

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

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In the Matter of Application 7850 of G. Patroni to  
Appropriate from San Vicente Creek in  
San Mateo County for  
Irrigation Purposes

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DECISION A. 7850 D-360

Decided *September 7, 1934*

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APPEARANCES AT HEARING HELD IN SAN FRANCISCO, AUGUST 3, 1934.

For Applicant  
G. Patroni

C. A. Torello

For Protestants  
Riviera Land Company  
John and Margaret T. Kyne

Marshall Nuckolls  
Marshall Nuckolls

EXAMINER: Harold Conkling, Deputy in Charge of Water Rights,  
Division of Water Resources, Department of Public Works,  
State of California.

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O P I N I O N

ESSENTIAL FEATURES OF APPLICATION 7850

Application 7850 was filed with the Division of Water Resources on February 15, 1934, by G. Patroni. Under Application 7850 it is proposed to appropriate an amount not to exceed 40 acre feet per annum from San Vicente Creek in San Mateo County, to be diverted to storage from about December 15th to about April 15th of each season at a rate not to exceed 0.20 of a cubic foot per second. Storage will be made in a reservoir of

40 acre feet capacity and the water will be released during the period from about April 15th to about December 15th of each season for the irrigation of 40 acres of land. Water will be diverted from San Vicente Creek at a point where the Half Moon Bay - San Francisco highway crosses San Vicente Creek which is within the SE $\frac{1}{4}$  of SW $\frac{1}{4}$  of Section 3, T 5 S, R 6 W, M.D.B.&M. The reservoir is situated within the SE $\frac{1}{4}$  of NW $\frac{1}{4}$  of projected Section 10, T 5 S, R 6 W, M.D.B.&M. The place of use is on applicant's property within the N $\frac{1}{2}$  of projected Section 10, T 5 S, R 6 W, M.D.B.&M.

The application was protested by Riviera Land Company and by John and Margaret T. Kyne.

#### PROTESTS

The Riviera Land Company claims that it and its predecessors in interest have appropriated and used the waters of San Vicente Creek for the irrigation of its lands for more than 35 years last past; that more than 10 years ago two reservoirs were constructed on its property and although it has diverted all the water available there has not been a sufficient quantity to fill these reservoirs nor to meet its irrigation requirements. It is further claimed that there has been considerable litigation over the waters of this stream and that as early as 1913-1914 the waters were adjudicated by court decree wherein the Riviera Land Company was plaintiff and the other riparian owners on the stream were defendants, which judgment was sustained by an appeal taken to the Supreme Court of California. This protestant alleges in effect that all of its land, containing 65 acres is used for truck gardening and should Application 7850 be approved protestant will be irreparably damaged. Protestant's point of diversion is located just below that of the applicant.

John Kyne and Margaret T. Kyne claim a right to divert 6.6 miners inches of water from San Vicente Creek from about April 1st to about November 1st of each year which right is based upon Application 151, Permit 112, License 26. Right is also claimed under Superior Court decision and riparian ownership. These protestants allege in effect that should Application 7850 be approved it would result in depriving them of irrigation water during the first three months of the year; that it would prevent flow of certain springs along the course of the creek; that it would result in decreasing the velocity of flow in the stream bed and its attendant self cleaning activity; that it would prevent the growth of foliage, shrubs and trees along the banks of the stream thereby endangering the firmness of the banks, threatening the contours adjacent to the embankment and making the property less desirable; that it would result in causing a deposition of sediment in the stream bed and that in any period of unusual runoff the natural flow would be so obstructed as to cause washouts and cave-ins along the bank and that the approval of the application would result in depriving the riparian owners along the stream of valuable water rights which have already been adjudicated by the Superior Court of San Mateo County.

HEARING HELD IN ACCORDANCE WITH SECTION 1a  
OF THE WATER COMMISSION ACT

Application 7850 was completed in accordance with the Water Commission Act and the rules and regulations of the Division of Water Resources and being protested was set for a public hearing in accordance with Section 1a of the Water Commission Act on August 3, 1934, at 1:30 o'clock P.M. in Room 537 State Building, San Francisco, California. Of this hearing, applicant and protestants were duly notified.

### PHYSIOGRAPHY AND HYDROGRAPHY

San Vicente Creek, the source of the proposed appropriation, rises in the vicinity of "South Peak" in the Montara Mountain Range in Section 25, T 4 S, R 6 W, M.D.B.&M. and flows in a general southwesterly direction a distance of about four miles to the Pacific Ocean. The drainage area comprises some 4.5 square miles of which about 4.1 square miles are above the proposed point of diversion of the applicant. The elevation of the watershed varies from sea level to about 1700 feet above sea level.

No data is available pertaining to the normal flow of the stream. The nearest government rainfall station is at San Francisco. The records at this station indicate the rainfall was 104% of normal during the year 1931, 55% of normal during the year 1932 and 78% of normal during the year 1933. Although the record was not complete for the year 1934, this year was also one of deficient rainfall.

### USE OF WATER BY PROTESTANT

The first protestant downstream from the applicant is the Riviera Land Company which claims the ownership of 65 acres of land. The summer flow has been deficient during the last few years and the Company has constructed two reservoirs in which to collect the winter runoff. Apparently the entire 65 acres is used for truck gardening and water is beneficially used for irrigation purposes. Mr. Debenadetti, manager of the Company, testified at the hearing that the flow of San Vicente Creek was not sufficient to fill the reservoirs during the season of 1933-34. During the season of 1932-33 one reservoir was filled and the other partly filled.

On October 5, 1915, Margaret and John Kyne filed Application 151

with this office to appropriate 1 cubic foot per second of the waters of San Vicente Creek for irrigation purposes. The application was approved on May 27, 1916, by the issuance of Permit 112 and on March 6, 1918, License 26 was issued confirming the right to an amount not to exceed 6.6 miners inches (0.185 c.f.s.) to be diverted from about April 1st to November 1st of each year for the irrigation of 9.6 acres of land in Lot 18 and 3.6 acres of land within Lot 17 of the Half Moon Bay Colony Subdivision being approximately within the SW $\frac{1}{4}$  of SW $\frac{1}{4}$  of Section 3, T 5 S, R 6 W, M.D.B.&M.

It would appear from reports of licensee filed subsequent to issuance of license that water was available and used for the irrigation of 16 acres of land in the years 1926, 1927, 1928, 1929 and 1930 during the period from May 1st to October 15th. No use of water was made in 1931 due to unfavorable market conditions.

The project was visited by an engineer of this office on October 11, 1925, at which time he was informed by the licensee that practically all of the riparian rights on San Vicente Creek had been decreed by Judge Buck of the Superior Court of San Mateo County but that the surplus or flood waters had not been included in the decree.

#### RIPARIAN RIGHTS ADJUDICATED BY COURT DECREE

On August 23, 1912, an action was brought in the Superior Court of San Mateo County by the Half Moon Bay Land Company, et al. v. S. H. Cowell, et al. seeking to perpetually enjoin the defendants from diverting any of the waters of San Vicente Creek to non riparian lands and requesting the court to adjudicate the riparian rights on said creek. The cause came on regularly for trial before the court on October 28, 1912, and thereafter on May 1, 1913, a judgment was rendered by Judge George H. Buck under which it was adjudged

that the plaintiff was entitled to a continuous flow of 8 miners inches for irrigation of its riparian land; that S. E. Cowell, et al. were entitled to a continuous flow of  $4\frac{1}{2}$  miners inches for irrigation of their riparian land; and that E. N. Torello was entitled to a continuous flow of  $10\frac{1}{2}$  miners inches for the irrigation of his riparian land; that if at any time there was less water flowing in the creek than the aggregate amounts allotted to the several parties then each should take less in the same proportion; that when more water was flowing than the aggregate of the amounts allotted and any additional area of land belonging to the defendants within the watershed of the creek should prove to be capable of profitable irrigation said defendants should be allowed to use on such additional land the additional water therein in excess of the amount allotted by the judgment and in proportion to the amount of additional land so capable of profitable irrigation. It was further adjudged that Cowell, et al. had no right to divert water from said creek to non-riparian lands and they were enjoined from so doing. It was also provided that nothing in the judgment should prevent the defendants from using more water on their riparian lands when the plaintiff or other lower proprietors did not object thereto.

The case was appealed to the Supreme Court by Cowell, et al. and on October 17, 1916, the judgment of Judge Buck was affirmed with a slight modification to the effect that nothing in the decree should operate to prevent any one of the parties from taking and using the waters of the stream on his own lands at any time when such taking and use did not interfere with the use by any of the other owners upon his riparian land, of his reasonable share of the water, as above limited (160 Pac. 675). Rehearing was denied November 1, 1916.

Justice Shaw in rendering his decision stated in part as follows:

"The Court did not attempt to apportion the entire quantity of water that might at any time, be flowing in the stream. The apportionment was made of the respective shares of the parties at a time when the stream had a flow of only 23 inches. The year which gave rise to this suit was the driest that had been known for many years, and the apportionment included no greater quantity than was flowing in the stream in the dry season of that year."

It appears from testimony presented at the hearing that a temporary injunction was given by the court in 1917 which was made permanent by Maxwell McMutt, Judge of the Superior Court on March 11, 1933, ordering the Ocean Shore Development Company, the Half Moon Bay Land Company, S. H. Cowell, et al.; Phillip Torrello, G. B. Torrello, David R. Tinei, E. M. Torrellic, Joe Gudugui and P. Quilici, et al., to refrain from diverting any of the water of San Vicente Creek to any lands non-riparian to said creek or from diverting on their lands, riparian to said creek, any more water than that to which they were entitled as riparian owners. Also it appears that a condition was laid down by the court to the effect that flood flows could only be taken by permission of the various riparian owners (transcript of hearing pages 20 and 21). The protestants apparently rely to a considerable extent upon the adjudication and subsequent final injunction. The applicant, however, was not a party to the decree and is not affected thereby. Moreover the decree was entered subsequent to the effective date of the Water Commission Act after which the only way in which an appropriative right could be initiated was by filing an application with this office. A riparian owner has no jurisdiction over water except as to the amount he can beneficially use in a natural regimen of flow. While the courts have held that a riparian owner may have the right to the usual, ordinary and customary flow of a stream

(Chow v. City of Santa Barbara, 22 Pac. 2d. 5), the only way in which a right to flood waters may be acquired which cannot be utilized except by seasonal storage is under the Water Commission Act. If the terms of the permanent injunction of the Superior Court of San Mateo County were correctly expressed at the hearing, apparently the court undertook to adjudicate water to which no title was vested in the riparian owner.

Aside from the application now before us no application has ever been filed with this office for the appropriation of flood waters by diversion to storage and the only application previously filed to appropriate by direct diversion was Application 151 of John and Margaret T. Kyne under which the right was confirmed to divert from April 1st to November 1st of each season.

Although the courts have held that seasonal storage cannot be legally made under a claim of riparian ownership, the Riviera Land Company "more than ten years prior" to the filing of its protest against the approval of Application 7250, constructed two reservoirs on its property below applicant's proposed point of diversion and reservoirs had also been constructed above applicant's point of diversion by another riparian claimant for the purpose of storing flood waters of the creek. Although the exact date of the construction of these reservoirs is not shown by the record it appears that they were built subsequent to the effective date of the Water Commission Act.

In 1923, one Nerli constructed a reservoir on the property now owned by applicant G. Patroni which has a capacity of approximately 40 acre feet and which is the same reservoir as described in Application 7250 and this reservoir has been filled four or five times. Mr. Patroni acquired



the property in 1930 and with the exception of the year 1934 has filled the reservoir each year from the flood waters of San Vicente Creek apparently under no color of right. He is now seeking to comply with the law to the extent that Application 7650 has been filed for the purpose of storing the flood waters of the stream.

It also appears from the testimony of Francis Kyne, a brother of protestant John Kyne, that some one had constructed a reservoir at the mouth of San Vicente Creek for the purpose of storing the flood waters "because he has no other rights". This reservoir partially filled during the month of February 1932, and completely filled in 1933 and 1934 although the flow was small during 1934.

#### UNAPPROPRIATED WATER IN SAN VICENTE CREEK

Under what claim of right the riparian owners are storing the flood waters of San Vicente Creek has not been shown. Assuming that such diversion is made under some color of right, which appears doubtful, the testimony presented at the hearing clearly indicated that even during years of deficient runoff there was some water which passed all diversions on the creek and flowed into the ocean without being applied to any useful or beneficial purpose.

Albert Quilici, a witness for the applicant, testified that he had observed water flowing into the ocean for a couple of weeks during the season of 1933-34 after a period of rainfall.

From the testimony of N. Bertolucci, a witness for the applicant, who had resided at Moss Beach for the past eleven years, it appears that during the year 1931 there was plenty of water and that even during the years 1932, 1933 and 1934 which were deficient in runoff, water escaped into the ocean.

Francis Kyne, brother of protestant John Kyne, testified that he had lived on San Vicente Creek practically all his life and although the flow in the creek had been gradually diminishing during the past twenty years, in previous years of normal rainfall the creek used to run bank full nearly the entire winter long. From his testimony it appeared that the flood flows during recent years were confined to a stream about three feet deep and about six feet wide and that these flows which occurred after heavy rainfalls were such that there was no way of impounding the water; that even in the year 1934, during the month of January there was a stream varying in depth from 2 feet to a mere trickle flowing into the ocean beyond all diversions.

#### MISCELLANEOUS GROUNDS OF PROTEST

Aside from the claim of injury based upon the allegation that the proposed diversion would result in depriving them of water for irrigation purposes, protestants John and Margaret T. Kyne alleged in effect that should Application 7850 be approved it would result in decreasing the flow of the creek to such an extent that it would result in the drying up of springs along its course, would prevent growth of shrubs along the banks thereof endangering the firmness of the banks, would interfere with the self cleaning of the stream and would allow silt and sediment to collect, thereby obstructing the natural flow.

No testimony was presented at the hearing in support of these allegations and no basis has been shown for denying the appropriation on these grounds.

CONCLUSION

The purpose to which applicant proposes to put the water is a useful and beneficial one and the record indicates that during a season of normal runoff there is water available for appropriation under Application 7850. It is therefore the opinion of this office that Application 7850 should be approved subject to the usual terms and conditions.

ORDER

Application 7850 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 Division of Water Resources now being fully informed in the premises.

IT IS HEREBY ORDERED that Application 7850 be approved and that a permit be granted to the applicant subject to such of the usual terms and conditions as may be appropriate.

WITNESS my hand and the seal of the Department of Public Works of the State of California, this 7th day of September 1934.

EDWARD HYATT, State Engineer

BY Harold Orskov  
Deputy

