

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

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In the Matter of Application 5245 by Bank of Italy as Trustee  
for A. K. Detwiler to appropriate from an unnamed spring  
tributary to Ward Creek and Application 12-5859 by  
Ward Creek Water Company to appropriate from  
Ward Creek, In Placer County, California,  
for Domestic, Irrigation and Recreational  
Purposes

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DECISION NO. A 5245, 12-5859 D-227

Decided: *May 6, 1929.*

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APPEARANCES AT HEARING HELD JUNE 19, 1928.

For Applicants

Bank of Italy as Trustee for  
A. K. Detwiler

Arthur Huston of Huston, Huston  
& Huston, Attorneys at Law

Ward Creek Water Company

R. I. Lipman of McCutchen, Olney,  
Mannon & Green, Attorneys at Law

For Protestants

William Kent, and  
Ward Creek Water Company

R. I. Lipman of McCutchen, Olney,  
Mannon & Green, Attorneys at Law

Grace R. and Wm. E. Briggs

R. T. Devlin of Devlin & Devlin,  
Attorneys at Law

Bank of Italy as Trustee for  
A. K. Detwiler

Arthur Huston of Huston, Huston  
& Huston, Attorneys at Law

State of California, Department of  
Natural Resources, Division of Fish  
and Game

J. Spencer

EXAMINER: Everett N. Bryan, Deputy Chief of the Division of Water Rights, for  
Harold Conkling, Chief of Division of Water Rights.

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## O P I N I O N

These applications are for appropriations of water from an unnamed spring tributary to Ward Creek and from Ward Creek itself, both being tributary to Lake Tahoe in Placer County, California.

The main features of the applications are as follows:

Application 5245 was filed on October 26, 1926. It proposes an appropriation of 0.75 cubic foot per second from an unnamed spring for recreational, domestic and irrigation purposes at Tahoe Park, a summer home subdivision at Lake Tahoe.

It was protested by William Kent, Ward Creek Water Company, Grace R. and William E. Briggs and State of California, Department of Natural Resources, Division of Fish and Game.

Application 12-5859 was filed on March 16, 1928, under Section 12 of the Water Commission Act, being an application for certificate fixing time of completion of an appropriation of water initiated prior to December 19, 1914.

It proposes an appropriation of 1.0 cubic foot per second from Ward Creek for domestic and irrigation use at about 250 summer homes at Lake Tahoe.

It was protested by Grace R. and William E. Briggs, Bank of Italy as Trustee for A. K. Detwiler and State of California, Department of Natural Resources, Division of Fish and Game.

These applications were completed in accordance with the Water Commission Act and the requirements of the Rules and Regulations of the Division of Water Rights, and being protested were set for a public hearing at 707 Forum Building, Sacramento, at 10:30 o'clock A.M. on June 19, 1928. Of this hearing applicants and protestants were duly notified and appearances were made on behalf of each.

The protest of William Kent was filed on September 10, 1927, and was directed against Application 5245. It is based upon ownership of 142 acres of claimed riparian land lying to the North of Ward Creek and adjacent to the place of use described in Application 12-5859. The protest states that these claimed riparian lands "have not been developed and the waters of Ward Creek have not been used thereon". The protestant acquired the property during 1907.

No evidence was presented at the hearing indicating that water had been used on the land or was proposed to be used except that a small portion of the land was eventually proposed to be served by the Ward Creek Water Company under its Application 12-5859.

The Division of Water Rights operates under the provisions of the Water Commission Act and is compelled to observe the provisions thereof. Section 11 of the Act provides in part that--

"If any portion of the waters of any stream shall not be put to a useful or beneficial purpose to or upon lands riparian to such stream for any continuous period of ten consecutive years after the passage of this act, such non-application shall be deemed to be conclusive presumption that the use of such portions of the waters of such stream is not needed upon said riparian lands for any useful or beneficial purpose; and such portion of the waters of any stream so nonapplied, unless otherwise appropriated for a useful and beneficial purpose is hereby declared to be in the use of the state and subject to appropriation in accordance with the provisions of this act."

It therefore appears that this protest is without merit and should not stand as a bar to the issuance of permit upon Application 5245. If in fact the protestant has a valid riparian claim it appears he will be sufficiently protected by the issuance of a permit expressly subject to all vested rights, and that a present appropriation should not be denied because of a possible future riparian use which is prospective only.

The protest of the Ward Creek Water Company against Application 5245 was filed on September 10, 1927. It is based on rights initiated during 1907 and 1914 and the claim that no unappropriated water exists in Ward Creek during the summer months or period of low flow.

Subsequent to the filing of this protest the water company filed Application 12-5859 in which a certificate under Section 12 of the Water Commission Act is sought fixing the time of completion of an appropriation of water made prior to December 19, 1914. Although the amount of the appropriation named in Application 12-5859 is 1.00 cubic foot per second the Ward Creek Water Company in its opening brief and through witnesses at the hearing definitely admitted that its requirements amount to approximately 0.42 cubic foot per second only.

From testimony of protestant's witnesses and protestant's briefs it further appears that in years of normal runoff the quantity of water available in Ward Creek during the low flow period of the year would be about 1.50 cubic feet per second or 1.08 cubic feet per second in excess of the protestant's claimed requirements.

It therefore follows that, insofar as this protest is concerned, unappropriated water exists during normal years and since all permits issued by the Division of Water Rights are issued expressly subject to vested rights the protestant is sufficiently protected during subnormal years without denial of Application 5245.

The protest of Bank of Italy as trustee for A. K. Detwiler against Application 12-5859 was filed on May 24, 1928. It is based on the claim that the applicant has not exercised due diligence in putting to beneficial use the

quantity of water appropriated in 1914. The protestant further contends that the applicant proposes to increase the area to be served beyond its original intent with a consequent increase in quantity of water required which would tend to reduce the quantity of water otherwise unappropriated and available for appropriation.

The applicant has through witnesses at the hearing and subsequent briefs, definitely shown that at the time of its 1914 water filing and prior thereto at the time of a filing in 1907 additional lands were eventually proposed to be served by it. It appears conclusively that the plan was to serve not only the then members of Ward Creek Water Company but also to serve those adjacent lands which were susceptible of service by the works then planned. And no evidence was introduced of a departure from the plan of that time.

The protestant's contention that the applicant has not exercised due diligence toward completing beneficial use of the water is not sufficiently supported by the evidence to bar issuance of a certificate to the applicant. The evidence presented in this connection shows that the increase in the use of water, area served, and population has been very slow but nevertheless fairly constant. We must take cognizance of the fact that such an undertaking is not in the nature of a commercial development and that progress is quite generally slow and continued over a long period of years before complete.

At the time of the hearing and in subsequent briefs the applicant has definitely fixed the amount of its requirements at 0.42 cubic foot per second which is considerably less than the original amount covered by its application and about twice the maximum amount put to beneficial use by it

prior to the time of the hearing. Although this proposed increase in use will, as protestant contends, decrease the quantity available for protestant's use, the flow in Ward Creek during the period of low flow in a normal year was described as stated above by both protestants' and applicants' witnesses as being about 1.50 cubic feet per second which is 1.08 cubic feet per second in excess of the prior applicant's requirements and 0.33 cubic foot per second in excess of the combined requirements of the two applicants.

The protest of Grace R. and William Ellery Briggs was filed on October 20, 1927, against Application 5245 and on May 18, 1928, against Application 12-5859. It is based on a claimed riparian right which has been exercised since 1900 and the contention that no unappropriated water exists in Ward Creek. The claim is also made that any additional diversion will destroy the beauty of the stream and the fishing.

One of the functions of the Division of Water Rights is to regulate the initiation of rights to appropriate water thus facilitating development of the unused waters of the state, and the Water Commission Act under which this office functions indicates the various purposes for which water may be appropriated designating use of water for domestic purposes as the highest and most beneficial use. The uses proposed by these applicants are higher uses than the retention of water in a stream bed for beautification purposes or as an aid to fishing. In the latter connection it may be stated that no statutes or constitutional provisions of this state have been pointed to or found which may reasonably be construed as even implying that water appropriations are to be denied in favor of fish protection.

It appears, therefore, that this portion of the protest may be dismissed as being without sufficient merit to deny approval of these applications.

It was established by witnesses at the hearing as stated above that the combined proposed diversions by the applicants total 1.17 cubic feet per second which is 0.33 cubic foot per second less than the low flow during a normal year.

The quantity of water used by the protestants is not definitely known but was roughly estimated by a witness for the applicant under Application 5245 at 0.06 cubic foot per second which is considerably less than the quantity available to protestants in a normal year. Assuming, however, that the protestants' use is five times this amount, or 0.30 cubic foot per second, there would still be during a normal year sufficient water available to meet the protestants' requirements.

The fact that all applications before the Division of Water Rights are approved especially subject to vested rights would appear to furnish the protestant with adequate protection during years of subnormal flow in Ward Creek.

The protest of the State of California, Department of Natural Resources, Division of Fish and Game was filed on January 3, 1928, against Application 5245 and it was requested by protestant during the course of the hearing that it be considered as applying also to Application 12-5859.

It is based upon claimed prior rights and use of the waters of Ward Creek for fish propagation and fish passage down stream to Lake Tahoe.

From the statements of witnesses it appears that there is plenty of water and creek for the fish to propagate in above the confluence of the spring water and Ward Creek, that the appropriators will quit using about the time of each year when the fish will be ready to go downstream into the lake and will not then be diminishing the flow which is needed to make a medium of conveyance for the fish, that, in any event, there will be no interference with fish propa-

gation or rather with any right of way for fish passage that may exist in favor of the Division of Fish and Game until the time comes for the fish to go down into the lake and that that time will be late in the season and that even if the appropriators are still using when that time arrives, and even if there exists in law a right in the Division of Fish and Game to stop diversions which deplete waters necessary to supply a medium for fish travel, nevertheless, there is no justification for denying the appropriators the right to use during nearly an entire season when the fish do not swim down to the lake and the Division of Fish and Game does not want them to do so.

Whether or not the Division of Fish and Game has a legal right to the maintenance of a stream intact for fish passage as against would be appropriators is considered very doubtful. The Water Commission Act does not provide for a dedication of waters for fish passage or in any wise indicate that waters shall be withheld from appropriation in order to supply fish with a medium of travel.

The Division of Fish and Game is authorized to protect fish as provided in Section 642 of the Political Code which enumerates its powers and duties but nothing therein contained confers unlimited power to protect fish or authorizes the nullification of the Water Commission Act or declares fish protection to be the prime consideration in the event of its conflict with other provisions of law. Indeed that section states that the Division of Fish and Game shall see "that the laws for the protection and preservation of \*\*\*fishes\*\*\*are strictly enforced." Thus the legislature seems to have limited the Division of Fish and Game to powers and duties enumerated in this section and in other sections such as 626 to 637 $\frac{1}{2}$  of the Penal Code.

In this connection Sections 636c and 637 provide the alternatives afforded the Division of Fish and Game in the event that it is deemed that fishways cannot be constructed which will serve the purpose of fish travel over or around a dam. The alternatives are to require erection of a fish hatchery or the planting of fish and not to prohibit the building of a dam or the appropriation of water thereby. Certainly such provisions of law do not declare and are not tantamount to declarations that the maintenance of rights of way for fish migration shall be of paramount importance and that appropriations of water to beneficial uses shall be subject thereto and shall be denied if they interfere therewith.

On the other hand the history of the appropriative doctrine in California is such as to cause the belief that the right to appropriate unappropriated water is not to be denied except as clearly and definitely provided by legislative mandate and the rule of law that "it is not to be presumed that the legislature in the enactment of statutes, or the people in the adoption of laws, intend to overturn long established legal principles, unless such intention is made to clearly appear by express declaration or by necessary implication" seems to apply. (Follette v. Pacific Light and Power Corporation, 189 Cal. 193, 208 Pac. 295; In re Garcelon, 104 Cal. 570, 584; Boyd v. U. S., 116 U. S. 616, Abbey v. Board of Directors, 58 Cal. App. 757, 761.)

In cases wherein the right of appropriation has been affected the legislature has specifically provided therefor as in the case of Section 2a of the California Irrigation District Act, Stats. 1917, p. 755 and Initiative Measure No. 11, Statutes of 1925, p. XCIII.

In view of the very doubtful authority of the protestant to prohibit appropriations in favor of fish rights of way and of the Division of

Water Rights to deny or restrict would be appropriators on account of such an interference, it is believed that protestant should be left to take such independent action as it may have authority to take in protecting fish propagation or rights of way in the event that there develops an actual interference which cannot be readily adjusted between the protestant and the appropriators. Especially is such a decision advisable in a case wherein the probability of interference is uncertain and will be for a short time only in each year if it occurs at all.

As to Application 12-5859 it may be that the right initiated thereunder and since maintained is of a priority anterior to the time when the Division of Fish and Game began the propagation of fish in Ward Creek. If so it would seem that the rights of said applicant were sufficiently vested prior to the entry of the Division of Fish and Game to entitle it to continue to completion regardless of the resulting effect on fish propagation activities subsequently commenced.

This brings us to the contention that the Division of Fish and Game occupies the status of an appropriator of the stream for fish propagation and transportation. Under the requirements declared necessary to constitute an appropriation, contained in such cases as Robinson v. Schoenfeld, 218 Pac. 1041; Lake Shore Duck Club v. Lake View Duck Club, 166 Pac. 311; Town of Antioch v. Williams Irr. Dist., 188 Cal. 451, 205 P. 688; and Schodde v. Twin Falls L. & W. Co., 32 Sup. Ct. Rep. 479, the mere planting of fish in a stream certainly does not constitute a sufficient exclusive possession and control of the water therein to constitute an appropriation thereof. The question as to whether water may be appropriated for fish propagation is not in issue. A use of water for fish propagation may be a beneficial use for which water may be appropriated.

(2 Kinney 1205, Par. 700; Smith Canal Co. v. Colo. Ice etc. Co., 82 Pac. 940, Ex parte Elam, 6 Cal. App. 233, 91 Pac. 811; and State v. Barker, 108 Pac. 352).

But the facts herein go to the point whether or not a planting of fish in a stream constitutes an appropriation thereof and we can find no cases wherein any such act has been held an appropriation (a taking) of water for beneficial use. The Division of Fish and Game has not diverted or controlled the waters in question or applied them to use and said waters have continued to flow as in a course of nature they have been wont to do from time immemorial.

In support of its claim as an appropriator the Division of Fish and Game relies upon Section 25 $\frac{1}{2}$  of Art. IV of the constitution which provides that the legislature may divide the state into fish and game districts and enact laws for the protection of fish and game therein. But no laws of the legislature under this constitutional authority are set forth which authorize the reservation of streams from appropriation for fish protection and propagation and wherein this legislative authorization declares any such power to exist in the discretion of the Division of Fish and Game is not apparent. In fact the "obvious purpose of this amendment was to remove the former restriction of Article 4, #25, subd. 33\*\*\*\* it increases the legislative discretion by authorizing local laws on the subject." (Paladini v. Superior Court, 178 Cal. 372, 173 Pac. 588; Ex parte Marinovich, 48 Cal. App. 482, 192 Pac. 156.)

Evidently in support of an appropriation or a legislative reservation from appropriation the Division of Fish and Game has submitted as an exhibit an order closing the stream in question to trout fishing. Wherein such an order is of any support as constituting or assisting to constitute an appropriation of water or reservation of water from appropriation is not apparent.

Finally the Division of Fish and Game urges that an appropriation of water from this stream is against public policy and constitutes a nuisance in that it will destroy the property of the people in fish.

A sufficient answer to all of these contentions is that historically the doctrine of free appropriation of unappropriated waters is not ante-dated by fish protection provisions and no statutes or constitutional provisions of this state have been pointed to or found which may be reasonably construed as even implying that water appropriations are to be denied in favor of fish protection. Certainly it would require an explicit legislative mandate to justify the Division of Water Rights in denying an application to appropriate on the ground that fish would be interfered with by reason of a depletion of water. Nor is the Division of Water Rights inclined to attempt decisions as to whether fish protection is of paramount public concern. Such a decision as to public policy and welfare is properly a matter for legislative decision and until such time as a definite legislative pronouncement is made, the Division considers itself without authority to deny applications on the basis of interference with fish life.

As to the quotation from Sec. 1 of Chap. 889 of the Statutes of 1921, the subject matter of the act of which that section is a portion is too foreign to the subject of fish protection to render it pertinent to the present inquiry. In fact it is an act to foster investigations to facilitate diversions and appropriations of water and not to restrict or limit them and to that extent is opposed to the contentions of protestant Division of Fish and Game.

If any constitutional and statutory provisions are in point the following should also be taken into consideration:

Sec. 1, Art. XIV of the constitution: "The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state, in the manner to be prescribed by law."

Sec. 17 of the Water Commission Act - "any person, firm, association or corporation may apply for and secure from the State Water Commission, in conformity with this act and in conformity with reasonable rules and regulations adopted from time to time by the State Water Commission, a permit for any unappropriated water."

Sec. 15'\*\*\*\* It is hereby declared to be the established policy of this state that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation\*\*\*\*".

In the case of Tulare Water Company v. State Water Commission, 187

Cal. 533, 202 Pac. 874, the Supreme Court says:

"The commission surely does not possess and could not be invested with power to arbitrarily deny an application made in conformity to the law for the appropriation of water that was subject to appropriation.

"The purpose of the act is clearly to permit any person or corporation desiring to make any of the enumerated beneficial uses of waters of the state, not otherwise utilized, to avail itself of this right of appropriation.

"Under the law in force prior to the adoption of this act (Civ. Code. Secs. 1410-1422) no permission was required for the appropriation of waters of the state. All that was required to create a preferential right to such water was to actually appropriate it to some authorized beneficial use, or to make a water filing to be followed with due diligence by an actual user.

"The obvious aim of the Water Commission Act was not to abolish, but to regulate and administer, this privilege."

Nor is the appropriation of water per se a nuisance.

It is therefore concluded that the Division of Water Rights has not the authority to deny appropriations upon the mere basis that fish life will

be imperiled by depletion of supply and that the Division of Fish and Game has not appropriated the flow of the stream in question from the point it plants fish to Lake Tahoe or otherwise appropriated the waters of Ward Creek.

Nor does it appear that a police power has been vested in the Division of Fish and Game which authorizes it to enjoin such diversions of water for beneficial uses as it deems inimical to fish life, but, if so, the issuance of permits to appropriate by the Division of Water Rights will not prevent the exercise of such an authority by said division.

It accordingly appears that protestant's claim of right as an appropriator is without basis in fact and cannot be urged as cause for denial of Applications 5245 and 12-5859.

O R D E R

Application 5245 for a permit to appropriate water and Application 12-5859 for a certificate under Section 12 of the Water Commission Act having been filed with the Division of Water Rights as above stated, protests having been received, a public hearing having been held, and the Division of Water Rights now being fully informed in the premises:

IT IS HEREBY ORDERED that said Application 5245 be approved and that a permit be granted to the applicant subject to such of the usual terms and conditions as may be appropriate; and

IT IS HEREBY FURTHER ORDERED that there be issued to the Ward Creek Water Company responsive to its said Application 12-5859, a certificate of diligence in the appropriation of not to exceed forty-two hundredths (0.42) cubic foot per second under a notice of appropriation filed with the recorder of Placer County, California, on June 27, 1914, and recorded at page 427 et seq

of Book B of Water Rights of said county, and that the time within which the water will be completely applied to the proposed use under said appropriation shall terminate January 1, 1939.

Dated at Sacramento, California, this *6* day of *May*, 1929.

Harold Conkling  
(Harold Conkling)  
CHIEF OF DIVISION OF WATER RIGHTS

ASW:  
ENB:MP  
SEB: