

STATE OF CALIFORNIA
DEPARTMENT OF PUBLIC WORKS
BEFORE THE STATE ENGINEER AND
CHIEF OF THE DIVISION OF WATER RESOURCES

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In the Matter of Application 13923 by Tanner Brothers, a Partnership,
to appropriate Water from Cowell Creek Tributary to San Antonio
Creek in Calaveras County for Irrigation Purposes.

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Decision A. 13923 D. 775

Decided February 27, 1953

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In Attendance at Investigation Conducted by the Division of Water
Resources at the Site of the Proposed Appropriation on August 22, 1951:

Norval Tanner) Norman Tanner)	Applicants
Mr. Siegfried	Representing the applicants' engineers
Gerald G. Spencer	Representing the protestant Fricot Ranch School, California Youth Authority
Woodrow L. Gomes	Protestant
Ed. Letora	Representing Hengen Brothers, Protestants
Grace Ponte	Representing herself and N. F. Ponte
Frank Oneto	Representing Oneto Brothers, Protestants
Meriel R. Letora	Protestant
John A. Huberty	Protestant
Walter E. Huberty	Protestant
Virgil M. Airola	Representing Rose N. Wiebe, et al., Protestant
A. S. Wheeler	Senior Hydraulic Engineer, Division of Water Resources, Department of Public Works, Representing the State Engineer.

Also present: Robert J. Romaggi and Mary Letora.

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General Description of the Project

The applicant seeks to appropriate 1 cubic foot per second from April 1 to October 1 and 124 acre-feet per annum, the latter to be collected between December 1 and April 15 of each season. The source named is Cowell Creek, a tributary of San Antonio Creek which in turn flows into the south fork of Calaveras River. Diversion is proposed at a point within the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 1, T 4 N, R 14 E, MDB&M. Direct diversion is to be effected by means of a 500 gallon-per-minute pumping plant, storage by means of an earth dam 30 feet high (to overflow level) by 215 feet long. The dam is to create a reservoir 12 acres in surface area and 110 acre-feet in capacity. The conduit is to be a 6 inch diameter steel pipeline, 2000 feet long and 500 gallons per minute in capacity. The proposed place of use is a 110 acre orchard located mainly within Section 36 of T 5 N, R 14 E, MDB&M, but also extending into the adjoining Sections 1 and 6. Irrigation is to extend from about April 1 to about September 30. The applicants claim no other water right or source of water supply.

Protests

The Calaveras Cement Company protests that the proposed diversion will interfere with the exercise of its claimed right to divert 2 cubic feet per second, year-round, from the south fork of Calaveras River. It claims appropriative rights under water Permits 2737 and 7547, describes its diversion point as being located within the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 32, T 4 N, R 12 E,

MDB&M, and states that its protest may be disregarded and dismissed "if Applicant will not divert any natural flow when the flow is at or below 0.50 sec. ft."

John A. and Walter R. Huberty protest the application, stating in part:

"Riparian use has been prior to the land survey on a portion of the land and for more than fifty years on the remainder. Water has been in continuous use for livestock purposes for drinking and for natural subirrigation along the San Antonio Creek which provides summer feed for livestock."

They state that their protest may be disregarded and dismissed "if the diversion for storage does not begin before December 1st and ends by April 1st of each year and if the natural flow of the San Antonio Creek is not disturbed during the period of May 1st to October 30th of each year."

The protest also contains statements to the effect that the protestants have riparian rights on San Antonio Creek in Sections 2 and 3 of T 3 N, R 12 E, MDB&M, that San Antonio Creek is not generally an all year stream, that the applicants are asking for too late a closing date for filling of the reservoir, and that if the proposed direct diversion is made from Cowell Creek the flow of San Antonio Creek will be affected to such an extent that during a major portion of the dry season of each year the protestants' requirements would not be met.

The Fricot Ranch School, California Youth Authority protests the application for the alleged reason that there is not enough unappropriated water in Cowell Creek to satisfy the application and therefore that further diversions from that stream would deprive it (Fricot Ranch School) of an adequate supply. This protestant claims a riparian right and a right based upon use commenced prior to December 19, 1914, its diversion heading

within Section 9, T 4 N, R 14 E, MDB&M. Present use is said to include a domestic supply for 210 persons, irrigation of 100 acres of vineyard, orchard, shrubbery, pasture and lawns and the watering of small livestock.

The protestant states in part:

"The total supply of water for this school is taken from the San Antonio Creek of which Cowell Creek is a major tributary. Our records of past years indicate that there is not as much water flowing in San Antonio Creek below its juncture with Cowell Creek as existing water rights demand during a large portion of the time between April 1st and October first. These records are available at the Div. of Water Resources, Sacramento and show an 18 year average minimum flow of 1 cu. ft. per second from 1924 to 1941."

The protest, according to another statement therein, may be disregarded and dismissed "if the applicant will permit a minimum of 10 cu. ft/sec. to flow past his point of diversion the year round and limit his usage and storage accordingly."

A group of 7 protests was submitted by the attorney of those protestants, Mr. Virgil M. Airola, the substance of the protests being as follows:

Protestants:

1. Meriel Letora
2. Oneto Bros.
3. N. F. Ponte
4. N. F. and Grace Ponte
5. Hengen Bros.
6. Woodrow L. Gomes
7. Rose R. Wiebe, John B. Roberts and Orvis Roberts

Reason for protest: apprehension that the proposed diversion will deprive protestant of water to which entitled under an existing right.

Bases of claimed rights: usage since prior to December 19, 1914, riparian ownership and in one case (Letora), prescription.

Extent of use:

1. Irrigation of trees, grasses, garden produce and general crops on ranch property within Section 24 of T 4 N, R 13 E, and Section 19 of T 4 N, R 14 E, MDB&M. Amount used: all water available up to 150 miner's inches, between April 1 and November 1.
2. Irrigation of 20 acres of garden, fruits and produce from May 1 to September 30; stockwatering year-round.
3. Stockwatering, year-round.
4. Irrigation of 9 acres of alfalfa and clover from May 1 to September 30, also stockwatering, year-round.
5. Irrigation of 20 acres of alfalfa and clover from May 1 to September 30, also year-round domestic use and stockwatering.
6. Irrigation of 15 acres of mixed grasses and garden from May 1 to September 30, also year-round domestic use and stockwatering.
7. Irrigation of 2 acres of garden and fruit trees from May 1 to September 30, also year-round domestic use and stockwatering.

Location of diversion points:

1. Within SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 19, T 4 N, R 14 E, MDB&M.
2. Within NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 10, T 3 N, R 12 E, MDB&M.
3. Along entire course of San Antonio Creek.
4. Within SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2, T 3 N, R 12 E, MDB&M.
5. Within NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 33, T 4 N, R 13 E, MDB&M.
6. Within SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 6, T 3 N, R 13 E, MDB&M.
7. Within SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 31, T 4 N, R 13 E, MDB&M.

Each of the 7 protests of this group contains the following passage:

"This protest may be disregarded and dismissed if applicant will agree not to store any of the natural flow between April 1 and December 1 of each year and will bypass at the outlet of the impounding reservoir a constant flow of water equal to the natural flow of water in San Antonio Creek at the junction thereof with Cowell Creek when the flow in San Antonio Creek is 250 miner's inches or less at said junction and will bypass sufficient water to bring the combined flow to 500 miner's inches at all times while the flow in San Antonio Creek is more than 250 miner's inches at the said junction of said San Antonio and Cowell Creeks when the combined flow therein at that point is 500 miner's inches or less, provided, however, that the amount of water which applicant shall by-pass shall not be less than 20 miner's inches at any time while there is any stored water impounded in applicant's reservoir."

Answer

The applicants' answers to one or another of the various protests include statements as follows:

"The storage of unappropriated waters in the season of excessive runoff cannot affect a riparian right to the beneficial use of the flow of a stream."

"The applicant does not dispute nor intend to interfere with the protestant's right."

"The applicant also has a riparian right - - - -"

"The application is for appropriation of unappropriated water only and therefore could not interfere with prior appropriative rights."

"Applicant cannot agree that the closing date of July 1 for storage is too late since U.S.G.S. stream gagings at Fourth Crossing on San Antonio Creek show a flow of over 8 c.f.s. on July 1, 1950."

"Applicant cannot agree to maintain the flow below junction of Cowell and San Antonio Creeks at 500 miner's inches when the flow in San Antonio Creek is more than 250 miner's inches."

"Applicant will not agree to bypass any waters except the natural flow of Cowell Creek when such impounding will interfere with prior rights."

"Protestant does not indicate the amount of water claimed for use under riparian right."

"Applicant will agree to not divert water to storage when the flow of Cowell Creek above the point of diversion is less than 0.50 c.f.s."

Field Investigation

The applicants and the protestants with the approval of the Department having stipulated to the submittal of the application and protests upon the official records of the Department, a field investigation was conducted at the site of the proposed appropriation on August 22, 1951, by an engineer of the Division. The applicants were present and all of the protestants were present or represented during the investigation.

Records Relied Upon

Application 13923 and all data and information on file therewith; records of the discharge of San Antonio Creek near San Andreas and of Calaveras River at Jenny Lind as published in Water Supply Papers of the United States Geological Survey and/or in unpublished records (advance sheets) of that agency; and the report on water supply for D. Fricot Estate transmitted by letter signed by T. R. Simpson, Senior Hydraulic Engineer, and dated December 28, 1943 (file 041.320).

Information Secured by Field Investigation

According to the report covering the field investigation of August 22, 1951, the watershed tributary to the applicants' proposed point of diversion, on Cowell Creek, is about 2.25 square miles in extent and is heavily wooded, rainfall within that watershed as reflected by records of rainfall at Arnold averages 45.62 inches, flow at the proposed point of diversion was about 0.2 cubic foot per second, and, according to the protestants, their requirements (the protestants') are satisfied when the flow of Calaveras River where San Antonio Creek joins it is at least 12.5 cubic feet per second.

Information Secured from Other Sources

San Antonio Creek, according to unpublished records of the United States Geological Survey, which records cover the period from January 9, 1950 to September 30, 1951, has discharged at monthly mean rates, in cubic feet per second, as follows:

<u>Month</u>	<u>1949-50</u>	<u>1950-51</u>
October	*	5.87
November	*	105.00
December	*	236.00
January	*	127.00
February	136.00	92.30
March	68.00	100.00
April	105.00	42.80
May	32.70	45.00
June	12.90	13.30
July	4.16	5.76
August	1.09	2.10
September	.74	1.27
Average		64.8

* No record

The gaging station on San Antonio Creek is at Fourth Crossing, which is approximately 1.9 miles upstream from the junction of that stream with South Fork of Calaveras River. It is a scaled distance of about 16.8 miles downstream from the proposed point of diversion.

Calaveras River to which San Antonio Creek is tributary, via South Fork of Calaveras River, has been gaged at Jenny Lind and the flow recorded, except for one minor break, since January, 1907. According to Water Supply Paper 1181, United States Geological Survey, the flow of Calaveras River at Jenny Lind over a 41-year period has averaged 242 cubic feet per second. During the water year 1950-51 which is the only complete year of record of San Antonio Creek at Fourth Crossing, the flow of Calaveras River at Jenny Lind averaged 423 cubic feet per second, indicating that year to be a year of $423/242$ or 175 per cent of normal runoff; and during the water year 1949-50, during which San Antonio Creek flow was recorded except during October, November, December and a portion of January, the flow at Jenny Lind averaged 166 cubic feet per second, or $166/242$ or 68.6 per cent of normal.

The report on water supply for D. Fricot estate, by Engineer Simpson, in 1943, is based upon an investigation made on request of the Youth Authority, State of California, when the Fricot property was being considered as a site for a proposed boys' camp. The water system including the diversion works, as described in the Simpson report, is evidently the same as is now in use by the protestant Fricot Ranch School. Pertinent extracts from the report mentioned, follow:

"Records were kept of the flow in San Antonio Creek over the Fricot diversion weir during the severely dry year of 1931, the year 1932 with nearly normal runoff conditions, and the moderately dry year of 1933. The creek was dry immediately below the diversion weir for 230 days in 1931, 145 days in 1932 and 171 days in 1933. Whenever the total flow in the

creek above the diversion weir was less than 4.50 cubic feet per second during the three years of records the entire flow was diverted through the San Antone Ridge Ditch to Fricot City.

* * *

"The San Antone Ridge Ditch is also known as the Ide and Terwilliger Ditch and as the Fricot City Ditch. The ditch was so designated at the hearing . . . on October 11, 1926. All claimants to water from San Antonio Creek between the Fricot diversion weir and the head of South Fork of Calaveras River were represented at the hearing. It was generally conceded by all parties at the hearing that the Fricot City Ditch had a first right to 4.50 cubic feet per second . . ."

The report elsewhere states that D. Fricot kept records of diversion through the San Antone Ridge ditch, that the record covered an 18-year period and that the number of days during each of those 18 years when the total flow in the creek above the Fricot diversion weir was more than 4.50 cubic feet per second and spill was occurring over the weir was as follows:

<u>Year</u>	<u>Days flow exceeded 4.5 cubic feet per second</u>
1924	127
25	270
26	196
27	283
28	248
29	202
30	199
31	135
32	220
33	194
34	155
35	236
36	230
37	239
38	332
39	162
40	214
1941	247
18 year average	216

Discussion

The protestants according to the information available all divert from San Antonio Creek. Their points of diversion, the gage (San Antonio Creek near San Andreas), the point where Cowell Creek joins San Antonio Creek and the applicants' proposed point of diversion on Cowell Creek scale approximately the following distances upstream from the junction of San Antonio Creek with South Fork of Calaveras River:

<u>Point</u>	<u>Scaled distance above mouth of San Antonio Creek (miles)</u>
Junction, San Antonio Creek and South Fork	0
Huberty	1.2
Oneto Bros.	1.6
USGS gage (designated as near San Andreas but actually located at Fourth Crossing)	1.9
Ponte	2.4
Wiebe et al.	4.7
Gomes	5.0
Hengen Bros.	7.9
Letora	13.2
Fricot School	14.3
Junction, San Antonio and Cowell Creeks	16.7
Applicants' proposed intake	18.7

The 216 days mentioned in an earlier paragraph on which, on average, spill occurs at the Fricot weir evidently represent the length of time in a normal year when unappropriated water exists at that point. The flow habits of San Antonio Creek as reflected by the 1949-50 and 1950-51 records of daily discharges of that stream "near San Andreas" (at Fourth Crossing) are such that those 216 days may be considered, without material error, to be consecutive. Those days embrace the wet period of the year and are equivalent to 7.28 months. From the available record

of monthly discharges of San Antonio Creek "near San Andreas" and from a consideration of the longer record of monthly mean discharges of Calaveras River at Jenny Lind the seven months of greatest discharge appear to be the months of November, December, January, February, March, April and May. Evidently therefore the flow of San Antonio Creek in a normal year is in excess of the protestant Fricot Ranch School's needs until about the end of May.

The occurrence of a flow in San Antonio Creek at Fourth Crossing does not in itself prove that unappropriated water exists at the same time on Cowell Creek where the applicants seek to appropriate. The watershed tributary to the proposed point of diversion (comprising some $2\frac{1}{4}$ square miles), in comparison with the watershed above Fourth Crossing (roughly 45.7 square miles), is quite small. Many small streams and one larger one (Indian Creek) enter San Antonio Creek below the point of entry of Cowell Creek and above Fourth Crossing. Also it may be that flow at Fourth Crossing, when irrigation is going on, is made up in part of return flow from irrigation. Be that as it may, there may well be a relationship, as the parties intimate, between the stage of South Branch Calaveras River and the stage, at the same time, of San Antonio Creek. The local residents are in a position to observe such relationship if there is one. The admission by the protestants during the field investigation that their needs are met when the flow at the junction of San Antonio Creek with South Fork Calaveras River exceeds 12.5 cubic feet per second, warrants credence. Flows at the junction of San

Antonio Creek and South Branch Calaveras River are not of record but they may be supposed to exceed the flow of San Antonio Creek alone. When the flow of San Antonio Creek at Fourth Crossing exceeds 12.5 cubic feet per second, therefore, it may be assumed that unappropriated water exists in the upper reaches of that stream including Cowell Creek, its tributary. According to the record, flows in excess of 12.5 cubic feet per second persisted through May and into June, at Fourth Crossing in both 1950 and 1951.

The protestants' apprehension that on-stream storage, above their points of diversion, will interfere with the passage to them of the flow necessary to satisfy their asserted rights is not unusual in situations of the sort. Clearly it is the applicants' obligation, if their application is approved, to so equip and operate their installation as to pass the full flow of the stream to lower users when they are unauthorized to divert or collect it, and to pass such amounts during an authorized collection period as may be necessary to satisfy prior downstream rights. To impress this obligation upon the applicants and to allay the protestants' apprehension it is fitting that an appropriate special clause be inserted in any permit issued.

Summary and Conclusions

Unappropriated water appears ordinarily to exist from December 1 to about May 31 in the source from which the applicants seek to appropriate. Such water may be taken and used beneficially in the manner proposed without injury to downstream users, provided that direct diversion is limited

to periods extending not later than May 31 and that the storage reservoir is operated with due regard to the rights and requirements of parties downstream. The responsibility for proper reservoir operation rests with the applicants.

In view of the situation presented it is the opinion of this office that Application 13923 should be approved and permit issued, subject to the usual terms and conditions, with diversions thereunder for direct application to beneficial use limited to periods extending from April 1 to May 31 of each season, and subject to a special term and condition apprising all concerned that it is the applicants' responsibility to pass downstream all water which enters the proposed reservoir insofar as said water may be required at points downstream for the satisfaction of prior rights.

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ORDER

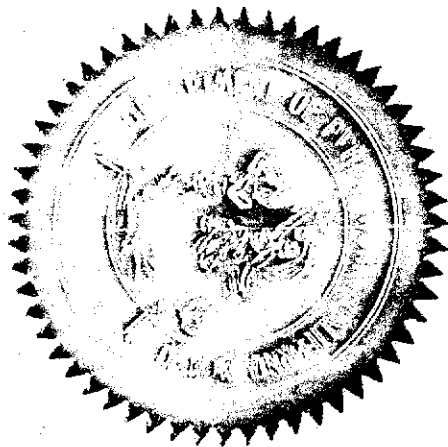
Application 13923 having been filed with the Division of Water Resources as above stated, protests having been filed, authorized procedure in lieu of hearing having been followed and the State Engineer now being fully informed in the premises:

IT IS HEREBY ORDERED that Application 13923 be approved in the amount of 1 cubic foot per second to be diverted from April 1 to May 31 for direct application to beneficial use without storage and 124 acre-feet per annum to be collected between December 1 and April 15 of each season for later application to beneficial use, and permit issued to the applicants,

subject to such of the usual terms and conditions as may be appropriate
and subject also to the following special term and condition, to wit:

Permittees shall install, maintain and operate facilities
to ensure that all water entering their reservoir insofar
as such water is required for the satisfaction of prior
rights will pass downstream unhindered by any of their
works.

WITNESS my hand and the seal of the Department of Public Works
of the State of California this 27th day of February, 1953.



A. D. Edmonston

A. D. Edmonston
State Engineer