

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

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In the matter of Application 9123 of Tanner Slough Irrigation Association to appropriate from Willow Creek in Lassen County for irrigation purposes.

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DECISION A. 9123 D 419  
DECIDED *April 25, 1938*

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APPEARANCES AT HEARING HELD AT SUSANVILLE, APRIL 5, 1938.

For Applicant

Tanner Slough Irrigation Association

J. A. Pardes

For Protestant

James Streshly

W. R. Ray of Williamson  
and Wallace

EXAMINER: Everett N. Bryan, Acting 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

GENERAL DESCRIPTION OF PROJECT.

Application 9123 was filed by the Tanner Slough Irrigation Association on September 21, 1937, for an amount of water not to exceed 2600 acre feet per annum to be diverted from Willow Creek from about October 15 to about May 1 of each season to storage in Willow Creek Reservoir (capacity 2600 A.F.) and to be subsequently released for irrigation purposes. The point of diversion to storage is within the NE<sub>1</sub> of NE<sub>2</sub> of Section 14, T 31 N, R 12 E, M.D.B. & M. The place of use is described as being 6849.8 acres within

Sections 34, 35  
Sections 2, 3, 10, 11, 14, 24, 25  
Sections 19, 30  
Sections 13, 14, 23, 24  
Sections 17 to 22 incl., 27 to 34 incl.  
Sections 5, 6

T 32 N, R 12 E, M.D.B. & M.  
T 31 N, R 12 E, M.D.B. & M.  
T 31 N, R 13 E, M.D.B. & M.  
T 29 N, R 14 E, M.D.B. & M.  
T 29 N, R 15 E, M.D.B. & M.  
T 28 N, R 15 E, M.D.B. & M.

as shown on the map filed in support of the application.

Applicant proposes to construct an earthen dam at the point of diversion which will be 5 feet in height, stream bed to spillway crest, and 2250 feet long thereby creating the Willow Creek Reservoir. Water stored in this reservoir will be released for irrigation purposes either directly into the stream bed of Willow Creek itself through the property of the protestant or into an artificial channel by-passing the protestant's property and thence into the channel of Willow Creek. From Willow Creek the water is to be rediverted by means of small timber and concrete dams into individual ditches of capacities varying from 2 to 5 c.f.s. Applicant also proposes to raise crops in the bed of the Willow Creek Reservoir after the release of the stored water, a use which is also claimed under the application.

#### PROTEST

Application 9123 was protested by James Streshly who owns a tract of land containing some 497 acres lying immediately below and south of the proposed dam and storage reservoir and above and north of a portion of applicant's proposed place of use. Streshly claims that his property is riparian to Willow Creek and alleges in effect the following grounds of protest:

- (1) The appropriation as proposed would result in obstructing the natural flow of Willow Creek, thus interfering with his right as a riparian owner and user of water.
- (2) The construction of the dam would interfere with his rights to maintain a dam and diversion ditch from Willow Creek for which he has an easement on lands which will be flooded by applicant's reservoir.
- (3) There is a possibility that the earthen dam which applicant proposes to construct will wash out during freshets and destroy his property.
- (4) Application 9123 was not made by any legal body nor does

it disclose the identity of the applicant but is signed by an employee of the Division of Water Resources.

- (5) Application 9123 does not comply with the provisions of the Water Commission Act and the Rules and Regulations of the Division of Water Resources in that it does not state the legal subdivisions of the land to be served and the acreage to be irrigated and does not set forth the names and addresses of the claimants of water below the proposed point of diversion.

#### HEARING SET

Application 9123 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 public hearing in accordance with Section 1a of the Water Commission Act on Tuesday, April 5, 1938, at 10:00 o'clock A.M. in Court Room, Courthouse, Susanville, California. Of this hearing, applicant and protestant were duly notified.

#### GENERAL DISCUSSION

At the hearing, the attorney for the applicant requested that the records of Application 9123 and the "Report on Water Supply and Use of Water on Susan River and Tributaries", prepared by the Division of Water Resources, February 1936, be considered in evidence. Upon assurance by the Examiner that these records would be so considered, applicant rested.

The protestant himself was the only witness called by protestant's attorney, who endeavored to show that applicant should be required to deliver all water released from storage into the main channel of Willow Creek instead of delivering a portion into the by-pass channel. It was his opinion that possible benefit might result to him through the use of this water for irrigation, without loss to the applicant, if the water was allowed to pass through his lands. From experience, however, we know that only a small portion of water used for irrigation purposes is normally returned

to the stream and therefore any benefit which protestant would derive from the use for irrigation of water released through his property would result in diminishing the amount of water available for applicant's use below. Also, the Division is without authority to direct the course or manner of delivery of waters released from storage to the place of use except in instances where it can be shown that the methods are wasteful and uneconomical.

As to the availability of surplus or unappropriated water for storage by the applicant, protestant testified that in some years probably no water would be available but did not deny that in years of more abundant runoff there would be a surplus.

By order of the Court on August 21, 1934, the case of J. J. Fleming, et al v. J. R. Bennett, et al, then pending before the Superior Court of the State of California in and for the County of Lassen involving the water rights on Susan River and its tributaries was referred to the Division of Water Resources for investigation as referee under authority conferred by Section 24 of the Water Commission Act.

As a result of this investigation, a report was prepared entitled, "Report on Water Supply and Use of Water on Susan River and Tributaries, Lassen County, California, February 1936", and a "Stipulation for Judgment" was prepared, the circulation of which among the various parties to the action was commenced on July 15, 1936. This stipulation has been subscribed to by 170 parties and refused by 7, including the protestant. Eight parties to the action were found to never have used any water from Susan River and its tributaries and were consequently not included in the stipulation.

According to the stipulation the season of diversion of water for general irrigation purposes is limited to the period from March 1 to October 31. During this period the water users on Willow Creek above its junction

with Susan River may divert an amount of water from Willow Creek not to exceed 35.28 c.f.s., and the water users on Susan River below the junction of Willow Creek may divert an amount of water not to exceed 21.70 c.f.s.

According to the Report on Water Supply and Use of Water referred to above, the minimum flow in Susan River at Colony Dam immediately below the junction of Willow Creek and Susan River during the year 1935 was 14.2 c.f.s. (Table 39) and this flow was adequate to provide water for all domestic, stock watering, municipal and industrial uses below (page 194).

It would therefore appear reasonable to assume that when the flow of water in Willow Creek at Cuming's Bridge which is located immediately above its junction with Susan River, is more than 21.70 c.f.s. during the months of October, March and April and more than 14.2 c.f.s. during the months of November, December, January and February, the surplus is unappropriated and subject to appropriation under the Water Commission Act.

From June 4, 1900 to December 31, 1901 and during the year 1905, the United States Geological Survey maintained a gaging station at the Cuming's Bridge and the flow of Willow Creek at this station is set forth in Tables 15, 16 and 17 of the Report. Also from April 1 to September 30, 1935 the Division of Water Resources maintained a gage at this point and the flow of Willow Creek is set forth in Table 33 of the Report. Table 3 of the Report sets forth the precipitation at Susanville (Elev. 4271) from which the index of wetness during these seasons may be estimated.

From the flow of Willow Creek at Cuming's Bridge and the water requirements from this stream below its junction with Susan River, the following table has been prepared for determining the unappropriated water in Willow Creek.

FLOW IN WILLOW CREEK AT CUMMINGS BRIDGE

	<u>Oct.</u>	<u>Nov.</u>	<u>Dec.</u>	<u>Jan.</u>	<u>Feb.</u>	<u>Mar.</u>	<u>April</u>
<u>Season 1900-1901</u>							
(Index of Wetness -115)							
Mean flow in sec. ft.	31.9	50.7	166.0	83.8	155.0	135.0	31.8
Monthly flow in A. F.	1970	3020	10,200	5160	8630	8310	1890
Rights of lower users	1330	840	870	870	790	1330	1290
Unappropriated water	6640	2180	9,330	4290	7840	6980	600
<u>Season 1901-1902</u>							
(Index of Wetness - 85)							
Mean flow in sec. ft.	43.7	51.8	85.3	----	----	----	----
Monthly flow in A. F.	2690	3080	5250	----	----	----	----
Rights of lower users	1330	840	870	----	----	----	----
Unappropriated water	1360	2240	4380	----	----	----	----
<u>Season 1904-1905</u>							
(Index of Wetness - 78)							
Mean flow in sec. ft.	----	----	----	80.4	89.4	53.5	22.9
Monthly flow in A. F.	----	----	----	4950	4960	2060	1360
Rights of lower users	----	----	----	870	790	1330	1290
Unappropriated water	----	----	----	4080	4170	730	70
<u>Season 1905-1906</u>							
(Index of Wetness - undetermined)							
Mean flow (c.f.s.)	31.8	39.6	38.7	----	----	----	----
Monthly flow in A. F.	1960	2350	2380	----	----	----	----
Rights of lower users	1330	840	870	----	----	----	----
Unappropriated water	630	1510	1510	----	----	----	----
<u>Season 1934-1935</u>							
(Index of Wetness - 83)							
Mean flow (c.f.s.)	----	----	----	----	----	----	83.6
Monthly flow in A. F.	----	----	----	----	----	----	4980
Rights of lower users	----	----	----	----	----	----	1290
Unappropriated water	----	----	----	----	----	----	3690

The following conclusions are drawn from the Table:

- (1) During the months of October to April, inclusive, Season of 1900-1901 (Index of wetness, 115) there were 31,860 acre feet of unappropriated water.
- (2) During the months of October, November and December of the Season of 1901-1902 (Index of wetness, 85) there were 7980 acre feet of unappropriated water.

- (3) During the months of January, February, March and April of the Season of 1904-1905, there were 9050 acre feet of unappropriated water.
- (4) During the months of October, November and December of the season of 1905-1906 there were 3,650 acre feet of unappropriated water.
- (5) During the month of April of the season 1934-1935 there was 3,690 acre feet of unappropriated water.
- (6) As the applicant proposes to store but 2,600 acre feet during the period from about October 1 to about May 1 of each season, such diversion may be made without interference with prior vested rights.

Protestant expressed some concern lest applicant would not allow sufficient water to pass through his reservoir to satisfy prior and existing rights to the natural flow of the stream. In this connection, it may be said that the responsibility is upon the applicant to so operate his reservoir as to not interfere with prior vested rights below. If he should fail to meet this responsibility ready means are available for securing redress. The approval of an application can not be denied upon the grounds that there is a possibility illegal diversion may be made.

The attorney for the protestant was of the opinion that under the decrees entered in the cases of Byers et al. v. Hartson, et al and Streshly et al v. Folsom et al, the rights to the entire flow of Willow Creek were fixed and determined and as members of the Association were parties to these decrees they were forever barred from any further appropriations from this stream.

Although these decrees may purport to allocate the entire flow of Willow Creek, more than 23 years have elapsed since the last decree was entered and the present rights are now limited to the actual amounts of water which have been applied to beneficial use in recent years. It has been shown above that during the period from about October 15 to about May 1 of a season of

normal runoff there is water in excess of the amount which applicant proposes to appropriate which can only be applied to beneficial use by collecting it during a period of surplus flow for subsequent release and use during the irrigation season and it is this water which applicant, in accordance with established statutory procedure, is now seeking to appropriate under the Water Commission Act.

As to the possible interference with protestants right to maintain a dam and diversion ditch within the area which will be flooded by the reservoir, applicant's dam has already been constructed and no showing relative to such interference was made at the hearing. It is possible, however, that arrangements may be made with the applicant to divert water at its dam instead of above the said dam. This is a matter however which must be settled between applicant and protestant and is without the jurisdiction of this office.

Relative to the possibility of the failure of applicant's dam it may be said that all dams 6 feet or less in height regardless of storage capacity are exempt from the supervision of this office by the provisions of Chapter 808, Statutes of 1933. As applicant's depth of storage will be but 5 feet, the responsibility for the safety of the structure rests entirely upon the applicant.

As to the charge that Application 9123 was not made by a legal body and that the identity of the applicant is not disclosed, the application being signed by an employee of this office, it may be said that the Water Commission Act provides that "as prerequisite to the issuance by the state water commission of a permit to appropriate water .....there must be a person, firm, association, or corporation as party applicant; .....(underscoring ours). The application was made in the name of Tanner Slough Irri-



gation Association and was prepared at its request by an engineer of this office because of his familiarity with our procedure. The mere fact that the application, as a matter of convenience to the applicant, was signed by this employee of the Division does not, in our opinion, invalidate the application.

Relative to allegation of protestant that the application does not comply with the provisions of the Water Commission Act and the Rules and Regulations of the Division of Water Resources in that it does not state the legal subdivisions of the land to be served and the acreage to be irrigated and does not set forth the names and addresses of the claimants of water below the proposed point of diversion, it may be said that the legal subdivisions and acreages to be irrigated are indicated upon the map which was filed in support of Application 9123 and which is a part of the application. The requirements of this office in this matter have been fully satisfied.

The law does not require that the names and addresses of the claimants of water below the proposed point of diversion be entered in an application. While the Rules and Regulations state that these names and addresses should be shown in paragraph 22 of the application, this is directory rather than mandatory and intended merely for the convenience of this office in sending notices directly to interested parties. In this case this information was not necessary for two reasons. (1) The office was already informed as to the names and addresses of the users of water below applicants proposed point of diversion and (2) the application was advertised by publication in a newspaper having a general circulation and published within the County wherein the proposed point of diversion is located, which is all that is required by law.

SUMMARY


- (1) During seasons of normal runoff there is unappropriated water in Willow Creek which may be appropriated under Application 9123 without depriving protestant Streshly of the water which he is entitled to divert under prior vested rights.
- (2) The responsibility rests upon the applicant Association to so construct, maintain and operate its diversion dam and storage reservoir as not to interfere with protestant's diversion or endanger his property.
- (3) Application 9123 complies satisfactorily with the provisions of the Water Commission Act and Rules and Regulations of this office and should be approved subject to such of the usual terms and conditions as may be appropriate.

ORDER

Application 9123 for a permit to appropriate water having been filed with the Division of Water Resources as above stated, a protest 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 9123 be approved and that a permit be issued 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 25<sup>th</sup> day of April, 1938.

  
State Engineer.

(Seal)