

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

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IN THE MATTER OF APPLICATION NUMBER 3562 OF ANNIE
W. BATTERSON TO APPROPRIATE WATER FROM LEWIS CREEK,
TRIBUTARY OF FRESNO RIVER IN MADERA COUNTY FOR
AGRICULTURAL PURPOSES

DECISION NO. 3562, D 75
Decided October 2, 1925

APPEARANCES AT HEARING HELD AT Madera, California,
June 15, 1925

For Applicant:	M. A. Bailey, Attorney
For Protestant:	W. A. Maloy, Attorney
Examiner:	Edward Hyatt, Jr. Chief of Division of Water Rights

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O P I N I O N

As presented at the hearing this application was for the appropriation of 0.56 second feet of water from Lewis Creek, a tributary of Fresno River; the water to be diverted from May 1st to November 1st of each year for agricultural purposes on 45 acres of land in Section 25, T 6 S, R 21 E, E.D.B. & L. but at the hearing it was requested that the filing be reduced to an amount necessary to irrigate 25 acres of the 45 acres named in the application during any one year. This amount is 0.31 second feet and the application has been amended accordingly. The application was protested by the Madera Canal and Irrigation Company.

The application was completed in accordance with the Water Commission Act and the requirements of the Rules and Regulations of the Division of Water Rights and being protested was set for a public hearing at the Supervisors

Room of the County Court House, Madera at 10:00 a.m. on June 15, 1925. Of this hearing applicant and protestant were duly notified.

The protest of Madera Canal and Irrigation Company was filed October 18, 1923. It is based upon a claim of right obtained by over forty years of use and supported by a decree of the Superior Court of the State of California in and for the County of Madera, in the action entitled "Union Colonization Company et al vs. Madera Canal and Irrigation Company", the judgment of the Court being confirmed by the Supreme Court of the State of California affirmed February 18, 1919, to 200 cubic feet per second of direct diversion from the Fresno River whenever there was sufficient water flowing in said river to furnish that amount and to all of the water in said river when less than 200 second feet was flowing therein, also up to and including 50 second feet of water from the North Fork of the San Joaquin River which is diverted into the Fresno River and up to and including 50 second feet of the waters of Big Creek, a tributary of the South Branch of the Merced River which is diverted into the Fresno River not exceeding, however, 25 second feet in the month of April in any year and ceasing in the month of July of each year.

Protestant alleges that the diversions from the North Fork of the San Joaquin River and from Big Creek supply waters which are available after the natural flow of the Fresno River has begun to diminish and which extend after the natural flow of the Fresno River has ceased.

Protestant also alleges that prior to the commencement of the proceeding applicant has given no virtue of any adverse claim to waters appropriated and that the granting of the application will operate injuriously to a large number of persons who are entitled to receive water from the protestant for irrigation purposes.

An answer to the protest was filed on November 9, 1923.

Applicant alleges in effect that for many years there has been no flow of water in the Fresno River past the intake of the protestant during the months of May to October inclusive and that during the months of April and November there is seldom any flow of water in the River at applicant's place of diversion and that therefore the protestant could not be injured by the proposed diversion; that the waters diverted from the North Fork of the San Joaquin River enter the Fresno River at a point below her proposed point of diversion and that therefore no part thereof could be used by applicant.

Applicant denies that waters of Big Creek are diverted into the Fresno River and alleges that the waters of Big Creek which are used by protestant are diverted into a lumber flume at Sugar Pine and carried to the City of Ladera and there turned into the canal system of protestant.

Applicant denies that the proposed diversion would deprive the protestant of any of the waters of the Fresno River at any time during which the waters thereof are available for use to the protestant.

Applicant alleges that she is an upper riparian owner, that all the lands to be irrigated slope toward Lewis Creek and that all water diverted which is not lost by evaporation will return to the Fresno River.

At the hearing testimony was presented to show that the applicant owned 320 acres of land in Section 25, T 6 S, R 21 E, M.D.B. & M. through which Lewis Creek a tributary of the Fresno River, flows and from which the applicant proposes to divert.

During the nine years that applicant has owned the property a portion of her lands had been irrigated by water which had been diverted through a ditch which took out of Lewis Creek at a point which recent surveys showed was located on a neighbor's property.

It is the applicant's intention to abandon this old ditch and divert water from another point of diversion on Lewis Creek about one-half mile above the headgate of the former ditch and take it through another ditch which is located entirely upon applicant's property and is about three quarters of a mile in length. This upper ditch was constructed sometime ago but has recently been cleaned out.

Ten acres is the largest area which has been irrigated in the past during any one year and was apparently done without the knowledge of the protestant.

Applicant was apparently under the impression when the place was purchased that she had a riparian right and could use the water regardless of the canal company and had constructed the ditch and used the water up to the present time expecting that if she had no right, the use would be stopped by the protestant. As there had been no objection, she was under the impression that the right was valid. Just what right the applicant has is rather uncertain.

The applicant's land slopes toward the Creek and any water not lost by evaporation and transpiration would return to it after use. The water is intended for the irrigation of alfalfa and clover.

The rights of the protestant are clearly set forth in the Decision and Judgment rendered by the Superior Court of the State of California on January 31, 1910, in the case of the Union Colonization Company and Miller and Lux Incorporated vs. Madera Canal and Irrigation Company, copies of which are on file in the office as exhibits B and C respectively in this proceeding.

Briefly, the protestant had the right to divert 200 second feet from the Fresno River at its headgate in Section 8, T 11 S, R 18 E, M.D.B. & M. whenever such an amount is available and all of the water in the said river

when there is an insufficient amount to permit of such diversion; the 200 second feet to include waters artificially turned into the Fresno River from the Merced River and the North branch of the San Joaquin River.

The judgment was upheld by the Supreme Court of the State of California upon appeal.

According to the decision of the Superior Court the protestant is entitled to 50 cubic feet of water to be diverted from the North Fork of the San Joaquin River through the Soquel Ditch to the Fresno River whenever that quantity is available and all of the waters of the said North Fork when that amount of water is not available, from October 1st to August 1st of each year and during the months of August and September protestant may divert water so long as it is required to supply the same to the Madera Sugar Pine Company, the rights of the protestant being subject to certain rights of that company.

Protestant is also entitled to divert 50 second feet from Big Creek a tributary of the Merced River into the channel of the Fresno River whenever that quantity is available and when that amount is not available it may divert all of the waters thereof during the months of January, February, March, May, June and to July 15th of each year and to the amount of 20 second feet in the month of April of each year subject to certain rights of the Madera Sugar Pine Company.

The North Fork of the San Joaquin River is diverted through the Soquel Ditch into Redwood or Nelder Creek which is a tributary of the Fresno River. The junction of Nelder Creek and the Fresno River lies below the applicant's proposed point of diversion and therefore any diversion which might be made by applicant from Lewis Creek could not affect the protestant's supply from this source.

The other source from which the protestant augments its supply is Big Creek. Water is diverted from this source into the milling pond at the Sugar Pine dam from where about 10 or 12 second feet are passed into the Sugar Pine Company's flume and returned with the exception of transition losses to the protestant at Madera; the remainder of the supply from Big Creek is spilled into Lewis Creek and finds its way to the Fresno River. At times there is also considerable leakage from the flume which is returned to Lewis Creek. The diversion of the waters of Big Creek into the flume of the Sugar Pine Company is maintained under the direction of the protestant.

It is these diversions from the North Fork of the San Joaquin River and Big Creek which enables the protestant to supply water during the end of the irrigation period as the water from these sources comes from a watershed area whose average altitude is much greater than that of the Fresno River watershed.

The protestant diverts water from about January 1st to some time in July the heaviest use being during the months of March to June inclusive. From May 1st the protestant uses all of the water it can get from the Fresno River as long as the supply lasts.

The channel of the Fresno River from protestant's point of diversion to the foothills is quite sandy and there is quite a considerable amount of water which is lost by sinking into the sand. For this reason there is undoubtedly water which will be flowing in Lewis Creek which does not find its way to the protestant's point of diversion and as agreed at the hearing there does not appear to be any objection to the applicant's proposed diversion after such a time as water ceases to flow at the weir at the protestant's point of diversion. From testimony presented at the hearing the period during which there was no flow in the Fresno River at protestant's proposed point of diversion was from about July 15th to November 1st in an ordinary year and the probability of a rise in the river after diversion has ceased is very remote.

On Pages 76 and 77 of Bulletin No. 1 of the Division of Water Rights entitled "Hydrographic Investigation of the San Joaquin River" there are tables showing the daily discharge of the Madera Canal and Irrigation Company's Canal at its headgate for the years 1921 and 1922.

It will be noticed that on August 4, 1922, diversion into the canal ceased on account of a deficient supply. Records on file with this office show that a day previous to this the discharge of the Fresno River as measured at the United States Geological Survey station near Knowles was 19 second feet. It would appear therefore that when the discharge at the gaging station near Knowles was 19 second feet there would be no flow over the dam at the canal headgate.

Upon this assumption the following table has been prepared:

Year	Estimated date of Cessation of Flow at M.C. & I.Co. Headgate	Remarks
1912	July 17	
1913	July 3	
1914		No record available
1915		No record available
1916	July 31	
1917	August 6	
1918	July 8	
1919	June 19	
1920	July 13	
1921	July 14	
1922	August 3	Year of excessive runoff
1923	August 3	Year of excessive runoff
1924	May 23	

From the above table it would appear that the statement made at the hearing by the protestant that during an ordinary year the flow in Fresno River at protestant's point of diversion ceased about the middle of July is true and since in an ordinary year protestant uses no water from July 15th to November 1st there is no reason why applicant should not be allowed to divert water from Lewis Creek as proposed whenever such water is available. It should be understood however that any permit that may be issued to applicant is subject to prior vested rights and therefore no diversion by the applicant should be allowed under this

permit at times when any diversion at the protestant's headgate is possible.

If any diversion of water is made by applicant from Lewis Creek other than from July 15th to November 1st it must necessarily be made under any existing right that the applicant may have.

ORDER

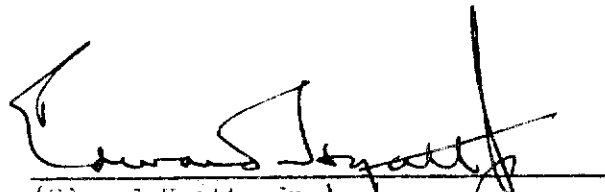
Application Number 3562 for permit to appropriate water having been filed with the Division of Water Rights as above stated, a protest having been filed, a public hearing having been held and the Division of Water Rights now being fully informed in the premises:

IT IS HEREBY ORDERED that the said Application Number 3562 be approved and that a permit be granted to the applicant subject to such of the usual terms and conditions as may be appropriate, except that the season of diversion be limited to the period from July 15th to November 1st of each season.

Dated at Sacramento this second day of October,

1925.

WES:MP



(Edward Hyatt, Jr.)
CHIEF OF DIVISION OF WATER RIGHTS