

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 15408 by Bruce D. Richart to Appropriate  
Water from an Unnamed Spring Tributary via Little Bear Creek to  
Bear River in Placer County for Domestic and Irrigation Purposes.

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Decision A. 15408 D.                     D 795                    

Decided           July 19, 1954                    

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In Attendance at Investigation Conducted by the Division of Water  
Resources at the Site of the Proposed Appropriation of January 19,  
1954:

Bruce D. Richart	Applicant
Earl Smith            )	
Mary Smith           )	Protestants
William C. Melton)	
Louise D. Melton )	
Mrs. Jerald P. Lee	Owner of Property Adjoining Applicant's
Walter Kater)	
Fred Meier    )	Interested Parties
W. H. Holmes)	
K. L. Woodward	Associate Hydraulic Engineer Division of Water Resources Department of Public Works Representing the State Engineer

n.b. Protestant Irma Delius, not herself in attendance, was  
represented at the investigation by William C. and Louise D. Melton.

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## OPINION

### General Description of the Project

The applicant seeks to appropriate 15 gallons per minute from April 15 to October 15 from an unnamed spring, tributary via Little Bear Creek to Bear River in Placer County, for domestic purposes and irrigation. The spring is described as being located within the SW $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 36, T16N R10E, MDB&M. Diversion is to be by gravity. The project includes a concrete dam at the spring site, 5 feet high by 30 feet long, and 350 lineal feet of earth ditch. Construction is said to be complete. The water is to be used for domestic purposes at one residence and for the irrigation of a 3-acre orchard. The applicant claims to own both the proposed place of use and the land at the proposed point of diversion.

### Protests

Earl Smith and Mary Smith protest the application, stating in part:

"None of the water in or flowing from the subject spring is subject to appropriation by applicant; the spring in question was reserved in the grant to applicant and was granted and appurtenant to lands granted these protestants, and all of the waters are subject to the vested rights of protestants;"

"Protestant claims a right ... based upon grant of the spring and water rights to protestants."

"The extent of present and past use of water by protestants ... from this source is ... entire supply for domestic use ... irrigation of garden plot ... irrigation of protestants' orchard, approximately 20 acres."

" ... no condition will relieve this protest."

"Applicant and these protestants deraign title from a common grantor, the spring in question was the water supply for said common grantor, when the applicant purchased his land all rights in or to the spring in question and the water therefrom were reserved to the grantor, these reserved rights were then conveyed together with the remainder of the grantor's land to protestants herein."

"The right applicant now seeks to acquire by his application was specifically excepted and reserved in the deed by which applicant acquired his lands."

"These protestants are the owners of all such rights, having acquired them by deed dated March 28, 1944, ...."

"The spring in question and the water thereof and the works used in connection therewith are and were appurtenant as aforesaid to the lands of these protestants."

"No water is available for appropriation at the spring in question in this, that these protestants have all possible rights therein and in the water produced therefrom; the spring does not produce a flow of 15 gallons per minute; in fact, the spring in question does not produce sufficient water for protestants' uses, and this source of supply is supplemented and added to by other sources and works and pipelines belonging to these protestants."

"The lands of these protestants are situated north of applicant's land and separated therefrom by a county road (also known as Bonnie Nook road), and in accordance with their rights hereinbefore set forth these protestants now take their water from the spring in question by means of pipelines running in a northerly direction from said spring across the said county road and onto the lands of protestants, consisting of about 37½ acres, more or less."

"That applicant has less than one acre of irrigable land; that applicant has other sources of water supply available to him. The water is already in use under prior and existing rights held by protestants, any diversion by applicant will impair these prior existing rights, to protestants' detriment."

William C. Melton, Louise Delius Melton and Mrs. Irma

Delius also protest the application, their statements in that connection including the following:

"The Delius water rights are the first rights on Little Bear and we do not feel the water from the spring is unappropriated water. This spring is on what was the Decker property, now owned by Earl Smith and the overflow from the springs up there constitute about half of our summer water supply."

"Protestant claims ... rights first recorded Book D, Mining Records, page 255, an appurtenance to Elmore Hill Mine. Deed from P.G. & E. Co. to rights of Little Bear River Canal."

"The extent of present and past use of water by protestant or his predecessors in interest from this source is as follows: 1855 mining 300", 1868 domestic and mining. Relocated 1913 by my father ... for domestic, mining and agriculture. Was used for mining and domestic 1901-02 the summers only 1902-23 1923 to date constantly all year domestic, agriculture and some mining, tho no mining now since 1950."

"... diversion point located NW $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 35, T16N R10E, MDB&M. Follow water of spring to Alta Ravine, go down Alta Ravine to Little Bear, Delius diversion about 25 feet below junction."

"Little Bear is the only source of water available under any conditions for the Delius property, "Elmore Hills", and without this water is uninhabitable and consequently worthless."

#### Answer

The applicant answered the protests at length and in detail, under date of September 24, 1953. The "summary", only, of his answer, reads as follows:

"The property conveyed to Bruce D. Richart and Anna W. Richart, from Hattie Hellena Decker by deed, dated June 6, 1939, excepted:

1. A pipe line leading from a spring, presumed to have been on the property conveyed, to the Decker home.

2. A pipe line extending from a spring, located in about the center of the property conveyed, to the Decker property, same being extended to the Potter Subdivision for sale of domestic water.

3. Right to maintain these pipe lines and the right of use of water from these springs."

"Protestants Earl and Mary Smith, who acquired the remaining Decker property by deed ... now claim all the water from these springs and in 1952 constructed a 3.1 inch outside diameter pipe line, from a dam below the lower spring and also below the overflow line from the upper spring, to their property, without my consent. This new pipe has sufficient capacity, together with the other two pipes, to carry all the flow from the two springs from early July to the remainder of the irrigation season. By means of such diversion, he has deprived me of water prior used for irrigation on property purchased by me."

"I claim that the average flow from these two springs, during the irrigation season, is in excess of 30 g.p.m. and that from 1946 to 1951 inclusive, the Smiths' water right established only by use, did not exceed 15 g.p.m.; therefore, surplus water exists in the amount of 15 g.p.m. The applicant has used this water, which is in excess of the Smith use, for surface and subsurface irrigation of the property from 1946 to 1951 inclusive, without protest, thereby establishes his right thereto. The applicant now makes a request for a permit for the same."

Appended to the applicant's answer to the protests is a purported copy of the deed which conveyed to him the property within which the spring in controversy is located. That document reads in part as follows:

"THIS INDENTURE, made this 6th day of June, 1939, between HATTIE HELLENA DECKER, a widow, the party of the first part, and BRUCE D. RICHART and ANNA W. RICHART, his wife, the parties of the second part,

WITNESSETH:

"That the said party of the first part ... does ... grant, bargain, and sell unto the said parties of the second part ... all that certain real property ... particularly described as follows:

"All that portion of the ranch owned by Grantor and lying within the Southeast corner thereof, and lying southerly of the County Road running in a general Easterly and Westerly direction through said ranch near the old Decker home, and being Easterly from the Altamonte Mining Company property and West of the East line of Grantor's said property. The premises hereby granted being in the North Half of Section 36, Tp. 16 N., R. 10 E. M.D.B.&M.

"Excepting and reserving therefrom, however, the two springs now active upon the property hereby conveyed, together with the water flowing therefrom and all buildings, pipe lines and other means of holding and conveying said water across the granted premises and the right to repair, replace, and maintain the whole thereof, and to remove said pipe lines, building and other means of holding and/or conveying said water.

"TOGETHER with the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof."

#### Field Investigation

The applicant 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 on January 19, 1954, by an engineer of the Division. The applicant and the protestants were present or represented during the investigation.

#### Records Relied Upon

Application 15408 and all data and information on file therewith; Dutch Flat quadrangle, United States Geological Survey; Bulletin No. 1, State Water Resources Board: "Water Resources of California."

Information Secured by Field Investigation

The report of the field investigation of January 19, 1954, contains among others the following statements:

"The principal source of supply of water is several small springs ... due to their proximity the source has been named in the application as an unnamed spring. A small regulatory pool is formed by a concrete dam ... and water was observed flowing into the pool from two springs immediately above the dam and from an overflow pipe leading from protestants Smiths' regulatory tank located approximately 150 feet farther uphill. This portion of the protestants' water is obtained from the Lee spring located on property some distance east of the applicant's owned by Jesse Lee. Allegedly water was rising from a spring or springs located in the bottom of the pool itself ...."

"At the time of the investigation measurement of the various sources of water flowing into and out of the pool (point of diversion) were as follows:

(1) Overflow from Smiths' tank carried by a 3/4" pipe and discharged directly into the pool: 2.5 gallons per minute (inflow to Smiths' tank was 4.3 g.p.m.)

(2) Flow from the easterly spring immediately above the pool: 9 g.p.m.

(3) Flow from the westerly spring immediately above pool: 4 g.p.m."

"Two pipe lines, one 1 3/4" and one 3" in diameter, lead from the dam, across the applicant's property and county road and onto the Smiths' property. Both lines were discharging into a 22 acre-foot lake recently constructed on Alta Ravine by the Smiths. This lake is stocked with fish for commercial purposes."

"Discharge of the two pipes was measured to be 6.7 g.p.m. and 18.0 g.p.m., respectively. This totals 24.7 g.p.m. or 9.2 g.p.m. more than inflow measured. As the applicant stated that the level of the pool had been constant for over 24 hours, it therefore may be concluded that the difference of outflow over inflow is derived from the alleged spring or springs in the bottom of the pool. An overflow pipe was installed in the dam approximately 2 feet above the water level which would indicate that the two pipe lines were flowing under almost maximum head."

"Protestants, Meltons and Delius, obtain their water supply from Little Bear River immediately below the confluence of Little Bear River and Alta Ravine. The combined flow was estimated to be in excess of 10 cubic feet per second. Water is diverted from the creek by means of a rock and log dam which is constructed annually after passage of the high winter and spring flow. Water flows through two 6" pipes approximately 20 feet long under a possible maximum head of 2 feet and thence through a small earth ditch one-half to three-quarters of a mile in length to a small regulatory reservoir. Immediately above the reservoir water is taken from the ditch into a 700 gallon regulatory tank and then conveyed by a 3/4" pipe line to the place of use. A ditch similar in size to the one above mentioned leads from the reservoir to the mining project."

"The principal domestic supply for protestants Smiths is obtained from the Lee Spring. Water from the unnamed spring carried through the 1 3/4" pipe is used for the irrigation of approximately two acres of garden and for an emergency domestic supply at such times as the Lee Spring is inadequate. These protestants propose to remove some old fruit trees immediately downstream from their lake and seed approximately 5 acres of the land in potatoes. Since construction of the 3" pipe line, the amount carried through this line has been allowed to flow into the lake to offset evaporation and aerate the water for maintenance of the fish."

"Meltons and Delius presently use water for domestic purposes for one three bedroom home and for the irrigation of an estimated 1/3 acre of lawn, flowers, shrubs and garden. The irrigation season reportedly extends from May 1 to October 1 with domestic needs year-around. The Meltons stated that during 1949 no water was available for irrigation from August 1 to the beginning of the rainy season and that for five days of this period they were entirely without domestic water. However, since the construction of Smiths' dam on Alta Ravine no serious shortage of water has allegedly been experienced by them. No water has been used for mining purposes since 1950 and plans for future operations appear indefinite."

"From a discussion with the parties it appears that when protestants Smiths purchased their property in 1943 there was included in their deed a grant to the spring which has been filed on by Richart. The protestants interpreted the grant to include the entire flow although at that time the only diversion being made was through the 1 3/4" pipe. The overflow, when available was either used by Richart or allowed



to flow unretarded down a small channel which crossed Richart's property, the property immediately to the west, the county road and emptied into Alta Ravine below Smiths. Whether this overflow ever reached the Ravine or, if so, to what extent could not be definitely determined. There also seemed to be a difference of opinion as to the extent, if any, of Richart's use."

"In 1945 Smiths decided to replace the earth dam then in use with a concrete dam which would form a small pool for regulation. In consideration of some assistance from Richart in construction of the dam Smiths agreed to allow him a 3/4" connection for his own use with apparently an understanding that at no time would Richart make any claim of right to the water. Allegedly the agreement was violated in 1946 and Richart's connection was removed. From 1946 until 1952 Smiths' use consisted of the water carried by the 1 3/4" line and during this interim the actual disposition of the excess again was controversial."

"In 1952 Smiths decided to take advantage of the production of the spring which could not be carried by the 1 3/4" line and installed the 3" pipe previously mentioned. Although Richart reported that this line was installed over his objection, it was noted that the pipe line does not follow the right of way of the smaller line but crosses somewhat diagonally Richart's property and according to the Smiths was laid at Richart's consent. Richart made only a passive objection to this statement.

The investigator summarizes his report of investigation as follows:

1. Protestants Smiths claim the entire flow of the spring by virtue of deed.
2. The flow of the spring at the time of investigation was 24.7 gallons per minute.
3. A maximum of about 7 gallons per minute was apparently used by protestants Smiths from 1943 to 1952.
4. Since 1952 the entire spring flow in excess of about 7 gallons per minute has been diverted to Smiths' Lake for maintenance of fish.
5. Protestants Melton and Delius reported that a shortage of water was last noted in 1949. Since Smiths' Lake has been in existence, the water supply for these protestants has been sufficient."

The report of investigation contains a statement to the effect that the protestants submitted certain letters at the investigation with the request that said letters be placed on record as exhibits. Those letters are as follows:

A copy of an undated letter to the Division from William C. Melton, Louise Delius Melton and Mrs. Irma Delius expressing and explaining concern over Mr. Richart's claim of a right to divert from the spring in controversy.

A copy of a letter dated October 11, 1946, from Attorney T. L. Chamberlain to Mr. and Mrs. Bruce D. Richart, the letter reading in part:

"Mr. Earl Smith has consulted me in reference to the springs which are situated on property which you purchased from Mrs. Decker but which were reserved by her in the grant to you and which were included in her grant to Mr. and Mrs. Smith. As I understand it, by mutual consent, a dam was constructed below the springs to take the place of the boxes which were previously used to catch the water from the spring, and as a penstock for the head of the pipeline to the property of Mr. and Mrs. Smith."

"It is my understanding that the dam was constructed with some assistance from you and under an understanding that you could use the overflow from the dam, subject, however, to the condition that you would never assert that you had any right to any of the water of the spring, and if you sold your property you would not represent to any purchasers that you had any right to any water of the spring; that instead of connecting your pipe to the overflow pipe near the top of the dam, you have connected a pipe to a pipe through the dam at approximately the same elevation as the outlet of the pipe which goes to the Smith property, and that in addition to this you have opened a valve in the bottom of the dam and used this water for irrigation, with the result that on several occasions the Smiths have been out of water."

"Mr. and Mrs. Smith do not desire to become involved in litigation over the matter but they believe that a very definite understanding should be reached ... and this understanding reduced to writing, and that your agreement should be complied with and that any water that you take from the springs should be taken from the

overflow pipe rather than from the pipe to which you now have your pipeline attached, and that you should not under any circumstances draw water from the valve in the lower part of the dam."

A letter dated January 14, 1954, from Charles L. Decker to Louise (Melton),  
the letter reading:

"We have your letter of January 10, regarding Mr. Richart's application to appropriate water from an 'unnamed spring' on what was at one time my parents' property.

"I recall the spring from your description. You also state he claims when he bot the property from my mother he had three sources for his domestic water, the unnamed spring, the so-called Lee Spring and buying water from the PG&E Co.

"My recollection is that my mother allowed him to buy water from her while he was getting his water system connected to the PG&E Co. pipe line and then would no longer allow him water."

A letter dated January 15, 1954, from Carlos Smith to Earl Smith, the  
body of that letter reading in part:

"If my memory serves me correctly, while I was visiting you in May or June ... 1952, Mr. Richart came over to your place with one or two men. Mary was there too.

"We were all talking about the merits of the property around that neighborhood. Mr. Richart, in the course of conversation, indicated the lake and said, look at that, I had the chance to buy this property before your Dad did; and I could have had this lake and all this water. I just didn't have the vision to see something like this, he said.

"He further stated, addressing all of us, Earl owns all this water in the lake with several springs on the place, and, he owns a spring on my place (Mr. Richart's place).

"Along that line, he said, that of course, Earl, let him have all the water he needed for his place as he did not need much for his own use.

"Then, he turned directly to Mary and I and said, I still wish I had this water instead of you people. At no time did he indicate or say that he owned any water of his own.

"He stated that he should have tried to buy the spring on his place from the lady you purchased your land from, but he didn't and now you owned it. This was said more directly to me than the others, they were within hearing however.

"All in all the trend of the conversation was, you had the water, including the spring on his place, he didn't but wished he had.

"If you will recall, you will remember my asking you about the spring on Richart's place, I hadn't known you owned it until he said so. You said, sure you owned it and then showed me the deed for your property, which clearly showed your ownership of the springs and water mentioned by Mr. Richart.

"Had Mr. Richart not been so emphatic about your owning these springs, especially the one on his place and my seeing the deed afterward, I might not have remembered the incident at all.

"It was definite and clear to me that he regretted not owning the water particularly the spring on his place, even though he did say that he had all he needed from the overflow.

"I hope this is sufficient for your required information. I shall have this notarized as well. If at any time it becomes necessary, I shall so testify in any court, that Mr. Richart did say exactly that I have written, perhaps I have not used his exact words, but the meaning of them I will swear to."

#### Information from Other Sources

On the Dutch Flat quadrangle, United States Geological Survey, the areas tributary to Applicant Richart's proposed point of diversion, the Protestant Smith's dam and the Protestant Melton and Delius intake scale respectively about 0.017 square mile, 0.256 square mile and 2.73 square miles. On the same quadrangle the down-slope distance from the applicant's proposed point of diversion to the Smiths' dam scales about 0.21 mile; the down-channel distance from the Smiths' dam to the Melton

and Delius intake scales about 0.9 mile. The watershed above the Melton and Delius intake, which includes the watershed above the Smiths' dam and the watershed above the applicant's proposed source, ranges in elevation from about 3380 to about 4650 feet.

Estimated natural runoff from the Bear River watershed above Wheatland, according to Bulletin No. 1, State Water Resources Board (California), has averaged 356,000 acre-feet over a 53-year period, equivalent to an average sustained flow of approximately 1.67 second-feet per square mile drained.

Under date of May 25, 1954, this office addressed the following inquiry to the Placer County Assessor:

"Will you please advise this office ... if the county road through the center of Section 36, T16N R10E, MDB&M, as shown on the enclosed portion of the USGS Dutch Flat quadrangle is a county easement or whether the right of way is owned in fee by the County."

The letter elicited the following reply, dated June 15, 1954:

"In checking our assessment plats we find several properties along the road (E & W) which call to the center of the road and this would lead us to believe that the road is an easement and not owned in fee by Placer County."

Under date of June 1, 1954, this office wrote to the protestants Smith as follows:

"In response to your letter of May 27 concerning Application 15408 of Bruce D. Richart, you are advised ... that the conditions under which the County acquired right to construct the road between you and Mr. Richart may have a bearing upon the riparian right of your land to the spring in question and this information should be available to us before releasing our decision in the matter."

Under date of June 4, 1954 Attorney Joseph B. Grossman addressed this office a letter, extracts of which are as follows:

"Your letter of June 1, 1954, addressed to Earl and Mary Smith has been referred to me for reply."

" ... inquiry at the Placer County Title Company by Mr. Smith reveals that the road in question, County Road No. 139, as it affects the Smith land, was not taken in fee either by condemnation or grant and is an easement for a right of way only. This is confirmed by the Placer County Road Commissioner. It is elementary that a riparian right is not destroyed by an easement for a highway and that the owner of the fee, the Smiths in this case, retain the exclusive right to the ownership of the land not incompatible with the public right of way."

Under date of June 10, 1954, this office addressed Attorney Grossman an acknowledgment of his letter of June 4, 1954, and addressed a copy thereof to Applicant Richart, the acknowledgment including the following statement:

"The information submitted appears to be adequate for our purposes and we will proceed with the application upon the assumption that the right of way is an easement only."

#### Discussion

There is no question that there is water of the unnamed springs in excess of the water beneficially used by Protestant Smith prior to installation by him of the 3-inch pipe line in 1952. There is also no question that Smith is now diverting substantially all of the water of the springs. The issue between the applicant and the protestants Smith therefore concerns the validity of the Smiths' right to the use of water not beneficially used by them prior to 1952.

The basis for the Smiths' claim of right to the additional water diverted by them since 1952 is as successor in interest to Hattie Decker. As it is undisputed that the Smiths succeeded to whatever rights belonged to Mrs. Decker at the time of her conveyance to them in 1944, the decisive question is the nature and scope of her right in the water of the springs at that time. She had previously deeded the land upon which the springs are situated to applicant who thereby acquired all of her interest in both the land and water appurtenant thereto except such interest as was expressly reserved or excepted from the grant. This brings us to a consideration of the exception and reservation clause in the deed and its legal effect.

Mr. Smith contends that by that language Mrs. Decker reserved and excepted all the water of the springs, whether theretofore used by her or not. Applicant contends the Decker right was limited by law to the water theretofore beneficially used and that Smith could acquire no greater right from Mrs. Decker. He also relies upon the forfeiture provisions of Section 1241 of the Water Code.

Applicant's position would be well taken if the Decker right was based solely upon prior appropriation. However, the entire Decker tract of land was contiguous to the springs and within their watershed. It was physically riparian thereto and in the absence of evidence to the contrary is presumed to include as part and parcel thereof the full riparian right to the beneficial use of water of the springs, which right is not dependent upon actual use and is not lost by nonuse. It includes the right to the beneficial use of water upon riparian land at any time in the future.

A vital question in determining the nature and extent of the Decker right which remained after execution of the deed to applicant, is whether the language of that deed was sufficient to reserve to the grantor all of her right to the water of the springs. If so, Smith succeeded thereto. There is also the question whether Mrs. Decker reserved by necessary implication a right of way across the land granted to applicant for additional facilities, not then in existence, for the conveyance of water. In these respects the deed is not entirely free from ambiguity and therefore it would be proper to consider extrinsic evidence in order to determine the true intent of the parties, which intent is the decisive factor. No direct extrinsic evidence concerning the intention of the parties has been made available in this proceeding. However, it is significant that applicant, although he filed an exceptionally complete and lucid statement of the case in his answer to the protests, has at no time asserted that the understanding between himself and Mrs. Decker was that the reservation should extend only to existing diversions and pipe lines, or that it was not her intention to reserve from the conveyance to him all of her interest in the water, so far as it was in her power to do so. Instead, he relies on an erroneous assumption that his grantor's title was entirely dependent on prior appropriation and was limited by existing use and that therefore she could not as a matter of law reserve water for future use regardless of her actual intent. The inference is strong that the parties to the deed did intend



to reserve to Mrs. Decker all of her right to the springs "together with the water flowing therefrom" of whatever nature, unlimited by past or existing use, together with an easement for necessary pipes or conduits. It follows that the language of the reservation should be construed broadly in accordance with that intent. A reservation in a deed is to be construed most strongly in favor of the grantor, and this principle has been held to apply to a reservation of the right to the use of water by a riparian owner (Walker v. Lillingston, 137 Cal. 401, 70 Pac. 282).

In view of the foregoing conclusions with respect to the adequacy of the Smith protest, the protest filed by the Miltons and Mrs. Delius is irrelevant and may be disregarded.

There being no water of the proposed source not presently being beneficially used under riparian right, there is no unappropriated water subject to appropriation by applicant, and the application must be denied.

#### Summary and Conclusions

The applicant seeks to appropriate 15 gallons per minute from what he terms an unnamed spring (actually a group of springs) tributary to Bear River in Placer County, for domestic purposes.

The application is protested by a couple named Smith who presently divert most of the yield of the springs through 2 pipelines, one old and the other recent, and claim a right to all the 2 pipelines will

carry, by virtue of a provision in a deed, the protestants' interpretation of which provision the applicant disputes. One widow Decker formerly owned the properties now owned respectively by the applicant and by the Smiths. Her deed to the applicant (and his wife) reserved the springs "together with the water flowing therefrom". She deeded the rest of her property to the Smiths. A 1-3/4 inch pipeline conveyed water from the springs to the Decker home. The Smiths occupied the Decker home and, in reliance upon the reservation in the deed as to the "springs together with the water flowing therefrom", laid a second pipeline, 3 inches in diameter, proceeded to divert more water than had been diverted theretofore. The applicant contends in effect that the Smiths are not entitled to divert more water than was diverted by the widow Decker.

The application is also protested jointly by 3 parties claiming prior rights to divert at a point some 0.9 mile downstream from the Smiths' reservoir (into which reservoir the 3-inch pipeline discharges). These parties contend that the diversion proposed would prevent the exercise by them (the protestants) of their prior rights.

In view of stipulations by the parties a field investigation was conducted on January 19, 1954. According to the report covering that investigation the water from the springs (collectively called "unnamed spring") is collected in a small pool, two pipelines, one of them 1-3/4 and the other 3 inches in diameter, lead from the pool to a 22 acre-foot lake on the Smiths' property, the lake having been recently constructed

and stocked with fish for commercial purposes. According to the same report the pipes were discharging 6.7 and 18.0 gallons per minute respectively, the flow through the small pipeline irrigates 2 acres of garden, the flow through the 3-inch pipeline offsets evaporation in the lake and aerates the water for the fish, the 3 protestants further downstream use water domestically at one home, irrigate 1/3 of an acre, state that in 1949 no water was available for irrigation from August until the resumption of rains, that for 5 days they were without domestic water and that there has been no serious water shortage since construction of the Smiths' dam, the Smiths state that they bought their property in 1943, their deed including a grant to the spring filed on by the applicant.

Certain letters, submitted by the protestants at the investigation with request for inclusion thereof in the record are quoted in an earlier paragraph. The letters however add nothing material to the information otherwise adduced.

On a map of the locality, drainage areas tributary to the spring filed upon, the Smiths' dam and the 3 lower protestants' intake scale respectively 0.017, 0.256 and 2.73 square miles; distances from proposed point of diversion to the Smiths' dam and from the Smiths' dam to the lower protestants' intake scale respectively 0.21 and 0.9 mile.

Office references indicate that runoff from Bear River watershed above Wheatland has averaged 1.67 second-feet per square mile over a 53-year period.

Responses to letter inquiries by this office indicate that the riparian right to use waters from "Unnamed Spring" upon what is now the Smith property, as well as upon what is now the Richart property was not lost as a result of the building of the road along the line between those properties (the Bonnie Nook road), title to the land occupied by that road apparently never having been relinquished. Former owner Decker was evidently privileged under the law to transfer her riparian right to the water from "Unnamed Spring" in full to the Smiths and that apparently was her intention at the time she deeded a portion of her property to the Smiths.

The circumstances in this matter point to the conclusion that a riparian right to the entire yield of the source from which Applicant Richart seeks to appropriate was held by former owner Decker and was transferred by due process to the protestants Smith, that substantially all of the water emanating from that source is in actual use by the protestants Smith and that none of it is subject to appropriation. In view of those circumstances it is the opinion of this office that unappropriated water in the source filed upon by Applicant Richart is nonexistent and that Application 15408 should therefore be denied.

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ORDER

Application 15408 for a permit to appropriate water having been filed with the Division of Water Resources as above stated, protests having been filed, stipulations having been submitted, a field investigation having been conducted and the State Engineer now being fully informed in the premises:

IT IS HEREBY ORDERED that Application 15408 be rejected and canceled upon the records of the Division of Water Resources.

WITNESS my hand and the seal of the Department of Public Works of the State of California this 19th day of July, 1954.



A. D. Edmonston  
A. D. Edmonston  
State Engineer