

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 12633 by Stephen Cuneo and George Cuneo to Appropriate Water from Owens Creek, Application 12634 by Stephen Cuneo and George Cuneo to Appropriate Water from Duck Slough, Application 12635 by W. F. Roduner and Rachael Roduner to Appropriate Water from Owens Creek and Duck Slough and Application 13071 by Turlock Land and Cattle Company to Appropriate Water from Duck Slough, all in Merced County and for Irrigation Purposes.

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Decision A. 12633, 12634, 12635, 13071 D. 710

Decided August 6, 1951

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APPEARANCES AT HEARING HELD AT MERCED, DECEMBER 12, 1950 and
FEBRUARY 15, 1951:

For the Applicants

Stephen Cuneo and George Cuneo)	A. E. Chandler
W. F. Roduner and Rachael Roduner)	
Turlock Land and Cattle Company	Nathan McVay

For the Protestants

Stevinson Water District)	Wallace Sheehan
East Side Canal and Irrigation)	
Company)	
Mary Crane)	W. Eugene Craven
Mary Emma Crane Smith, Executrix)	
George S. Bloss, Jr.	H. K. Landrum

EXAMINER-GORDON ZANDER, Principal Hydraulic Engineer, Division of Water Resources, Department of Public Works, for A. D. EDMONSTON, State Engineer.

Also Present-Lawrence C. Spencer, Assistant Hydraulic Engineer, Division of Water Resources.

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OPINION

General Description of the Proposed Developments

Application 12633 contemplates the appropriation of 36 cubic feet per second, year-round, from Owens Creek, tributary via Bear Creek to San Joaquin River, for irrigation purposes. Three points of diversion are proposed, these being located respectively within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 15, the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 14 and the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 14, T8S R12E, MDB&M. Diversion is to be effected by a single structure, 8 feet high by 24 feet long, composed of concrete piers and wooden flashboards. The place of use is to be a pasture 2842.5 acres in extent located within Sections 14, 15, 16, 21 and 22 of the same township. According to the application another water right or source of water supply is claimed, the E $\frac{1}{2}$ of Section 21 and the N $\frac{1}{2}$ of Section 22 lying within the Merced Irrigation District.

Application 12634 contemplates the appropriation of 4 cubic feet per second, year-round, from Duck Slough, tributary via Owens Creek and Bear Creek to San Joaquin River, for irrigation purposes. Diversion is proposed at a point within the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 25, T8S R12E, MDB&M. The project includes a diversion structure, 7 feet high by 20 feet long, consisting of wooden flashboards supported on concrete piers. The place

of use is a net acreage of 313.4 acres of pasture located within the N $\frac{1}{2}$ of Section 25 of the same township. No other water right or source of water supply is claimed.

Application 12635 contemplates an appropriation of 29.5 cubic feet per second, year-round, from either Owens Creek or Duck Slough or from both of those sources. Water is to be diverted from Owens Creek at 3 points, lying within the SE $\frac{1}{4}$ NE $\frac{1}{4}$, the NE $\frac{1}{4}$ SE $\frac{1}{4}$ and the NE $\frac{1}{4}$ NE $\frac{1}{4}$ respectively of Section 16, T8S R13E, MDB&M, and from Duck Slough at a point within the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 21 of the same township. Diversion is to be effected on Owens Creek by a dam 6 feet high by 29 feet long, of steel rails and wooden flashboards, and on Duck Slough by a dam 8 feet high by 50 feet long, of the same general type. The place of use, 1237.1 acres in extent, lies within Sections 16 and 21 of the same township. Of that acreage 1120.6 acres are to be in rice and the remainder in pasture. The rice is to be irrigated from about April 1 to about November 1, the pasture, year-round. A right to 11.65 cubic feet per second from Duck Slough is also claimed.

Application 13071 contemplates an appropriation of 2 cubic feet per second, year-round, from Duck Slough. The water is to be diverted at a point within the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 27, T8S R12E, MDB&M by means of a structure - concrete piers and wooden flashboards - 5 feet high by 20 feet long. The place of use is to be a 120 acre pasture, located within the N $\frac{1}{2}$ of the same Section 27. No other water right or source of water supply is claimed.

Protests

George S. Bloss, Jr., protests applications 12633 and 12635 only. It is his contention that the appropriations sought in those applications may tend to interfere with and limit his rights to use of waters in Owens Creek and Duck Slough. He asserts a riparian right to use of waters from the streams mentioned by virtue of ownership of Sections 13, 14 and 15, T8S R13E and ownership of portions of Sections 23, 24, T8S R13E and Sections 20 and 29, T8S R12E. He states that he has diverted and beneficially used water from Owens Creek and Duck Slough in irrigating the lands described when water has been available. He also asserts an appropriative right under License 1518 to divert 20 cubic feet per second from Duck Slough at a point within the NE $\frac{1}{4}$ of the above mentioned Section 13. He describes his points of diversion on Owens Creek as consisting of a series of 9 dams on that stream in Sections 13, 14, 15 and 20. He states that his protest may be disregarded and dismissed if the applicants specifically recognize all of his rights to waters of Owens Creek and Duck Slough and disclaim any intention or desire to interfere with or encroach upon those rights.

Mary Crane protests Applications 12633, 12634 and 12635, asserting the belief that the appropriations therein sought will injure her by tending to interfere with and limit her claimed rights to the use of waters of Owens and Bear Creeks. She claims a riparian right by virtue of ownership of all portions of Sections 1, 2 and 12 of T8S R11E, and of Sections 26, 35 and 36 of T7S R11E, MDR&M. She claims that she and her predecessors in interest have for many years used water from the sources mentioned for

watering livestock and that in future water from the same sources may be used for the irrigation of grass and seasonal crops. She states that her protest may be disregarded and dismissed if the applicants specifically recognize her claimed rights and disclaim any intention or desire to interfere with them.

Mary Emma Crane Smith, Executrix of the estate of C. A. Crane, deceased, protests Applications 12633, 12634 and 12635, representing that appropriations under those applications will tend to interfere with and limit the rights of the estate mentioned to the use of waters of Owens Creek, Duck Slough and Bear Creek. She claims that the estate is entitled to divert waters of those streams by virtue of ownership of all or portions of Sections 7, 8, 17, 18, 19, 30, 31 and 32 of T8S R12E and Sections 2, 11, 12, 13, 14, 24 and 25 of T8S R11E, N3B3M, all of which she contends is riparian to the streams named. She states that water from those streams has been used beneficially on those lands for many years for stockwatering and that future use for irrigation of grass and seasonal crops is contemplated. She states that her protest may be disregarded and dismissed if the applicants specifically recognize the estate's claimed rights and disclaim any intention or desire to interfere with those rights.

The Stevinson Water District protests all four of the applications, representing that the appropriations sought therein will injure it by depriving it of waters to the use of which it claims to be entitled. It claims rights to divert from Owens Creek, based upon (1) a conveyance by Merced Irrigation District evidenced by the final decree, Superior Court in and for Merced County, entitled James J. Stevinson vs. Merced

Irrigation District, No. 6179, and (2) State Permits 5726 (Application 5724) and 5729 (Application 6111). It contends that such rights are superior to any right of the applicants except their riparian rights to a reasonable use of natural flow. It states that its rights as against the applicants' rights have been adjudicated by judgment rendered by the Superior Court in and for Merced County in actions entitled James J. Stevinson et al. vs. George S. Bloss, Jr., et al., Nos. 8960 and 8964, Stevinson Water District vs. J. R. Flynn, et al., No. 13135, and Stevinson Water District vs. Elsie A. Flynn, No. 13167, which judgments have become final; and in the actions entitled Stevinson Water District, et al. vs. Stephen Cuneo and George Cuneo, No. 17444 and Stevinson Water District et al. vs. W. P. Roduner and Rachael Roduner, No. 17445, judgments wherein have not yet become final. It claims to have used waters of Owens Creek and its tributaries for the irrigation of some 10000 acres, diversion therefor being made at the intersections of Owens Creek and Duck Slough with the main canal of the East Side Canal and Irrigation Company, and the acreage served lying within T6&7S R9E, T7&8S R10E and T7&8S R11E, MDE&M.

The East Side Canal and Irrigation Company also protests all four of the applications for reasons paralleling those advanced by the Stevinson Water District. In support of its protests it cites actions before the Superior Court in and for Merced County as follows: East Side Canal and Irrigation Company vs. George Bloss, Jr., et al., No. 8919, East Side Canal and Irrigation Company vs. J. R. Flynn et al., No. 13136,

East Side Canal and Irrigation Company vs. Elsie A. Flynn et al., No. 13168, in which judgments are final; and Stevinson Water District and East Side Canal and Irrigation Company vs. Stephen Cuneo, George Cuneo et al., No. 17444 and East Side Canal and Irrigation Company vs. W. F. Roduner and Rachael Roduner, No. 17445, in which actions judgment is not yet final. It also cites State Permit 5733 (Application 7012). It claims to divert at the intersections of Owens Creek and Duck Slough with the Main Canal of the East Side Canal and Irrigation Company, and to irrigate some 10,000 acres within T6&7S R9E, T7&8S R10E and T7&8S R11E, HDR&M.

Answers

The applicants Cuneo in answer to the protests against Applications 12633 and 12634 state that their applications are for unappropriated waters only and that action by the Division upon them cannot affect the validity of vested rights. They state further that the Division in acting upon applications cannot define the magnitude of vested rights. They request an investigation by the Division under the provisions of Section 728 of the California Administrative Code. They state that while they must recognize the superiority of such vested rights as exist, they cannot specifically stipulate as to the measure of such vested rights, if any. They state that according to their understanding the Division holds that prospective use by a riparian cannot be urged as a basis for protesting an application.

The applicants Roduner made no reply to the protests against their Application 12635.

The Turlock Land and Cattle Company in answer to protests against its Application 13071 denies that the appropriation which it seeks will result in injury to any protestant or will violate any protestant's rights. It denies that either protestant has acquired any right under any permit heretofore issued to divert from Duck Slough and alleges that rights based on any such permit as may have been issued have been lost by non-user. It denies that either protestant is now using any of the waters which it (the applicant) is seeking to appropriate; it alleges that neither protestant has used any of the waters from Duck Slough or tributaries thereto for a period of more than 5 years prior to the date of filing of Application 13071.

Hearing Held in Accordance with the Water Code

Applications 12633, 12634, 12635 and 13071 were completed in accordance with the Water Code and the Rules and Regulations of the Division of Water Resources, and being protested were set for public hearing under the provisions of Article 13, Section 733(b) of the California Administrative Code on Tuesday, December 12, 1950 at 10:00 o'clock A. M., at the Merced County Court House, Merced, California. Of the hearing the applicants and the protestants were duly notified. The hearing of December 12, 1950 was continued to and reconvened on Thursday, February 15, 1951, at the Merced County Court House, at 1:45 o'clock P. M., for completion.

Discussion

Applications referred to in the protests are:

Application 5386 Permit 2847 License 1578, by George S. Bloss, Jr., for 20 cubic feet per second, year-round, from Duck Slough at a point within the NW 34 of Section 13, T8S R13E, MDEEM. Claimed use: the irrigation of 1627 acres within Sections 13, 14, 15 and 23 of the same township.

Application 5724 Permit 5726, by Stevinson Water District, for 163 cubic feet per second from Bear Creek, Owens Creek, Duck Slough and/or Deadman Creek, in that order, as necessary to obtain the amount of water sought. The proposed points of diversion are at the intersections of the East Side Canal and Irrigation Company with the streams named. Proposed use: the irrigation of some 7336 acres within Stevinson Water District, from March to October, both inclusive. The time within which to complete construction of works and beneficial application of water has been extended until December 1, 1953.

Application 6111 Permit 5729, by Stevinson Water District, for 163 cubic feet per second as follows:

<u>Source</u>	<u>Cubic feet per Second</u>	<u>Proposed Point of Diversion</u>
McCoy Spillway	10	NE 1/4 SW 1/4 Sec. 20, T7S R11E
Arena Spillway	15	NE 1/4 SE 1/4 Sec. 20, T7S R11E
Livingston Drain (South Branch	15	NW 1/4 NE 1/4 Sec. 33, T7S R11E or SW 1/4 NW 1/4 Sec. 27, T7S R11E
Bear Creek	60	SE 1/4 NW 1/4 Sec. 12, T8S R11E
Owens Creek	40	NE 1/4 SW 1/4 Sec. 19, T8S R12E
Duck Slough	10	NE 1/4 NW 1/4 Sec. 30, T8S R12E
Deadman Creek	10	NW 1/4 SE 1/4 Sec. 30, T8S R12E

Proposed use and time within which to complete: as in Application 5724 supra.

Application 7012 Permit 5733, by East Side Canal and Irrigation

Company. The sources, amounts and proposed points of diversion are the same as those set forth in Application 6111. The time within which to complete construction and to apply the water to beneficial use has been extended to December 1, 1951.

At the hearing of December 12, 1950 Witness Johnson testified (pages 21 to 38 of transcript) that the earth dam shown on Turlock Land and Cattle Company Exhibit No. 1 was maintained as shown in the exhibit from 1934 until 1948 and was then moved south 0.2 or 0.3 mile to a position south of Owens Creek Weir, that the purpose of the dam in his opinion was to prevent water entering the East Side Canal from Bear Creek and other creeks from backing up and being lost into Meriposa Slough, Sand Slough and San Joaquin River, the canal being so level that it will run backward; that the dam made it impossible for the East Side Canal Company to use water from Duck Slough; that the East Side Canal Company has never taken water from Duck Slough during the irrigation season. Witness Johnson further testified that for the past 2 years Duck Slough has received water from 2 sources, viz. drainage from rice irrigated by deep well pumps on the Roduner Ranch and drainage from permanent pasture served by Merced Irrigation District, 6 or 8 second feet in all, about one half coming from each source. At the hearing of December 12, 1950, also, Attorney Craven explained that Mary Crane and Mary Emma Crane Smith are one and the same person. Subject to the understanding, assented to by opposing counsel, that that protestant's lands are riparian and that water has been used on them

for many years for stockwatering, Attorney Craven submitted the case of Mary Crane (Mary Emma Crane Smith) on the record. Attorney Landram on behalf of Protestant Bloss likewise submitted that protestant's case on the record.

At the hearing of February 15, 1951, Witness Kelley testified (page 5 of transcript et seq.) that the East Side Canal Company has used the water of Duck Slough whenever it was available; that the Company has maintained a dam in the East Side Canal north or downstream from Duck Creek in order to conserve the water entering the canal from other sources; that this dam has been removed at the beginning of irrigation seasons to allow any natural flow from Duck Slough or certain other streams to enter the canal; that it has been replaced in early June because about that time there would otherwise be a reversal of flow due to the flatness of the canal grade and water would be lost; that the dam has not been removed during the last 4 years because there was no water coming in; that the dam is soon to be replaced by a weir; that during the summer months water deliveries from Merced Irrigation District through one or another of 9 different channels, of which Duck Slough is one, are the East Side Canal Company's primary source of supply, that irrigation in the Stevinson Water District extends from early April to mid-October; that San Joaquin River used to be the main source of early supply, which supply however has not been available since the construction of the Friant Dam; that the acreage served by the East Side Canal is increasing constantly; that water is abundant in spring when rains are heavy, but that the supply is never enough, later in the season;

and that the water spilled out through Crane Gate passes down through pasture land of the Crane Ranch and finally enters the San Joaquin River. Witness Lucas testified (pages 19 to 26 of transcript) that each year since 1930 water from Duck Slough has been used for irrigating pasture on the Crane Ranch; that the East Side Canal Company has taken water from Duck Slough when there was any water to take; that the Cuneo lands use water from Owens Creek; that the Cuneo lands are often flooded, that cattle graze along the edge of the flooded area, that the flooded area could not be cultivated. Witness Johnson testified (pages 32 to 40 of transcript) that the first diversion of water on the Cuneo property in 1950 took place on September 10, such water being purchased from Merced Irrigation District; that in 1950 Sections 14, 15 and 16 of the Cuneo lands were dry and were used for cattle grazing, all summer. Witness Johnson also testified that the photographs designated as Turlock Land and Cattle Company Exhibit No. 6 are photographs which he took of the spill going out of Bloss Lake, that the spill enters a slough that passes eventually into San Joaquin River, that Bloss Lake is about 5 miles north of the intersection of Owens Creek with East Side Canal, that he visited the structure photographed about every 2 weeks during 1948 including about 4 trips during July and August of that year, that on many of his visits, although not invariably, water was observed to be flowing over the weir. Applicant W. F. Roduner testified that he operates 7 pumps of a capacity of 1800 to 2000 gallons per minute each, on his lands in Sections 16 and 21, T8S R13E; that he irrigates 800 acres of rice, that return flow from his irrigation drains into Owens Creek and Duck Slough, that irrigation extends from mid-April to mid-September, that in 1948 his pumps ran almost constantly.

Limited information as to the flow of Duck Slough is contained in the report of inspection by Engineer B. Kibbey on May 15, 1934 in connection with license action on Application 5386. Extracts from that report are as follows:

"Duck Slough is a ramification of Mariposa Creek as it debouches from the foothills -----.
During the summer there has been a considerable flow from Merced Irrigation District -- but since 1930 much of this has been taken by the El Nido Irrigation District and practically none has been available to permittees after May 15. -----."

* * * * *

"The largest flow actually measured was 5.54 cubic feet per second in the north ditch and 6.21 cubic feet per second in the south ditch on April 21, 1930. Mr. Bloss stated however that during the winter months he runs the ditches to capacity, greatly exceeding the amount of the permit on a continuous flow basis and that he has diverted water in all months between November 1 and May 15 within the last 3 years."

Engineer Kibbey estimated the combined capacity of the ditches referred to in his report to be of the order of 212 cubic feet per second.

Information as to the flow of Owens Creek is not of record. In view of the nearness together of Owens Creek and Duck Slough, the similarity of the area drained and the fact that both streams traverse the Merced Irrigation District it is inferred that their behavior is somewhat the same.

As to the availability of the waters of Owens Creek for appropriation it has been determined by the Supreme Court that the foreign water in Owens Creek, to the extent that such water is put to beneficial use by the Stevenson Water District, is not subject to appropriation. The opinion of the court in this connection is as follows:

"It appears without dispute that some of the foreign water has not been beneficially used by plaintiffs and that at certain times the present facilities are not adequate to carry all of it. In this connection the trial court found that during periods of heavy runoff the amount of water delivered to plaintiffs by M. I. D. exceeds the capacity of the East Side Canal, that at such time plaintiffs are required to release the excess amounts by means of several spills and a siphon located at the canal, and except for this excess water plaintiffs need and use all the water of Owens Creek ———. Accordingly, to the extent that the water delivered into Owens Creek by M. I. D. cannot be captured and put to a beneficial use by plaintiffs, they cannot prevent appropriation of the water by persons such as defendants who can beneficially use it." (Stevinson Water Dist. v. Roduner, 36 A. G. 204, 209-210.)

Conclusions

Unappropriated waters in Owens Creek and Duck Slough appear to exist (1) when floods occur, chiefly in the winter or early spring months, occasioning flows in those streams at rates in excess of the protestants' reasonable requirements and (2) when, during the late spring or summer months, return flow of waters diverted upstream for various purposes, mainly irrigation, exceeds the amount that can be beneficially used by holders of prior rights. That they exist at times during winter and early spring is indicated by Engineer Kibbey's observations in connection with Application 5386. That they occur at times in later months is indicated by the hearing testimony and hearing Exhibits 2, 3 and 6. The occurrence of unappropriated water in these streams is erratic and largely unpredictable. The supply of water that warrants classification as unappropriated is by no means firm. However the utilization of such surpluses as do occur, even through those surpluses are erratic and require supplementation from another source, as by pumping, will be in the public interest as well as advantageous to the applicants. In the event of utilization of the surpluses as proposed, the protestants will be legally protected by the usual permit wording,

limiting the applicant's appropriations to unappropriated water and making the permits subject to prior rights.

In view of the various circumstances which bear upon the matter under discussion it is the opinion of this office that the protests against Applications 12633, 12634, 12635 and 13071 are an insufficient basis for the denial of those applications and that the applications should therefore be approved, subject to the usual terms and conditions and subject to a special provision excluding from appropriation any foreign water flowing from the Merced Irrigation District and being put to beneficial use by the Stevinson Water District.

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ORDER

Applications 12633, 12634, 12635 and 13071 for permits to appropriate water having been filed with the Division of Water Resources as above stated, protests having been filed, a public hearing having been held and the State Engineer now being fully informed in the premises:

IT IS HEREBY ORDERED that applications 12633, 12634, 12635 and 13071 be approved and that permits be issued to the applicants, subject to such of the usual terms and conditions as may be appropriate and subject to the following special term and condition, to wit:

Foreign water flowing from the Merced Irrigation District and being put to beneficial use by the Stevinson Water District pursuant to that certain agreement and stipulation for decree between the Merced Irrigation District and James J. Stevinson, a corporation, which agreement is more particularly referred to in the decree of the Superior Court in and for the County of Merced in action number 6179, is excluded from appropriation under this permit.

WITNESS my hand and the seal of the Department of Public
Works of the State of California this 6th day of August, 1951.

Original signed by

A. D. EDENSTON
State Engineer

SCW:dm