacity of the reservoir between, these two stages were computed.

"At the end of the reservoir release, a certain amount of water remained impounded due to backwater from below and

the need for stockwater above the dam. The area inundated at that time was computed from the survey data and the average depth of water covering this area was estimated

... "

* * *

"From field determination, the elevation of the lowest point along the boundary fence line, between the hay meadow land and the field to the East which becomes inundated by the reservoir waters, was found to be only 0.6 foot above the concrete floor of the spillway at the abutments. This figure is much smaller than it was generally understood to be. From the Area-Capacity curves which accompany this memorandum, it is seen that for the depth of water of 0.6 foot the area is 340 acres and the capacity only 122 acre-feet. The maximum storage impounded in the reservoir during the 1947-48 season was 573 acre feet and the maximum area covered was 615 acres. The map which accompanies this memorandum shows that a portion of the hay meadow land was inundated at the maximum reservoir stage of 1.9 feet."

* * *

"The volume of water which the reservoir is capable of storing between the reservoir stages of May 13 and July 4 was ... 505 acre-feet.

"The storage which remained impounded at the end of the reservoir release ..., at reservoir stage of 0.41 foot, calculates as 68 acre feet.

"The maximum reservoir storage for the 1947-48 season is ... a total of 573 acre-feet."

* * *

" ... if Mr. Barron's contention that water can be stored only to a level which will extend to but not beyond the hay meadow land fence is correct the amount of possible storage is 122 acre-feet."

Discussion

The conclusion underlying the decision to approve Applications 12142, 12312 and 12750, viz. that unappropriated water at times exists, was based upon the determination at that time that the normal flow of Willow Creek was probably sufficient to satisfy those applications as well as to satisfy prior rights including the appropriations under Application 9123. The flow of Willow Creek and the demands made upon it now do not appear materially different from what they were when the 3 applications mentioned were acted upon. If as Applicant Barron contends the right to divert more than a trifling fraction of the 2600 acre feet authorized under Application 9123 cannot be exercised because of the provision in the Walsh-Fleming contract, unappropriated water in the amount sought under Application 13617 evidently exists. An interpretation of the Walsh-Fleming contract is beyond the jurisdiction of this office but may be effected by negotiation between the parties or by court action. Until interpretation of the contract, action upon Application 13617 insofar as it relates to on-stream storage appears unwarranted: should the application be approved and Barron allow the reservoir to fill, with the contract uninterpreted, the down-river interests presumably would take the water under Application 9123 and Barron would not benefit; should the application be disapproved, neither party, apparently, would benefit.

The protests against the application in themselves are not a bar to the application's approval. Protestant Murrer's objection

to the transportation of more than a stated amount through a ditch that traverses her property is a matter outside of the Division's jurisdiction. The other protestants express apprehension that the proposed appropriation will interfere with the supply depended upon at points downstream; their objections cannot be entertained inasmuch as the information at hand indicates that water in excess of downstream requirements frequently exists in Willow Creek at the season during which the applicant seeks to appropriate it.

The Tule Irrigation District's objections to the proposed appropriation, expressed by entering an appearance at the hearing and tendering a reply brief thereafter pertain to issues beyond the Division's jurisdiction and therefore are not factors in arriving at a decision.

Summary and Conclusions

The applicant seeks to appropriate 1239 acre feet per annum from Willow Creek, collected between November 1 and April 1, stored in 3 reservoirs on lands which he assertedly owns and later used to irrigate 1506 acres of general crops or pasture from early April to late October. Of the total amount sought 109 acre-feet are to be stored off-stream, 1130 acre-feet on-stream.

The various objections advanced by protestants are insufficient in themselves to bar approval of the application; they are either insufficiently supported or based upon issues beyond the jurisdiction of the Division to determine.

The lowermost of the reservoirs which the applicant proposes to utilize - his on-stream reservoir - will occupy practically the same area as the reservoir in which Tanner Slough Irrigation Association stores water appropriated under Application 9123; and the impounding dam that the applicant proposes to use in connection with that reservoir is the dam now in use under that licensed application. Applicant Barron apparently is bound by an agreement entered into by his predecessor to allow downstream parties to utilize said reservoir subject to certain conditions. Those conditions are in dispute. The dispute is a matter beyond the jurisdiction of the Division. It may be settled by compromise between the parties or by litigation. Until it is settled the approval, in full, of Application 13617 is unjustified. In view of the possibility that the dispute may be settled in Applicant Barron's favor, Application 13617 should not at this time be denied.

In view of all the circumstances it is the opinion of this office that Application 13617 insofar as it relates to the appropriation for off-stream storage should be approved but that action upon the application insofar as it relates to the appropriation for on-stream storage should be deferred for not to exceed one year in order to afford the parties an opportunity for a settlement of the controversy centering upon an interpretation of the Walsh-Fleming contract.

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ORDER

Application 13617 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 State Engineer now being fully informed in the premises:

IT IS HEREBY ORDERED that Application 13617 insofar as it relates to diversion of 109 acre feet per annum to off-stream storage be approved and that a permit be issued subject to such of the usual terms and conditions as may be appropriate.

IT IS FURTHER ORDERED that action on Application 13617 insofar as it relates to the diversion of 1130 acre feet per annum to on-stream storage be deferred for not to exceed one year from present date.

WITNESS my hand and the seal of the Department of Public Works of the State of California this 1st day of February, 1954,
1954.



A. D. Edmonston
A. D. Edmonston
State Engineer