

ADOPTED MAR 18 '59

STATE OF CALIFORNIA
STATE WATER RIGHTS BOARD

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| In the Matter of Application 16162 |) | |
| by North Coast County Water District |) | |
| to appropriate water from an unnamed |) | Decision No. D 928 |
| spring in San Mateo County |) | |

928

Substance of the Application

Application 16162, filed on December 1, 1954, by Western Slope Land Corp. and subsequently assigned to North Coast County Water District on August 28, 1957, is for a permit to appropriate 0.47 cubic foot per second (cfs) of unappropriated water, year-round, from an unnamed spring tributary to South Fork San Pedro Creek in San Mateo County for municipal purposes. The applicant proposes to divert by gravity at a point within the NE $\frac{1}{4}$ of SW $\frac{1}{4}$ of Section 24, T4S, R6W, MDB&M* and transport the water to the place of use through 8,000 feet of pipe. Use of water is to be made within the boundaries of North Coast County Water District, having a present population of approximately 16,000 persons. According to the application, the District does not own the land at the proposed point of diversion but intends to gain right of access thereto through eminent domain proceedings.

*All township references herein are to Mount Diablo Base and Meridian (MDB&M).

Protests

Protests against the subject application are of record from some 20 parties. The protestants, users of water from San Pedro Creek and South Fork San Pedro Creek, claim appropriative, riparian, prescriptive or adjudicated rights (Decree entered May 12, 1921, in the Superior Court of the State of California, in and for the County of San Mateo in Civil Case No. 4807 entitled Mary A. Tobin v. Henry Ward Brown et al.), allege that the proposed appropriation may so deplete the already limited supply of water in the stream that they will be unable to divert the water to which they are entitled; that water is used mainly for stock-watering, irrigation, domestic and, in the case of protestants John S. Gay and Mary A. Gay, also for fish culture purposes.

Answers to Protests

The original applicant, Western Slope Land Corp., answered each of the protests in substantially the same language stating in substance that it has acquired considerable property to which water was allotted by the above-mentioned decree; that the applicant desires to "establish" those rights by a new appropriation; that it is not the intention of the applicant to cut off all the water from the stream; that it proposes to use the water in such a manner that property owners along the stream who have rights by decree or established use will continue to have water available in the amount of those rights; and that the protestants and their tenants will continue to have the water to which their rights entitle them.

Hearing

Application 16162 having been completed in accordance with the provisions of the Water Code and applicable administrative rules and regulations of the State Water Rights Board (hereinafter referred to as the "Board"), was set for public hearing under the provisions of the California Administrative Code, Title 23, Waters, before the Board on Thursday, June 19, 1958, in Redwood City, California. Of the hearing the applicant and protestants were duly notified. The following discussion is based upon evidence received at the hearing and written matter submitted by John S. Gay thereafter in accordance with a stipulation of the parties made at the hearing.

Watershed

San Pedro Creek is formed by the junction of its north, middle, and south forks in the SW $\frac{1}{4}$ of Section 13, T4S, R6W, as projected into San Pedro Rancho and flows in a general north-westerly direction about two miles across San Pedro Valley to the Pacific Ocean. All of the protestants with the exception of John S. and Mary E. Gay are located on this reach of the stream. South Fork San Pedro Creek heads near the south line of Section 24, T4S, R6W, at an elevation of about 1,100 feet on the northwest slope of Whiting Ridge and flows northerly about 1.5 miles to the above-mentioned junction.

The source specified in Application 16162, an unnamed spring, rises in the NE $\frac{1}{4}$ of SW $\frac{1}{4}$ of said Section 24 near the headwaters of South Fork San Pedro Creek, and is the principal source

of supply to the South Fork San Pedro Creek during the dry season. Protestants Gay obtain their water supply from South Fork San Pedro Creek at a point approximately 0.5 mile downstream from the spring.

Adjudication of San Pedro Creek

Water rights on San Pedro Creek were defined by the Superior Court in and for the County of San Mateo in decree entered May 12, 1921, in Case No. 4807 "Mary A. Tobin v. Henry Ward Brown, et al.". The case was referred to the State Water Commission in 1917 as referee and the matter was concluded by a stipulated judgment (applicant's Exh. 2).

Essentially, the decree provided that 0.04 cubic foot per second of the flow must proceed downstream to serve the lands then belonging to Mary J. E. Cryan and J. J. Rooney with equal quantity to each. The remaining flow was to be diverted at a point upon the Cryan property into a flume or ditch and distributed to the various parties included in the decree upon the basis of a given number of hours of the full flow each week for irrigation and domestic purposes.

The record protestants to Application 16162 collectively own some 37% of the land originally included in Decree No. 4807 (Exh. I of applicant's Exh. 4). Most of the remaining land which was formerly irrigated has been subdivided and is occupied by residences and commercial buildings of the community of Pedro Valley (staff Exh. 6) and none of the present users of water are operating on a rotation basis as set forth in the decree but instead take water at such times as their requirements demand (R.T. p. 184).

Proposed Stipulation

During the course of the hearing a stipulation (R.T. pp. 236, 237) was offered by the applicant which provided that permit may be issued for diversion of water from the unnamed spring only during such time as surface flow exists in San Pedro Creek at State Highway 1 crossing some 700 feet upstream from the ocean. All of the record protestants with the exception of John S. and Mary E. Gay were agreeable to the stipulation (R.T. p. 237). Mr. Gay contended that the stipulation as proposed carries no assurance of an adequate water supply in South Fork San Pedro Creek to meet their requirements.

Rights of John S. and Mary E. Gay to the Use of Water of South Fork San Pedro Creek

Protestants Gay claim rights to the use of water from South Fork San Pedro Creek (1) as permittee under Permit 10263 (Application 15827) issued by the former State Engineer, predecessor of this Board, (2) as successor in interest of a portion of the right of the Mary J. E. Cryan property under Decree No. 4807 (protestant's Exhs. 4 and 5) and (3) as a riparian owner. These claims are discussed in the order presented.

1. Condition 9 of Permit 10263 provides that appropriation of water for fish culture purposes is subject to future appropriations of the water for domestic or irrigation purposes. In view of this provision, the permit does not bar approval of the subject application.

2. Regarding the alleged right under the decree, counsel for Mr. Gay argues (R.T. p. 12) that as Decree No. 4807 distributed

the entire production of the stream system no unappropriated water is currently available for appropriation. The applicant contends (applicant's brief of August 28, 1958) that the existence of unappropriated water must be determined in light of present conditions and not by conditions that existed some 37 years ago when the decree was entered.

The record is not clear as to the proportion of the Cryan decreed right which was subsequently acquired by the Gays. However, the decreed right of the entire Cryan property amounted to only 0.02 cubic foot per second of continuous flow, plus 8 hours per week of the entire flow of the south fork. The Gays, as successor in interest to only part of the Cryan property, could not at most claim rights under the 1921 decree in excess of those decreed to the entire Cryan property. As will be discussed hereinafter, these amounts fall far short of the quantity of water which the Gays are using and claims a right to use as a basis for their protest to Application 16162. As previously stated, evidence shows that the rotation schedule originally established by the decree has been discontinued (R.T. p. 151).

3. The applicant questions the validity of the riparian right claimed by the Gays. Three elements are essential to establish such right; (a) the land must be contiguous to the stream or natural watercourse, (b) the land must be within the watershed, and (c) the land's riparian status must not have been lost by severance. Although Mr. Gay made no announced attempt at the hearing to prove the validity of the alleged riparian right, the Board is satisfied in view of evidence (applicant's Exh. 3, protestants' Exhs. 4 and 5 and staff Exh. 5) that such a riparian right does in fact exist.

The owner of riparian land has a paramount right, as against an applicant for a permit to appropriate water, to all the water of the stream which he can put to reasonable beneficial use upon his riparian land. This is the measure of the riparian right of the Gays unless it is limited in some manner. Several reasons and circumstances taken together cause the Board to conclude that the Gays' present riparian right is not so limited by the 1921 decree. In the first place, the decree would no more than determine the correlative share in the water of the stream of the parties to the action, each as against the others. It did not purport to determine the rights of the parties as against strangers to the action nor, as against such strangers, would it limit the parties' entitlement to use water for beneficial use on riparian land.

Secondly, the rotation procedure prescribed in the decree has been abandoned.

In the third place, there has been a great change in the character of land usage in the San Pedro Valley, with housing subdivisions replacing farms and only a minor portion of the lands subject to the decree using water for irrigation purposes at the present time. To the extent water is not used pursuant to the decree by any of the parties thereto, it is available for use by other parties to the action by virtue of their ownership of riparian lands and if a surplus exists in excess of such rights, it may be appropriated by the applicant.

In summary on the point, the Board concludes that a riparian right still attaches to the Gays' land and that the

existence of unappropriated water in South Fork San Pedro Creek must be considered in the light of the Gays' reasonable water requirements as well as the reasonable requirements of the other prior right holders on the main stem of the stream. The Board's determination of these matters is necessarily for its own guidance in acting on the application and does not constitute an adjudication of water rights such as would only be obtained by appropriate court action.

Existence of Unappropriated Water

Staff Exhibit 7* indicates that the average annual rainfall on the San Pedro Creek watershed totals 17,963 acre-feet with actual runoff amounting to an estimated 28% of this total, or about 5,000 acre-feet. According to engineer Bruce H. Collins, witness for the protestants represented by Attorney Hopkins, the rainfall and runoff characteristics of San Pedro Creek are similar to those of Pescadero Creek, which drains a portion of the westerly slopes of San Mateo County about 25 miles to the south. The United States Geological Survey has maintained a continuous stream gaging station on Pescadero Creek since 1951. Assuming that the distribution of monthly runoff of Pescadero Creek as determined from the Water Supply Paper of the United States Geological Survey (staff Exh. 4) is comparable to that of San Pedro Creek as contended by Mr. Collins, it would be reasonable to expect, on the basis of Staff Exhibits 4 and 7, that during a year of normal precipitation

*Report by University of California, Agricultural Extension Service, entitled, "Agriculture, Population Increase, and Water Problems in San Mateo County", dated January 1956.

the following average monthly runoff in cubic feet per second of the watershed of San Pedro Creek would be:

| Oct | Nov | Dec | Jan | Feb | Mar | Apr | May | Jun | Jul | Aug | Sept |
|-----|-----|------|------|-----|------|-----|-----|-----|-----|-----|------|
| 0.5 | 1.0 | 13.8 | 28.4 | 9.8 | 17.9 | 5.9 | 2.6 | 1.3 | 0.8 | 0.6 | 0.4 |

Streamflow measurements of San Pedro Creek at a point about 1,000 feet upstream from the ocean were made during the period of June 7, through June 17, 1958, by the engineering firm of McCandless and Jett (applicant's Exh. 4). Based upon those measurements that firm estimated that some 1.7 million gallons per day flowed into the ocean from San Pedro Creek during the June 7 - June 17, 1958, period. McCandless and Jett also determined that during the same period some 66% of the runoff of the entire watershed originated in the South Fork San Pedro Creek. Assuming that the flow relationship determined by McCandless and Jett were to prevail year-round, from the foregoing tabulation the following average monthly runoff in cubic feet per second would be expected to occur in South Fork San Pedro Creek during a year of normal rainfall.

| Oct | Nov | Dec | Jan | Feb | Mar | Apr | May | Jun | Jul | Aug | Sept |
|-----|-----|-----|------|-----|------|-----|-----|-----|-----|-----|------|
| 0.3 | 0.6 | 9.0 | 18.5 | 6.4 | 11.6 | 3.8 | 1.7 | 0.8 | 0.5 | 0.4 | 0.3 |

Engineer Sprague McCandless estimated that the bulk of the water in the South Fork San Pedro Creek during the summer months originates from the unnamed spring, source under Application 16162 (R.T. p. 85). As previously stated, use of water by

protestants Gay is for commercial fish culture purposes. Such a use requires a continuous and somewhat uniform flow of water, the amount of which depends upon the number and size of fish being maintained. Mr. Gay has set forth in his statement of July 24, 1958, further supported by a statement of September 23, 1958, the estimated minimum water requirements by months to maintain their operation at the present or anticipated level. According to Mr. Gay, their minimum monthly water requirements, in terms of cubic feet per second, are as follows:

| <u>Month</u> | <u>Gays Estimated Requirements in cfs</u> | <u>Estimated Average Monthly Flow in cfs South Fork San Pedro Creek</u> | |
|--------------|---|---|-----------|
| | | <u>*</u> | <u>**</u> |
| Oct. | 0.8 | 0.3 | 0.5 |
| Nov. | 0.9 | 0.6 | 0.6 |
| Dec. | 0.9 | 9.0 | 0.8 |
| Jan. | 1.1 | 18.5 | 1.1 |
| Feb. | 1.1 | 6.4 | 1.1 |
| Mar. | 1.3 | 11.6 | 1.0 |
| Apr. | 1.3 | 3.8 | 0.9 |
| May | 1.1 | 1.7 | 0.6 |
| June | 1.1 | 0.8 | 0.6 |
| July | 0.8 | 0.5 | 0.5 |
| Aug. | 0.8 | 0.4 | 0.5 |
| Sept. | 0.8 | 0.3 | 0.5 |

No other information concerning the reasonable requirements of the Gays has been presented and it is accepted as approximately correct.

The Board believes that the estimated flow of South Fork San Pedro Creek as determined from the flow records of Pescadero Creek is probably more accurate, particularly during the winter and spring months, in view of the precipitation pattern in the area.

*Estimated flow as determined by correlation with measured flow of Pescadero Creek.
 **Estimated flow by applicant based upon 1957 stream measurements (applicant's Exh. 4).

According to the climatological data of the United States Weather Bureau (staff Exh. 8) some 70% of the annual rainfall normally occurs during the 4 month period of December through March, and on the basis of the foregoing it is apparent that water in excess of Gays' requirements cannot reasonably be anticipated except during the period of December through May.

Use of water for fish culture purposes is a beneficial and lawful riparian use of water and as against a subsequent appropriator the riparian owner is entitled to whatever quantity is reasonable and necessary for such operation. Should his requirements leave an insufficient quantity in the stream to satisfy the needs of an appropriator, recourse would be for the appropriator to divest the riparian land of its right by whatever legal means are available or to seek an alternate source of supply. The Board cannot subordinate a valid riparian right to a subsequent appropriator merely because the proposed use of water by the latter is of a higher priority as defined by the Water Code (Section 106).

Other Considerations

Mr. David R. Blain, on behalf of himself and 77 other owners of property allegedly abutting on San Pedro Creek downstream from the applicant's proposed point of diversion submitted a written objection at the hearing (protestants' Exh. 9) and testified to the effect that any depletion of the flow of San Pedro Creek (1) will be a threat to the health and welfare of those parties because of the possible accumulation in the creek bed of overflow from the sanitary sewers of the community of Pedro Valley, (2) will depreciate the values of their homes which were purchased

at a price greater than other homes in the area because of the aesthetic value of a live stream flowing nearby, (3) will eliminate the recreational fishing value of the stream, and (4) will infringe upon their water rights as successors in interest to portions of the property of various parties under the aforementioned Decree No. 4807 (R.T. pp. 224-227).

In the absence of protest from the California Department of Fish and Game and a lack of showing in the record in support of alleged adverse effect on fish in the stream, the Board must conclude that the proposed appropriation will not be detrimental to fishlife. The use of water upstream by the Gays is substantially non-consumptive and will be immediately returned to the stream. So long as sufficient flow is maintained to meet the Gays' requirements, together with the runoff from the other tributaries, it is extremely doubtful that diversion allowed to the applicant will create any of the problems cited by Mr. Blain.

A number of legal issues were raised at the hearing by Attorney Levy in addition to those discussed in this decision. The Board has considered such issues and concludes that they are either without merit or that in view of the disposition herein made it is unnecessary to decide them.

Summary and Conclusions

All of the record protestants with the exception of John S. and Mary E. Gay stipulated that permit may be issued to the applicant, provided diversion thereunder is limited to those periods and to the extent that water wastes into the Pacific Ocean.

Although such a condition would undoubtedly safeguard the rights and consumptive use requirements of those parties, the Board recognizes that further consideration must be given if the Gays are to enjoy full benefit of the use of water which their riparian right affords; first, because they are located on only one of several streams contributing to the outflow of San Pedro Creek and second, because their water uses are non-consumptive and the existence of surface flow below their property does not necessarily indicate that their requirements are being satisfied.

The evidence indicates and the Board finds that unappropriated water normally exists in the source named in Application 16162 during the period of December through May, that water may be taken during this period and used in the manner proposed by the applicant without interference with the exercise of any prior rights. The Board further finds that under present conditions unappropriated water is normally nonexistent during the period of June through November and that Application 16162 should be denied insofar as it relates to diversion during that period. In view of this disposition of the application a condition limiting diversion to the period that water wastes into the ocean would be superfluous.

ORDER

Application 16162 for a permit to appropriate unappropriated water having been filed, protests having been submitted, a hearing having been held by the Board and said Board having considered all of the evidence received at said hearing and now being fully informed in the premises:

IT IS HEREBY ORDERED that Application 16162 be, and the same is, hereby approved in part, and that a permit be issued to the applicant subject to vested rights and to the following terms and conditions, to wit:

1. The amount of water appropriated shall be limited to the amount which can be beneficially used and shall not exceed 0.47 cubic foot per second from about December 1 of each year to about May 31 of the succeeding year.

2. The maximum amount herein stated may be reduced in the license if investigation so warrants.

3. Actual construction work shall begin on or before June 1, 1960, and shall thereafter be prosecuted with reasonable diligence, and if not so commenced and prosecuted, this permit may be revoked.

4. Said construction work shall be completed on or before December 1, 1962.

5. Complete application of the water to the proposed use shall be made on or before December 1, 1963.

6. Progress reports shall be filed promptly by permittee on forms which shall be provided annually by the State Water Rights Board until license is issued.

7. All rights and privileges under this permit including method of diversion, method of use and quantity of water diverted are subject to the continuing authority of the State Water Rights Board in accordance with law and in the interest of the public welfare to prevent waste, unreasonable use, unreasonable method of use or unreasonable method of diversion of said water.

Insofar as Application 16162 seeks diversion from about June 1 to about November 30 of each year, the same is hereby denied.

Adopted as the decision and order of the State Water Rights Board at a meeting duly called and held at _____, California, on this _____ day of _____, 1959.

Henry Holsinger, Chairman

W. P. Rowe, Member

Ralph J. McGill, Member