

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

oOo

In the Matter of Application 9165 of D. Gerster Trust Estate
to Appropriate Water from San Timoteo Creek, Tributary
to Santa Ana River in Riverside County for
Recreational Purposes.

oOo

DECISION A. 9165 D-422

Decided *July 5, 1938*

oOo

APPEARANCES AT HEARING HELD AT RIVERSIDE, JUNE 2, 1938.

For Applicant

D. Gerster Trust Estate, Ralph M. Hammer, Trustee

J. C. Sexton,
Attorney at Law

For Protestants

J. H. Stewart

Burton E. Hale,
Attorney at Law

Estate of Nancy McMahon Cheney

No appearance

EXAMINER: Everett N. Bryan, Acting Deputy in Charge of Water Rights,
Division of Water Resources, Department of Public Works,
State of California.

oOo

O P I N I O N

GENERAL DESCRIPTION OF PROJECT

Application 9165 was filed by D. Gerster Trust Estate, Ralph M. Hammer, Trustee, on October 29, 1937. It proposes an appropriation of 1.5 cubic feet per second to be diverted throughout the entire year from San Timoteo Creek for recreational (fish culture) purposes. It is proposed to construct a small diversion dam just below the junction of Singleton Creek by

means of which water will be diverted through a 10 to 14 inch diameter pipe line to a battery of six fish ponds having a total capacity of approximately 120 acre feet and a surface area of 11.5 acres. Applicant states that a spillway has been placed in the lowest pond by means of which water may be returned to the stream at a point within the NE $\frac{1}{4}$ of NW $\frac{1}{4}$ of Section 28, T 2 S, R 2 W, S.B.E.&M.

Application 9185 was protested by J. H. Stewart and by U. F. Lewis, executor of the Estate of Nancy McMahon Cheney, deceased.

PROTESTS

J. H. Stewart claims an appropriative right to the water which applicant seeks to appropriate which right was initiated prior to the effective date of the Water Commission Act. He alleges in effect that no water flows past his property except in times of flood and that any diversion which applicant may make will deprive him of water to which he is lawfully entitled.

U. F. Lewis, executor of the Estate of Nancy McMahon Cheney, deceased, claims rights to the water which applicant seeks to appropriate by virtue of an appropriative right initiated prior to the effective date of the Water Commission Act, and also by virtue of riparian ownership. Although this protestant's present point of diversion is above that proposed by applicant he alleges he will in the future divert some water at a point below applicant and that the diversion as proposed by applicant will interfere with his use as a riparian owner; that the proposed use of water by applicant for fish propagation is not a beneficial use; and that the Division has no jurisdiction over water rising upon privately owned lands and flowing down the stream through privately owned lands.

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

Application 9165 was completed in accordance with the Water Commission Act and the requirements of the Rules and Regulations of the Division of Water Resources and being protested was set for hearing in accordance with Section 1a of the Water Commission Act on Thursday, June 2, 1938, at 10:00 o'clock A.M. in the Court House at Riverside, California. Of this hearing applicant and protestants were duly notified.

PROTEST OF THE ESTATE OF NANCY McMAHON CHENEY UNSUPPORTED

The property of the Estate of Nancy McMahon Cheney, lies between the property of the applicant and the property of protestant Stewart. The record indicates that at least a portion of this property was once what was known as the "Erink Ranch" and that wells were drilled thereon from which water was pumped. The record indicates however that this use has long since been discontinued and at the present time there are no diversions between applicant's proposed point of diversion and protestant Stewart's point of diversion. This fact may account for the reason that no appearance was entered at the hearing on behalf of the Estate of Nancy McMahon Cheney.

Mr. Lewis, executor of the Estate, who was present at the hearing announced that his protest was filed simply in his "fiduciary capacity of the Estate", and after conferring with counsel representing all beneficiaries under the will, as well as the heirs at law, it was decided not to proceed with the protest.

This we believe is tantamount to withdrawal of the protest and it may therefore be dismissed without further discussion. The Division would not deny the application because of some prospective future use by a down-

stream riparian owner and we find no merit either in the claim that the use of water proposed by applicant is not beneficial, or that the Division lacks authority to consider an application to appropriate water originating on private lands.

GENERAL DISCUSSION OF PROTEST OF J. H. STEWART

Between the applicant's proposed point of diversion and the diversion point of protestant Stewart, who is the lower of the two protestants, San Timoteo Creek flows for some three miles through a valley approximately one-half mile in width. Adjoining applicant's property on the East and upstream on San Timoteo Creek is the Haskell Ranch. Singleton Creek an important tributary of San Timoteo Creek from the east and north, has its confluence a few hundred feet above applicant's proposed point of diversion.

Prior to 1927 there was a diversion from San Timoteo Creek at or near applicant's proposed point of diversion. This diversion was covered by a court decree under which the entire normal surface flow of San Timoteo Creek at this point was allotted to certain downstream users. Substantially all of the summer flow in San Timoteo Creek below its junction with Singleton Creek came from Singleton Creek, the surface flow of San Timoteo Creek above the confluence of the two streams being wholly diverted. To obtain greater pressure the users of water under the decree in the spring of 1927 moved their point of diversion on San Timoteo Creek upstream a distance of approximately 1000 feet to a point on Singleton Creek abandoning whatever small contribution might have been available in San Timoteo Creek in favor of the higher head.

About this same time, the Moreno Water Company drilled some wells on its property some two miles above the new intake. Pumping from these wells

apparently resulted in diminishing the normal flow of Singleton Creek and to make good this loss to the users under the decree, the Moreno Water Company has since been supplying these users with water pumped from its wells.

One of the diverters from San Timoteo Creek above the confluence of the two streams is the Haskell Ranch. In 1935 this ranch put down a well from which to supplement its gravity diversion. Since that time there has been considerable waste of irrigation water from the Haskell Ranch back into San Timoteo Creek above applicant's proposed point of diversion. It is this accretion which applicant seeks to appropriate, together with any other water which may be available at that point, it being his contention and apparently the fact that prior to the pumping of the Haskell well and this increased waste, the summer flow in San Timoteo Creek opposite his property was insufficient to justify any attempt at diversion and use during the summer months.

No continuous records of the summer flow of San Timoteo Creek are available for that portion of the stream which is here involved. Various records of instantaneous flow were introduced by protestant Stewart embracing measurements made at points between his diversion and the confluence of Singleton Creek but these are of little value in this matter. They indicate, however, that ~~during the rainfall season San Timoteo Creek is a flood stream~~ but during the summer months there is little if any flow in the creek below applicant's proposed point of diversion except that which is derived from springs in the creek bed and return flow from irrigated fields above. The surface flow is intermittent and during very hot days may disappear entirely for a few hours during the extreme heat, to return again when it is cooler. In fact protestant Stewart himself testified to the effect that the stream bed during the past two years has been comparatively dry for several days at

a time although he felt that this condition was unusual and was no doubt caused by the pumping operations on the Haskell Ranch.

We feel, however, that the evidence leads to the rather definite conclusion that prior to 1926, San Timoteo Creek had only an irregular and uncertain surface flow during the summer months below its confluence with Singleton Creek. Supporting this conclusion is the fact that those diverting under the decree referred to above, moved upstream from San Timoteo Creek onto its con-fluent Singleton Creek in order to obtain greater pressure, thus abandoning in 1927 all claim to whatever flow might come from San Timoteo Creek itself above the confluence.

The fact that most of the water that protestant Stewart has been di-verting rises in San Timoteo Creek between his property and that of applicant is supported by the notice of appropriation upon which protestant Stewart bases his right. On September 27, 1884, almost immediately following the entry in the Superior Court of the original court decree referred to above, one Berry Roberts, a predecessor of protestant Stewart filed a notice of appropriation with the County Recorder claiming for irrigation and domestic use

"all the water that raises or comes to the surface of the ground in and along the channel of the San Timoteo Creek in the above named co. between J. R. Frink dam (as now used) and the land now owned and occupied by said Roberts. Said water to run along the channel of said creek and to be diverted therefrom at any point on said Roberts land as may seem best for his use and convenience."

As the Frink dam was then located on San Timoteo Creek about one-half mile below applicant's proposed point of diversion it would indicate that pro- testant's predecessor in interest recognized that his only hope for surface flow from this source depended upon rising water which appeared in San Timoteo Creek below applicant's property.

Not only the evidence in this case but investigations previously made by the Division and reported in Bulletin 45 entitled "South Coastal Basin Investigation" (pp. 161 to 168) lead to the conclusion that there is a subsurface flow in San Timoteo Canyon. Where the hydraulic gradient of this flow approaches the surface in the channel of San Timoteo Creek, rising water appears and surface flow begins. Pumping draft upon this subsurface flow depresses the hydraulic gradient and causes the appearance of rising water to retreat downstream. There is nothing to indicate that protestant Stewart could not, if the surface flow during the summer months were wholly diverted above, secure an adequate supply from this subsurface flow by pumping.

SUMMARY AND CONCLUSIONS

Summarizing briefly then, it is concluded that during the summer months the surface flow in San Timoteo Creek between applicant's proposed point of diversion and protestant Stewart's point of diversion is uncertain and more or less intermittent. Protestant Stewart formerly depended to a large extent upon rising water which appeared in the creek between these two points but in recent years this rising water has apparently decreased due to pumping operations above and at times he has found it impractical to divert.

Waste water resulting from irrigation immediately above him on San Timoteo Creek in recent years has provided a surface supply which applicant considers it is practical for him to divert. If his application is denied and applicant is not permitted to divert this surface flow it may or may not reach protestant Stewart's intake in such amount and with such continuity as to permit successful diversion. Whether or not it does, there will undoubtedly be a very considerable loss by evaporation and transpiration in the three miles of surface stream channel which intervenes.

Under the arid and semi arid conditions which prevail in this State and particularly in view of the provisions of Section 3, Article XIV of the State Constitution, we do not feel that applicant should be denied a permit to make a surface diversion of water which would otherwise be dissipated in large measure by transpiration and evaporation in order to make possible an uncertain diversion by protestant, particularly when it appears that a dependable subsurface supply is available to protestant for the cost of pumping as other users both above and below him on the stream are now doing. Application 9165 should be approved.

O R D E R

Application 9165 for a permit to appropriate water having been filed with the Division of Water Resources as above stated, protests having been received, 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 9165 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 *Fifth* day of *July*, 1938.

EDWARD HYATT, State Engineer

BY HAROLD COOK

Deputy

(Seal)

WES:
ENB: MP