

STATE OF CALIFORNIA  
STATE WATER RIGHTS BOARD

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In the matter of Application 18073 )  
by C. R. Norton to appropriate from ) Decision No. D 938  
an unnamed stream in Orange County )  
**ADOPTED AUG 27 '59**

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Substance of the Application

Application 18073, filed March 28, 1958, requests a permit to appropriate six acre-feet per annum by storage to be collected between October 1 of each year and March 31 of the succeeding year from an unnamed stream in Orange County for stockwatering purposes. Water is to be collected by an earth dam 28 feet high and 160 feet long located within NE $\frac{1}{4}$  of NW $\frac{1}{4}$  of Section 32, T5S, R7W, SBB&M. The water impounded by the dam creates a reservoir with a surface area of about one acre and a capacity of six acre-feet. Approximately 25 head of cattle will water from the reservoir.

Protest

A protest against approval of Application 18073 was submitted by Frank W. Waer. Protestant Waer claims a riparian right to the use of water from the unnamed stream; that the proposed appropriation would take all or nearly all of the normal flow of the stream; that he uses six to eight acre-

feet of water annually for stockwatering purposes and to assure a water supply during the summer for stockwatering and fire protection; that diversion of water is accomplished by means of a storage dam and reservoir located about 800 feet south (downstream) of the applicant's proposed dam; that his (the protestant's) property consists of about 80 acres, with 75 acres in pasture and 5 acres used for his home, barns and corrals, and that his property is fenced and cross-fenced and is used for breeding horses.

#### Answer to Protest

In reply to the protest, applicant Norton denies that the proposed appropriation will result in injury to the protestant or that it will take all or nearly all of the normal flow of the creek. He claims that he owns 108 acres adjoining the protestant's land and that the entire area, except about 40 acres, would continue to drain onto the land of the protestant. Drainage from the 40 acres will flow into the reservoir contemplated under Application 18073. He states that the protestant has threatened to sue him for damages because of erosion; that the proposed project would protect the protestant from such damage; that the protestant has ample water from other sources and will not suffer because of the project.

#### Field Investigation

Applicant and protestant, with the approval of the State Water Rights Board, have stipulated to the proceedings

in lieu of hearing as provided for under Section 737 of the Board's rules. A field investigation was conducted on September 2, 1958, by D. E. Kienlen, an engineer of the Board. The applicant and protestant were present at the investigation.

#### Records Relied Upon

The records relied upon in support of this decision are Application 18073 and all relevant information on file therewith, with particular reference to the report of field investigation made on September 2, 1958, by the above-named engineer; United States Geological Survey, Water Supply Papers; United States Geological Survey "El Toro" quadrangle, 7½-minute series.

#### Source

The unnamed stream rises in the foothills in the southern portion of Section 29, T5S, R7W, SBB&M, as projected into Rancho de Los Alisos, at an elevation of about 1500 feet and flows in a southeasterly direction about one mile to a confluence with Aliso Creek. From this confluence, Aliso Creek flows in a general southwesterly direction approximately 17 miles to the Pacific Ocean. The applicant's point of diversion is located a short distance below the head of the unnamed stream and about 800 feet above the protestant's point of diversion. There are approximately 38 acres of very steep watershed area covered with native grasses, brush, and low trees above the applicant's point of diversion and about 102 acres above the protestant's point of diversion.

According to the USGS Water Supply Paper 1445 the average annual discharge of Aliso Creek at the station "Aliso Creek at El Toro" (station is located about 8 miles downstream from the applicant and measures the runoff of 8.5 square miles of watershed) for the 26-year period, 1930-1956, was 550 acre-feet or an average of about 64.7 acre-feet per square mile. Upon the basis of a conservative assumption that the runoff of the watershed above the applicant and protestant is at least comparable to the runoff of the remainder of the area above the "El Toro" stream gage, on an average, the runoff at the applicant's and protestant's points of diversion would be about four acre-feet and ten acre-feet respectively. Inasmuch as runoff of the watershed is influenced almost entirely by precipitation, the runoff generally occurs only during the late fall, winter, and early spring and is very erratic and flashy in nature. According to the above-mentioned Water Supply Paper, the flow of Aliso Creek at the "El Toro" gage has ranged from 1950 cubic feet per second on February 6, 1937, to no flow most of each year.

#### Applicant's Project

The applicant's dam was completed in the spring of 1958 after the winter runoff and no water had been impounded in the reservoir at the time of the investigation. The capacity of the reservoir is reported to be about six acre-feet, and outlet works through the dam have not been provided. Water impounded in the reservoir will be used for stockwatering

purposes and to recharge the ground water from which the applicant pumps by means of a 440-foot well located near the upper end of the reservoir. The well pump reportedly has a capacity of 120 gallons per hour and, according to the applicant, can be operated only about one hour out of ten because of the limited ground water supply. Water from the well is to be used to furnish a domestic supply for the applicant's proposed home.

#### Protestant's Project

The protestant has constructed a dam approximately 20 feet high to spillway crest and 125 feet long which is reported to be capable of impounding 3.5 acre-feet. The dam was constructed in 1957 and had some water in storage at the time of the investigation. Water is siphoned from the reservoir through a 1.5-inch pipe and discharged into a well located approximately 200 feet below the dam in the stream channel. The water is then pumped from this well into a water distribution system to supply stockwater at the protestant's horse stables and corrals. The protestant indicated that he requires about 600 gallons per day for his horses and for miscellaneous purposes in connection with their training and breeding.

The protestant also has a small dam on an unnamed stream which enters the source in question below his main dam. The reservoir created is small and apparently dries up relatively early in the summer. Domestic water for household use is obtained from a well which produces about 30 gallons per day.

There is a third well on the property, but the protestant indicates that it dries up during the early portion of the summer.

The protestant has filed no application and holds no permit or license from the State Water Rights Board for water storage.

#### Discussion

There is no direct information as to the actual quantity of water available for use by the applicant and protestant, but in view of the records of streamflow of Aliso Creek as heretofore discussed, there is undoubtedly water available for both parties during certain years. However, in view of the disposition taken herein of the issues involved, more definite information regarding water supply is unnecessary.

The protestant indicates in his protest, and the fact has been confirmed by field investigation, that his use of water is accomplished in the same manner proposed by applicant, that is, by collection to storage during periods of runoff for use during a time of deficiency. The courts have held (Seneca Consol. Gold Mines Co. v. Great Western Power Co., 209 Cal. 206, 287 P. 93; Colorado Power Co. v. Pacific Gas and Electric Co., 218 Cal. 559, 24 P. 2d 495; and Moore v. California-Oregon Power Co., 22 Cal. 2d 725, 140 P. 2d 798) that water cannot be stored and withheld for a deferred use under a claim of riparian right. "The right of storage may be exercised only pursuant to appropriations lawfully made"

(Meridian, Ltd. v. San Francisco, 13 Cal-2d 424). Issuance of permit is the sole means for acquiring a right to appropriate water (Water Code Section 1225). This being the case it would appear that the protestant does not have a valid right for the storage of water of the stream in question and accordingly has no basis for objecting to the approval of Application 18073.

#### Conclusions

The evidence indicates and the Board finds that unappropriated water exists at times in the source from which the applicant seeks to appropriate and that such water may be taken and used in the manner proposed by the applicant during such times without injury to downstream parties holding prior vested rights. It is therefore the conclusion of the Board that Application 18073 should be approved and that a permit should be issued to the applicant subject to the usual terms and conditions.

#### Order

Application 18073 for a permit to appropriate unappropriated water having been filed, a protest having been filed, applicant and protestant having submitted stipulations to the proceedings in lieu of hearing as provided for under Section 737 of the California Administrative Code, Title 23, Waters, an investigation having been made by the Board, and said Board now being fully informed in the premises:

IT IS HEREBY ORDERED that Application 18073 be and the same is hereby approved, and it is ordered that a permit be issued to the applicant subject to vested rights and the following terms and conditions, to wit:

1. The amount of water appropriated shall be limited to the amount which can be beneficially used and shall not exceed six (6) acre-feet per annum by storage to be collected from about October 1 of each year to about March 31 of the succeeding year.

2. The maximum amount herein stated may be reduced in the license if investigation so warrants.

3. Complete application of the water to the proposed use shall be made on or before December 1, 1962.

4. Progress reports shall be filed promptly by permittee on forms which will be provided annually by the State Water Rights Board until license is issued.

5. All rights and privileges under this permit including method of diversion, method of use, and quantity of water diverted are subject to the continuing authority of the State Water Rights Board in accordance with law and in the interest of the public welfare to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of said water.

Adopted as the decision and order of the State  
Water Rights Board at a meeting duly called and held at  
\_\_\_\_\_, California, on this \_\_\_\_\_ day of  
\_\_\_\_\_, 1959.

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Kent Silverthorne, Chairman

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W. P. Rowe, Member

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Ralph J. McGill, Member