

STATE OF CALIFORNIA
STATE WATER RIGHTS BOARD

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In the Matter of Application 17346)
of F. O. Whitaker and in the Matter)
of Application 17347 of F. C. Boone) Decision No. D 941
to appropriate water from Copsey)
Creek in Lake County)

Substance of the Applications

Applications 17346 and 17347 were filed on November 2, 1956, for permits to appropriate 112 acre-feet per annum by storage from Copsey Creek tributary to Cache Creek to be collected between October 1 of each year and June 1 of the succeeding year. The applications cover a joint project envisioning the use of a single onstream storage reservoir. Diversion is to be effected at a point within the NE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Section 11, T12N, R7W, MDB&M*, by means of a concrete dam 31 feet high by 155 feet long. Each application contains a provision that the combined amount of water to be appropriated under both applications shall not exceed 112 acre-feet per annum.

Under Application 17346, water is to be used for stockwatering purposes and the irrigation of 80 acres within Sections 11, 13, and 14, T12N, R7W. Under Application 17347, water is to be used for stockwatering purposes and the irrigation of 80 acres within Sections 11 and 14, T12N, R7W.

*All township references hereinafter mentioned are from Mount Diablo Base and Meridian (MDB&M).

Protests and Answers

Protests against approval of the subject applications were received from Clear Lake Water Company and O. W. Karn. Subsequent to the hearing the protest of the Water Company was adjusted by agreement which is discussed in later sections of this decision.

O. W. Karn claims a right to the use of water from Cache Creek (Copsey Creek is tributary to Cache Creek) by virtue of riparian ownership and by continuous beneficial use commencing in 1891, and is apprehensive that approval of the applications may adversely affect his water supply. Mr. Karn, located some 30 miles downstream from the applicants, claims that since 1951 he has used water to irrigate 250 acres of pasture and alfalfa.

In answer to the protest of O. W. Karn the applicants claim that the proposed appropriation will not interfere with his use of water as water is wasting into the ocean during such times as the applicants propose to divert; that storage of water will increase the supply of water available to the protestant during the summer; and that justification for the project exists by virtue of the costly soil erosion damage it will tend to prevent.

Hearing

Applications 17346 and 17347 were completed in accordance with the provisions of the Water Code and applicable administrative rules and regulations of the State Water Rights

Board, and were set for public hearing under the provisions of the California Administrative Code, Title 23, Waters, before the full Board on Tuesday, March 18, 1958, in Sacramento, California. The applicants and protestant were duly notified of the hearing. The applications were consolidated with Application 16572 of David L. Moskowitz for hearing under a common record. Disposition of the latter application was made by independent action.

Appearances were made at the hearing by the following parties:

<u>Party</u>	<u>Representative</u>
David L. Moskowitz	In pro per
F. O. Whitaker	In pro per
Frank C. Boone	In pro per
Clear Lake Water Company	Neal Chalmers, Attorney
O. W. Karn	Richard D. Karn
Western Yolo Water Users Association	Martin McDonough, Attorney

The following discussion is based upon evidence received at the hearing and upon subsequent negotiations between the parties.

Source

According to the United States Geological Survey Lower Lake quadrangle, 15-minute series, edition of 1945 (Staff Exh. 7), Copsey Creek rises within the northern portion of Section 3, T11N, R7W, and flows in a general northeasterly

direction about eight miles to a junction with Cache Creek about two miles west of and upstream from Clear Lake Dam on Cache Creek.

The watershed area of Copsey Creek upstream from the proposed point of diversion is approximately 17 square miles, ranging in elevation from about 2500 feet to about 1400 feet.

Cache Creek heads at the southeasterly end of Clear Lake within Section 34, T34N, R7W, and flows in a general easterly direction some four miles to the afore-mentioned dam. Under natural conditions Cache Creek provided an outlet to the runoff accruing in Clear Lake. The dam controls a drainage area of some 528 square miles which includes the surface area of Clear Lake itself (Staff Exh. 6). Inasmuch as the function of the dam is to control the water level in Clear Lake it may be considered that Copsey Creek discharges directly into Clear Lake.

From Clear Lake Dam, Cache Creek meanders in a north-easterly direction some six miles to a confluence with North Fork Cache Creek thence southeasterly some 25 miles to Capay Dam of Clear Lake Water Company. This latter dam, located some three miles downstream from the point of diversion of Protestant Karn, is used to divert the water supply of Clear Lake Water Company, both natural flow and Clear Lake releases, to the Company's customers in western Yolo County.

Historical Operation of Clear Lake

The Clear Lake Water Company stores the waters tributary to Clear Lake for distribution through its system for irrigation and other purposes (RT pp. 49, 50, 59). Records of the releases made by the Company at the storage dam which purportedly represent the extent of releases in excess of the Company's uses and requirements are shown on Clear Lake Water Company Exhibit 1, and are presented herein as Table I. The records cover a 38-year period, 1920-21 through 1957-58. According to these data, surplus water was spilled in 21 of the 38 years of record or about 55 per cent of the time. With the exception of these surpluses the Company has distributed all of the inflow to Clear Lake since 1914 (RT p. 53).

A decree entered on October 7, 1920, by the Superior Court of the State of California in and for the County of Mendocino in *M. M. Gopcevic v. Yolo Water and Power Company* provides, in effect, and among other things, that the Clear Lake Water Company as successor to the Yolo Water and Power Company shall maintain the Clear Lake water level between zero and 7.56 feet on the so-called Rumsey Gage (Staff Exh. 5). According to the USGS Water Supply Papers, Part 11 (Staff Exh. 6), the capacity of Clear Lake between the afore-mentioned gage heights is about 319,000 acre-feet.

TABLE I

Water Discharged from Clear Lake as Surplus
by Clear Lake Water Company
(in acre-feet)

<u>Water Year</u>		<u>Water Year</u>	
1920-21	80,485	1940-41	603,355
22	-	42	467,386
23	-	43	202,101
24	-	44	-
1924-25	65,866	1944-45	-
26	35,193	46	50,351
27	347,143	47	-
28	75,363	48	-
29	-	49	-
1929-30	-	1949-50	-
31	-	51	139,317
32	-	52	399,829
33	-	53	235,357
34	-	54	131,126
1934-35	54,443	1954-55	-
36	145,708	56	590,501
37	12,091	57	38,264
38	449,961	58	<u>228,566</u>
39	-	Total	4,551,875
1939-40	199,450	Average	119,800
<u>Years of Record</u>		<u>Years Spill</u>	<u>Years no Spill</u>
38		21	17

Existence of Unappropriated Water

Copsey Creek is an ephemeral stream responsive to winter and spring rainfall. Flow usually ceases about June 15 and no runoff occurs during the summer and early fall months (RT p. 34).

Protestant Clear Lake Water Company admits the existence of unappropriated water in the source under consideration (RT pp. 73, 74). The Company further admits that the quantities of water set forth in Table I are released from Clear Lake and are in excess of the Company's requirements. A study of its Exhibit 1 indicates that the Company's excess releases usually occur during the winter and early spring months. In view of the ephemeral characteristics of Copsey Creek it follows that at such times as excess releases are being made by Clear Lake Water Company from Clear Lake, flow is usually also occurring in Copsey Creek, which flow, in the absence of a showing of use by others must be considered unappropriated water.

Disposition of Protests

In a letter to the Board dated July 18, 1958, regarding Application 12389 of the Big Valley Soil Conservation District, the Protestant Clear Lake Water Company states as follows:

"Even though no unappropriated water exists in the watershed above the Clear Lake Dam until such time as the 7.56 feet elevation is reached, the situation could exist where the lake is not full until late in the rainy season when some of the tributaries would no longer have enough runoff to fill the reservoirs built on them, yet others would be flowing and have to be spilled as surplus. In order to get the fullest utility of the total runoff from the watershed, the Clear Lake Water Company would be agreeable to permits being issued for storage on tributaries of Clear Lake which would permit impounding at any time even though the rights of the Clear Lake Water Company were not satisfied on the condition that if the lake does not eventually fill, these waters so impounded would be released for flow to the lake."

Applicants Whitaker and Boone, by letters of November 26, 1958, and January 31, 1959, respectively, indicated to the Board that the conditions set forth by Protestant Clear Lake Water Company in the above-quoted paragraph were acceptable to them. Accordingly, the substance of the paragraph quoted above from the letter of July 18, 1958, should be included in any permits issued to insure adequate protection of vested rights of the Clear Lake Water Company.

Protestant O. W. Karn claims a right to the use of the natural flow of Cache Creek by virtue of ownership of lands riparian to the Creek (RT p. 88). Mr. Karn irrigates about 250 acres of land located along Cache Creek approximately three miles above Clear Lake Water Company's Capay Diversion Dam and some 30 miles downstream from the Clear Lake Dam (RT p. 87). The season of irrigation is normally April 1 through November 1. No water is stored by the protestant (RT p. 88).

Witness for Protestant Karn testified that small appropriations such as those proposed by Applications 17346 and 17347 would not normally result in injury nor noticeably affect the protestant; that injury could result in a dry year; and that the proposed appropriations coupled with similar developments in the future may be injurious (RT pp. 87, 88).

Clearly, a fair interpretation of this testimony is that the proposed appropriations alone will not materially affect the ability of Protestant Karn to divert from Cache Creek. Anticipated or possible injury by future applications is not sufficient to bar the approval of Applications 17346 and 17347. The record shows that over the years substantial amounts of water have been discharged from Clear Lake as surplus. Assuming a repetition of such condition it may be expected that water will be available for appropriation in most years in excess of the requirements of this protestant.

Conclusions

The evidence indicates and the Board finds that unappropriated water exists in the source named in Applications 17346 and 17347; that subject to the conditions indicated in this decision such water may be taken and used as proposed by applicants without material injury to any prior vested right; that the intended uses under Applications 17346 and 17347 are beneficial; that the proposed appropriations will result in further development of the water resources of the watershed

above Clear Lake which the Board considers to be in the public interest; and that the applications should be approved and permits issued to the applicants subject to the usual conditions and to the afore-mentioned special conditions.

ORDER

Applications 17346 and 17347 for permits to appropriate unappropriated water having been filed, protests having been submitted, a hearing having been held by the Board and the Board having considered all of the evidence received at the hearing and now being fully informed in the premises:

IT IS HEREBY ORDERED that Applications 17346 and 17347 be and the same are approved, and that permits be issued to the applicants subject to vested rights and to the following terms and conditions:

1. The amount of water appropriated under permit issued pursuant to Application 17346 shall be limited to the amount which can be beneficially used not exceeding 112 acre-feet per annum by storage to be collected between about October 1 of each year to about June 1 of the following year.

2. The amount of water appropriated under permit issued pursuant to Application 17347 shall be limited to the amount which can be beneficially used not exceeding 112 acre-feet per annum by storage to be collected between about October 1 of each year and about June 1 of the succeeding year.

3. The total amount of water to be appropriated under both permits issued pursuant to Application 17346 and Application 17347 shall not exceed 112 acre-feet per annum.

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

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

6. Said construction work shall be completed on or before December 1, 1961.

7. Complete application of the water to the proposed use shall be made on or before December 1, 1962.

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

9. 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.

10. These permits are subject to the prior rights of Clear Lake Water Company. Should the level of Clear Lake not reach an elevation of 7.56 feet above zero as measured on the Rumsey Gage at Lakeport, California, during the period from October 1 of each year to June 1 of the succeeding year, permittees shall, upon demand of Clear Lake Water Company, release from their reservoir into the natural stream channel the water impounded under these permits.

Provided, however, that the amount of water released shall be sufficient only to meet the aforesaid elevation requirements after holders of permits subsequent in time and subject to the same condition shall have complied therewith.

Provided, further, that any water released from Clear Lake by Clear Lake Water Company during the period from October 1 of each year and to June 1 of the succeeding year for purposes other than irrigation shall be considered surplus regardless of the level of Clear Lake at the time of said release, and permittees shall be entitled to retain an equivalent amount of water for storage in accordance with the priority of permits subject to the provisions of this condition No. 10 even though Clear Lake does not reach the level of 7.56 feet on the Rumsey Gage.

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.

Kent Silverthorne, Chairman

W. P. Rowe, Member

Ralph J. McGill, Member