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 Applications 15712 and 15713 by Emilio Barrera to Appropriate from an Unnamed Creek Tributary to Mormon Slough and from an Unnamed Stream Tributary to Duck Creek, in San Joaquin County, for Irrigation and Stock-watering Purposes.

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Decision A 15712, 15713 D 851

Decided March 15, 1956

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In Attendance at Investigation Conducted by the Division of Water Resources on May 25, 1955:

Emilio Barrera	Applicant
Joseph C. Tope	Applicant's attorney
James E. Soares	Protestant
Arthur T. Chute	Protestant
K. L. Woodward Senior Hydraulic Engineer J. V. Scammon Associate Hydrographer Division of Water Resources Department of Public Works	Representing the State Engineer

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DECISION

Substance of the Applications

Application 15712: 3.0 cubic feet per second from April 1 to October 31 of each year from an unnamed creek, tributary to Mormon Slough, the water to be pumped from the unobstructed channel at a point within the SE¼ SE¼ of Section 2, T1N R8E, MDB&M, and used for watering 150 head of cattle and irrigating 150 acres of rice and 90 acres of clover. The project includes 4,600 lineal feet of ditch and 2,000 lineal feet of 14-inch diameter pipe.

Application 15713: 3.0 cubic feet per second from April 1 to October 31 of each year from an unnamed stream, tributary to Duck Creek, the water to be pumped from the unobstructed channel at a point within the SW¼ SE¼ of Section 11, T1N R8E, MDB&M, and used for watering 150 head of cattle and irrigating 150 acres of rice and 60 acres of alfalfa. The project includes 4,000 lineal feet of ditch.

In each instance the applicant states that he owns both the land at his proposed point of diversion and the land whereon the water is to be used; and that the land to be irrigated is also supplied from wells.

Protests

James E. Soares protests Application 15712, stating in part:

> "If the application is approved it will result in injury to me because I use and depend on this water for irrigation. Under current conditions there is not sufficient water in this creek to supply this new applicant plus previously approved applications."

Protestant Soares claims a right under Application 15545 Permit 9696. He states that his protest may be disregarded and dismissed if at some future time it becomes apparent that flow is sufficient throughout the irrigation season to supply both his own requirements and the applicant's.

Arthur T. Chute, holder of Application 15079 Permit 9297, protests both Application 15712 and Application 15713. He states in part:

> "Any new water diversions upstream from my property ... will infringe ... inasmuch as there is not more than 3 sec. feet reaching my diversion point."
>
> "This water was first used by protestant in ... 1951. Water flow was estimated at 3 cubic feet per second."
>
> "This protest may be disregarded and dismissed if at some future time it becomes apparent there is an excess of water reaching my diversion point."

Answers

The applicant answers the Soares protest by stating in part:

" ... Soares is at least three and one-half miles ... below ... applicant and ... is too far removed from applicant to ... suffer any damage by reason of the diversion ...."

" ... the only water now in the Unnamed Creek is ... waste water from pumping operations."

" ... applicant ... is now pumping water from said diversion point ... for irrigation."

" (Applicant) has two wells about 600 feet deep ...."

" ... the overflow or waste water from both ... wells is being dumped and spilled ... and in taking water from the Unnamed Creek applicant is now and will ... be recapturing to a large extent the water which he is emptying and spilling ... out of his own wells and irrigation system ...."

"Applicant denies ... that his application will in any way damage or infringe upon any right of protestant ...."

The applicant answers the Chute protest against Application 15713 by stating in part:

" ... Chute is at least seven miles below ... and ... is too far removed from applicant to ... suffer any damage by reason of the diversion of water from Duck Creek ...."

" ... the only water now in Duck Creek is ... waste water from pumping operations."

" ... applicant has just started to pump from Duck Creek and ... is ... spilling his waste water from ... two ... deep wells on his land ... and this waste water ... (empties) into Duck Creek ... and ... practically all of the water which applicant ... will at any time take or divert from Duck Creek is recapturing applicant's own water from his irrigating system on his own land and from his own pumps ...."

"Applicant has confined his answer to ... protest (against) Application 15713 because

Application 15712 ... in no way pertains to Duck Creek."

"Applicant denies ... that his application will in any way damage or infringe upon any right of protestant ...."

Field Investigation

The applicant and the protestants with the approval of the Division having stipulated to the submittal of the applications and protests upon the official records, a field investigation was conducted on May 25, 1955, by an engineer of the Division. The applicant and the protestants were present during the investigation.

Records Relied Upon

Applications 12976, 13814, 15079, 15228, 15360, 15361, 15545, 15712 and 15713 and all information on file therewith; Peters and Stockton East quadrangles, United States Geological Survey.

Information Secured by Field Investigation

Extracts from "Report of Division of Water Resources on Applications 15712 and 15713", dated December 21, 1955 and filed with Application 15712, are as follows:

"The (source named in Application 15712) carries no natural flow except during (rainy) periods and during the irrigation season it serves only as a channel for waste and spillage

water from applicant and upstream irrigators. The primary crops in the area are rice and pasture, with water supply obtained almost entirely from deep wells. The applicant had deepened and widened the channel and constructed a ... ditch ... which carries his drainage water back into the stream channel. A low earth dam had been constructed ... which ... backs the water up to ... the described point of diversion. About 0.5 cubic foot per second was flowing in the channel from upstream on May 25, 1955 and no water was passing beyond the dam. The applicant attempts to operate ... often enough to eliminate any passage of water downstream. He stated that the only purpose of filing Application 15712 as well as 15713was to obtain permission to recapture his own drainage water."

"The (source named in Application 15713) is essentially the North Branch of Duck Creek ...."

" ... the North Branch has been blocked off from large flows by an earth dam at the junction (in Section 13, T1N R8E). A culvert ... through the dam ... allows small flows to pass into the North Branch .... This stream also carries no natural flow except during (rainy) periods ... and serves as a carrier for waste and spillage water from local irrigation during the summer, which water is obtained from wells. The channel through the applicant's property is about 30 feet wide and possibly 10 feet deep, with an extremely flat grade. At the west boundary of (that) property the channel has been filled to a depth of about three feet with earth which prohibits any runoff water, except during periods of greater runoff, from flowing westward. The applicant, as well as Leslie Hunt, a permittee ... under Application 13814, diverts ... from the pool created .... On May 25, 1954, there was no flow in the channel originating upstream from the applicant, although about 20 gallons per minute was entering the channel from an irrigated alfalfa field of his .... Again, the applicant contended that little or no water comes from upstream and that the sole purpose of the application was for permission to recapture his own drainage water."

" ... during the 1954 irrigation season bi-weekly observations were made of the flow ... in the two streams ... at the Drais Road .... The engineer who made the observations reports that although upon each visit some water was available in the form of channel storage, upon no occasion was there water flowing from upstream."

"Protestant Soares complained that during the major portion of the 1954 irrigation season there was inadequate water to cover his right under Application 15545 and that it was therefore necessary that he obtain water from a well ...."

"Applicant Barrera serves his ranch with 3 ten-inch deep wells and irrigates about 500 acres ...."

"The Progress Report ... for ... 1955 in connection with Application 15545 ... indicates that ... (Protestant Soares) irrigated 80 acres of corn. However, it was believed, ... the major portion of this irrigation water was obtained from a well."

"Protestant Chute states that prior to the May 25, 1955 investigation he had made no use of water from Duck Creek but that he ... anticipates (having) ... his permitted amount of water in use prior to the expiration of the time allowed ...."

"The applicant has made no showing whatsoever of the existence of unappropriated water and there is no reason to believe that conditions will improve in the foreseeable future."

Other Information from Division Files

Applications to appropriate from Duck Creek and/or Mormon Slough drainage include the following:

Application 12976 Permit 7732, Wesley F. Fowler, 3 cubic feet per second, from about May 1 to about October 31, to be diverted from Duck Creek at a point within the SE¼ NE¼ of Section 16

and/or from a branch of Duck Creek at a point within the NW¼ SW¼ of Section 10, T1N R8E, MDB&M, for irrigation. According to progress reports Permittee Fowler has used water from April to and including September, utilizes practically all the water available, expects to use more, when and if it reaches him. In progress report dated January 17, 1955 he states:

> "This creek is normally dry during the months we usually irrigate. The only source of supply is drainage from other lands higher which are irrigated by wells and pumps. Some times there is plenty of water for our drain pumps. Most of the time there is nothing."

One of Permittee Fowler's points of diversion scales about 2.0 miles downstream from Applicant Barrera's proposed diversion under Application 15713.

Application 13814 Permit 8756, Leslie Hunt, 9 cubic feet per second, April 1 to November 1, from Duck Creek at a point within the SE¼ NW¼ of Section 13, T1N R8E, MDB&M, for irrigation. Permittee Hunt's point of diversion scales about 1.1 miles above Applicant Barrera's proposed diversion under Application 15713.

Application 15079 Permit 9279, Arthur T. Chute, 3 cubic feet per second, year-round, from Duck Creek at a point within the NW¼ NW¼ of projected Section 12, T1N R7E, MDB&M, for irrigation and stockwatering. The Chute intake is downstream from the point of diversion described in Application 15713 a channel distance of about 8 miles.

Application 15288, W. L. and A. F. Ripley, 3.0 cubic feet per second, April 1 to November 1, from Duck Creek, at a point within the SE¼ NE¼ of Section 15, T1N R8E, MDB&M, for irrigation. The application was protested, investigated and denied, the investigation indicating non-existence, ordinarily, of unappropriated water at the proposed point of diversion. The following passage from the report of field investigation in the matter of Application 15288 bears upon the effect upon the lower diverters from Duck Creek (Chute, Minahen, Sanguinetti) of diversions such as proposed by Applicant Barrera under Application 15712:

> "The latest map of the area (Peters Quad 7½', Edition of 1952) shows that several of the drains north of Duck Creek ... flow in a general westerly direction to ... Mormon Slough. The map is not correct in every respect. In the NW¼ of Section 7, T1N R8E, MDB&M, an earth dam has been constructed ... on the north drain which diverts the water south to Duck Creek. According to Mr. Sanguinetti it is from these northerly drains that the major supply of water during the summer originates."

Application 15545 Permit 9696, James E. Soares, 1.5 cubic feet per second, April 1 to November 30, from one of the sources from which Applicant Barrera now seeks to appropriate, at a point within the NW¼ NE¼ of Section 8, T1N R8E, MDB&M, for irrigation. The Soares intake scales about 3.9 channel-miles downstream from the point of diversion proposed in Application 15716.

The Drais Road, mentioned in the report of field investigation, runs north and south from about the north

quarter corner of Section 3 to about the center of Section 15, T1N R8E, MDB&M, and intersects the two sources from which Applicant Barrera seeks to appropriate. The proposed points of diversion under Applications 15712 and 15713 (Barrera) scale respectively about 1.8 miles and 1.2 miles upstream from Drais Road. The distances downstream from Drais Road to Protestant Soares' intake (on the northerly of the two sources) and to one of the Fowler intakes (on the southerly of the two sources) scale respectively 2.5 and 0.6 channel-miles.

Discussion

The biweekly observations during the 1954 irrigation season at the intersections of the sources with Drais Road indicate that flows probably seldom pass those points during irrigation seasons, or exist in the reaches immediately upstream. It is evident that if limited flows do so pass or so exist, occasionally, during irrigation seasons, such flows are not subject to appropriation; they should be allowed to continue westward to satisfy rights of the protestants and other downstream users who quite unanimously assert insufficiency of supply at their points of diversion. Thus the flow of 0.5 cubic foot per second reported by the investigator as having occurred at or near the point of diversion designated in Application 15712, on May 25, 1955, does not appear classifiable as unappropriated; that flow -- unless Applicant Barrera

was entitled to divert it under some right that he already held -- evidently should have been bypassed in deference to prior appropriators downstream.

The data contain no indication that unappropriated water exists. The applicant himself stated, according to the report of field investigation, that his only purpose in seeking to appropriate was to obtain permission to recapture his own drainage water.

While under his control the applicant's drainage water is his to use and a permit to appropriate same would avail him nothing. If the applicant allows such water to escape beyond his control that water is subject to appropriation insofar as it exceeds demand under prior rights downstream. No such excesses appear currently to exist.

Inasmuch as the existence of unappropriated water is a condition precedent to the approval of an application and unappropriated water at the proposed points of diversion appears not to exist, approval of Applications 15712 and 15713 is unwarranted.

Conclusion

The available information indicates that unappropriated water seldom if ever exists at the points at which and during the periods within which appropriation is sought under Applications 15712 and 15713, and that diversions as proposed

in those applications would result in denial to parties downstream of the use of waters to which they are entitled. In view of these circumstances it is the opinion of this office that Applications 15712 and 15713 should be denied.

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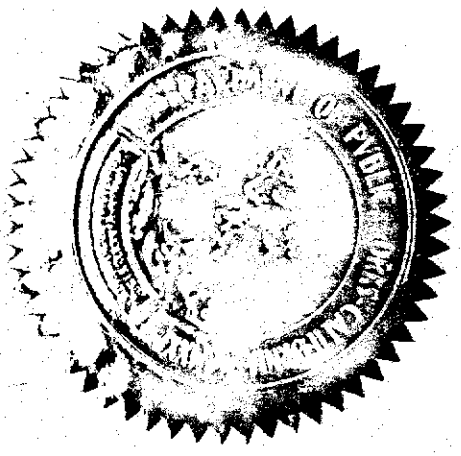
ORDER

Applications 15712 and 15713 having been filed with the Division of Water Resources as above stated, protests having been filed, stipulations having been submitted, a field investigation having been conducted and the State Engineer now being fully informed in the premises:

IT IS HEREBY ORDERED that Applications 15712 and 15713 be rejected and canceled 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 15th day of March, 1956.



HARVEY O. BANKS, STATE ENGINEER

By _____
L. C. Jopson
Assistant State Engineer