

STATE WATER RESOURCES CONTROL BOARD
RESOLUTION NO. 96-087

ADOPTING THE REPORT OF REFEREE FOR
WILLIAM L. RIECK, ET AL. V. JOHN R. CATON, ET AL.
SHASTA COUNTY SUPERIOR COURT NO. 115049
REGARDING THE WATER OF JOHNSON CREEK IN SHASTA COUNTY

WHEREAS:

1. An Order of Reference (Order) dated January 11, 1995, from Shasta County Superior Court ordered the State Water Resources Control Board (SWRCB) to determine whether specified parties have pre-1914 appropriative rights, riparian rights, and prescriptive rights to divert and use the water of the unnamed stream also known as Johnson Creek, and to establish the priority of those rights found to be valid.
2. The Court further ordered the SWRCB to conduct a field investigation regarding the uses of water by the parties and to define the place of use and purpose of use of the water diverted from Johnson Creek, to determine the location and capacity of the diversion works and conduits conveying water from the stream system, and to determine the amount of water diverted and reasonably required to satisfy the uses being made.
3. In accordance with the Order, the parties submitted opening briefs, reply briefs, and all supporting evidence to the SWRCB.
4. Also in accordance with the Order, the staff of the Division of Water Rights conducted a field investigation of the diversion and use of water from Johnson Creek.
5. The Report of Referee has been prepared in accordance with the Order and Water Code Sections 2010-2012.
6. The Report of Referee was announced and mailed to the parties in accordance with Water Code Sections 2013-2014.
7. The parties were given notice that they had thirty days to file objections to the Report of Referee with the SWRCB in accordance with Water Code Section 2015.
8. No objections to the Report of Referee have been received.

THEREFORE BE IT RESOLVED:

That the SWRCB adopts the Report of Referee. The SWRCB directs the staff to file the Report of Referee with the clerk of the court and to give notice by mail of its filing to the parties in accordance with Water Code Section 2016.

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the State Water Resources Control Board held on November 21, 1996.


Maureen Marché
Administrative Assistant to the Board

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

WILLIAM L. RIECK, et al.,
Plaintiffs,

v.

JOHN R. CATON, et al.,
Defendants.

Shasta County
Superior Court
No. 115049

JOHN R. CATON, et al.,
Cross-Complainants,

v.

WILLIAM L. RIECK, et al.,
Cross-Defendants.

DRAFT

REPORT OF REFEREE

Unnamed Creek (AKA Johnson Creek)
Tributary to Montgomery Creek
in Shasta County
by
State Water Resources Control Board

Referee

July 1996

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STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

WILLIAM L. RIECK, et al.,)	
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Plaintiffs,)	Shasta County
)	Superior Court
v.)	No. 115049
)	
JOHN R. CATON, et al.,)	
)	
Defendants.)	
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JOHN R. CATON, et al.,)	
)	
Cross-Complainants,)	
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v.)	
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WILLIAM L. RIECK, et al.,)	
Cross-Defendants.)	
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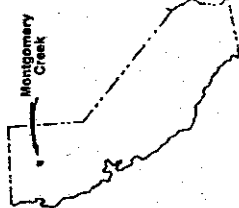
DRAFT REPORT OF REFEREE

1.0 INTRODUCTION

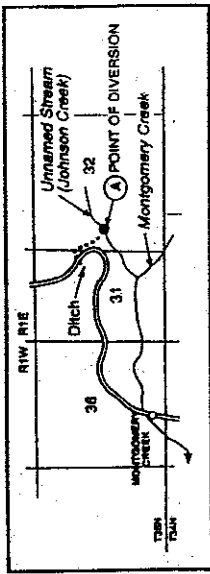
This draft Report of Referee (Report) is prepared pursuant to California Water Code Section 2000 et seq. and pursuant to an Order of Reference (Order) dated January 11, 1995, from Shasta County Superior Court (Appendix A). The Order requires the State Water Resources Control Board (SWRCB) to determine whether specified parties have pre-1914 appropriative rights, riparian rights, and prescriptive rights to divert and use the water of the unnamed stream also known as Johnson Creek, and to establish the priority of those rights found to be valid. The Court further ordered the SWRCB to conduct a field investigation regarding the uses of water by the parties and to define the place of use and purpose of use of the water diverted from Johnson Creek, to determine the location and capacity of the diversion works and conduits conveying water from the stream system, and to determine the amount of water diverted and reasonably required to satisfy the uses being made.

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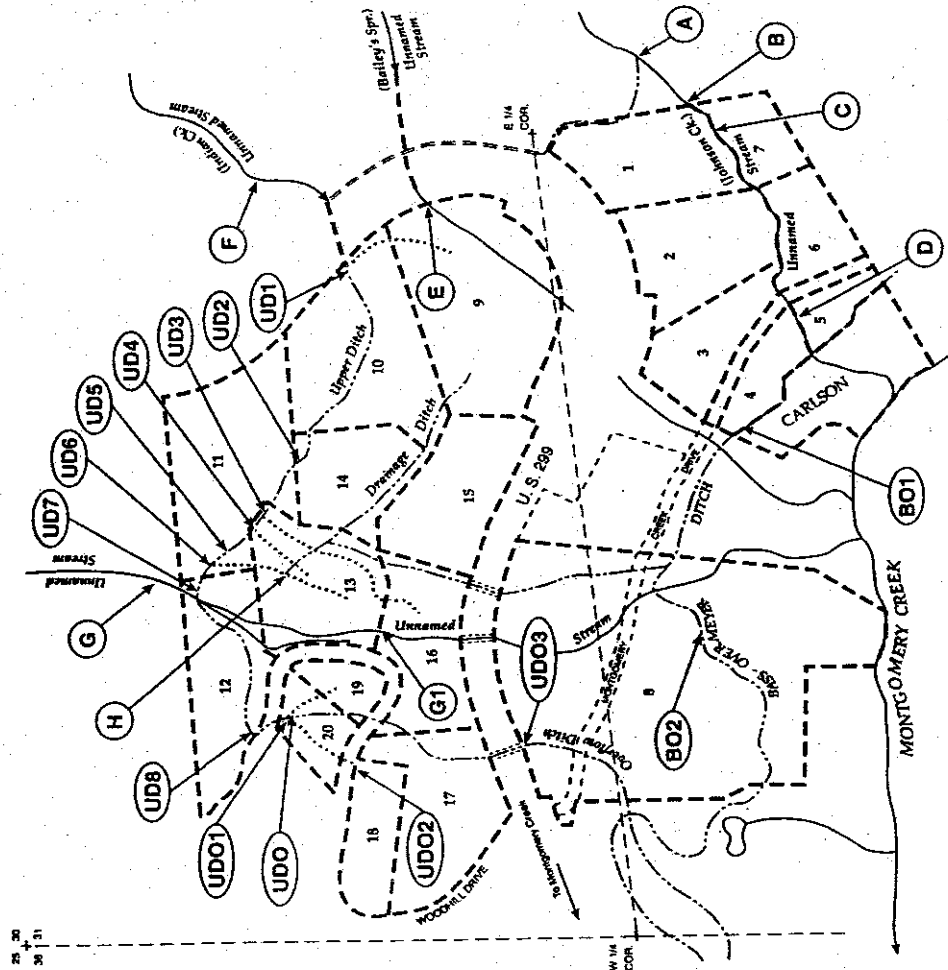
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Location Map



Vicinity Map



LEGEND

- Stream
- Ditch
- Pipeline
- Underground Pipeline
- Parcel Boundary
- Road Culvert
- Points of Diversion & Locations Referred to in Report



SHASTA COUNTY
T 35 N R 1 E
M. D. B. & M.

POINTS OF DIVERSION

- A. Johnson Creek Ditch Users (pipeline broken)
- B. Johnson Creek: Eslinger
- C. Johnson Creek: Eugene Robinson
- D. Johnson Creek: Maryann Robinson
- G1. Unnamed Stream tributary to Unnamed Spring: Troxell (pipeline broken)

ADDITIONAL WATER SOURCES

- E. Unnamed Stream (aka Bailey's Spring); Unused
- F. Unnamed Stream (aka Indian Creek)
- G. Unnamed Stream
- H. Drainage Ditch from Caton's Spring; Unused

POINTS OF REDIVERSION

- Base-Overmeyer Ditch
- BO1. Robinson
- BO2. Troxell
- Upper Ditch
- UD1. Kennedy
- UD2. Blaylock
- UD3. Renwick
- UD4. Caton
- UD5. Merrill
- UD6. Caton
- UD7. Sparks
- UD8. Collection Barrel from Upper Ditch for Klein, Thomason, & Stetler

- Upper Ditch Overflow
- UDO. Upper Ditch Overflow
- UDO1. Storage Tank: Klein and Thomason
- UDO2. Storage Tank: Stetler
- UDO3. Overflow Ditch: Troxell

PARCEL OWNERS

1. M. & E. Robinson - PL
2. M. & E. Robinson - PL
3. M. Robinson - PL
4. M. & D. Robinson - PL
5. R. Brown - PL
6. G. & K. Eslinger - PL
7. L. & P. Eldridge - PL
8. G. Troxell - D
9. T. Kennedy - D
10. E. Shuffleton (not a party)
11. J. & J. Merrill - D
12. B. & L. Sparks - D
13. J. & K. Caton - D
14. D. Blaylock - D
15. R. Petersen (not a party)
16. T. Renwick - D
17. L. & J. Stetler - D
18. L. & J. Stetler - D
19. J. & D. Klein - D
20. I. & H. Thomason - D

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD
DIVISION OF WATER RIGHTS

MAP 1

RIECK, et. al., vs CATON, et. al.
COURT REFERENCE

SCALE 300 FEET

DATE: 1-22-96 DRAWN: D.L.O. CHECKED: M.C. DWG: 3567

In accordance with the Order, the parties submitted opening briefs, reply briefs, and all supporting evidence to the SWRCB. Also in accordance with the Order, the staff of the Division of Water Rights (Division) of the SWRCB conducted a field investigation of the diversion and use of water from Johnson Creek.

2.0 PARTIES TO THE REFERENCE

2.1 Plaintiffs and Cross-Defendants

The plaintiffs and cross-defendants are Mary Ann Brown, Richard M. Brown, Lester E. Eldridge, Patricia Eldridge, Gaylen E. Eslinger, Katherine K. Eslinger, Donald Robinson, Eugene Robinson, and Mary Ann Robinson.¹ They are property owners whose parcels abut Johnson Creek. They are collectively referred to in the briefs filed by the parties as the "Riparian Users"² and the "Robinson Group." In this Report, they will be referred to as the Plaintiffs. The Plaintiffs own the following parcels:

<u>Name</u>	<u>Assessor's Parcel No.</u>	<u>Map 1 Parcel No.</u>
Mary Ann and Eugene Robinson	027-380-21	1
	027-380-22	2
Mary Ann Robinson	027-380-23	3
Donald and Mary Ann Robinson	027-380-24	4
Richard M. Brown	027-380-18	5
Gaylen and Katherine Eslinger	027-380-19	6

¹ William L. Rieck is the predecessor in interest to Mary Ann and Eugene Robinson. He formerly owned parcels 1, 2, and 3 as shown on Map 1. William L. and Georgene E. Rieck acquired an appropriative right to divert and use the water of Johnson Creek (permitted Application 26015) which was assigned to the Robinsons and is not part of this court, reference.

² Use of the term "Riparian Users" does not imply or confer a valid riparian water right.

Lester and Patricia
Eldridge

027-380-20

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2.2 Defendants and Cross-Complainants

The defendants and cross-complainants are Donna Blaylock, John Caton, Katherine Caton, Bonnie Kennedy, Thomas Kennedy, Carolyn Klein, Jeff Klein, Joan Merrill, John Merrill, Thelma Renwick, Barry Sparks, Lynn Sparks, Joyce Stetler, Leslie Stetler, Harriet Thomason, Ivan Thomason, and Gerald Troxell. They divert water from Johnson Creek into a ditch known as the "Upper Ditch." All of them divert and use water from the Upper Ditch on their respective parcels. None of the parcels are contiguous to Johnson Creek. They are collectively referred to as the "Ditch Users" in the briefs filed by the parties. In this Report, they will be referred to as the Ditch Users. The Ditch Users own the following parcels:

<u>Name</u>	<u>Assessor's Parcel No.</u>	<u>Map 1 Parcel No.</u>
Gerald Troxell	027-370-05	8
Thomas and Bonnie Kennedy	027-360-14	9
John and Joan Merrill	027-360-17	11*
Barry and Lynn Sparks	027-360-07	12
John and Catherine Caton	027-360-08	13
Donna Blaylock	027-360-12	14
Thelma Renwick	027-360-11	16*
Leslie and Joyce Stetler	027-360-10	17
	027-360-09	18
Jeff and Carolyn Klein	027-360-06	19
Ivan and Harriet Thomason	027-360-05	20

(*Parcels 10 and 15
are not included in
this litigation.)

3.0 SWRCB FIELD INVESTIGATION

In accordance with the Order, Division staff conducted a field investigation during the week of July 17-21, 1995. The report for the field investigation is included herein as Appendix B.

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4.0 PLAINTIFFS' CONTENTIONS

The Plaintiffs contend that they have riparian rights to divert and use the water of Johnson Creek. The Plaintiffs further contend that the Ditch Users do not have riparian, pre-1914 appropriative rights, or prescriptive rights to divert and use the water of Johnson Creek. The Plaintiffs allege that even if the Ditch Users had a pre-1914 appropriative right, it was forfeited or abandoned. Finally, the Plaintiffs contend that they have the highest priority to divert and use the water of Johnson Creek.

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5.0 DITCH USERS' CONTENTIONS

The Ditch Users contend that they have a pre-1914 appropriative right to divert and use water from Johnson Creek. They contend that they have not wasted water or abandoned all or part of their pre-1914 appropriative right. They further contend that their property is riparian to Montgomery Creek and that they have the right to divert water from Johnson Creek because it is tributary to Montgomery Creek. The Ditch Users also contend that they have a prescriptive right to divert and use water from Johnson Creek based upon their diversion of water since 1964. Finally, the Ditch Users contend that the Plaintiffs lost their riparian rights by prescription and, therefore, have no legal basis of right to divert and use water from Johnson Creek.

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6.0 EXTENT OF COURT REFERENCE

The Ditch Users state that all of the users of Johnson Creek are parties to the action and that this proceeding "is in the nature of an adjudication of water rights, including rights to

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appropriate unappropriated water and including the right of the court to quantify future riparian rights." (Ditch Users' Opening Brief at 4:9-12.) The Ditch Users cite the Long Valley³ case for support of this statement.

Long Valley authorizes the SWRCB to assign a lower priority to presently unexercised riparian rights than the priority assigned to all presently active rights, whether riparian or appropriative, in a statutory adjudication proceeding conducted pursuant to Water Code Section 2500 et seq. This proceeding is not a statutory adjudication of water rights conducted pursuant to Water Code Section 2500 et seq.; rather, it is a court reference conducted pursuant to Water Code Section 2000 et seq.

The Order neither requires nor authorizes the SWRCB to quantify future (unexercised) riparian rights, and in this case, the SWRCB is of the opinion that it would be inappropriate to make such a determination pursuant to Water Code Section 2011. Wright v. Goleta Water District (1985) 174 Cal.App.3d 74, 219 Cal.Rptr. 740 (Goleta), is a case in which landowners of real property overlying a ground water basin filed an action to determine relative rights to ground water use. The trial court, citing Long Valley, determined that unexercised rights had lower priorities than rights actually exercised. The trial court reasoned that since an overlying right to extract and use ground water is analogous to a riparian right, the principles stated in Long Valley should apply to overlying ground water rights. The Court of Appeal held that it is inappropriate to extend the Long Valley principle of subordinating an unexercised right to a present appropriative use when adjudicating competing claims to ground water. (Goleta, supra, 174 Cal.App.3d at 87.) The Court's rationale was that a statutory adjudication determines

³ In re Waters of Long Valley Creek Stream System (1979) 25 Cal.3d 339, 158 Cal.Rptr. 350, 599 P.2d 656.

all rights to divert and use water from a stream system and the Goleta case did not purport to determine all rights to the ground water in the basin. The Court stated:

"absent a statutory scheme for *comprehensive determination* of all ground water rights, the application of *Long Valley* to a private adjudication would allow prospective rights of overlying landowners to be subject to the vagaries of an individual plaintiff's pleading without adequate due process protections." (174 Cal.App.3d at 89 (emphasis in original).)

In the present case, there is a potential federal riparian claim as well as one other parcel (Assessor's Parcel No. 027-380-17 owned by Pat Carlson) which is riparian to Johnson Creek, and another ditch (Bass-Overmeyer Ditch) into which water of Johnson Creek is diverted. Therefore, this court reference cannot presume to be a comprehensive determination of all rights to the water of Johnson Creek. Accordingly, it is not appropriate to quantify future riparian rights in this proceeding.

Long Valley also does not hold that the SWRCB has authority to determine the rights to appropriate unappropriated water in a statutory adjudication or a court reference. The SWRCB has authority to determine the availability of unappropriated water pursuant to Water Code Section 1200 et seq. The SWRCB, not the court, has the authority to issue permits to appropriate unappropriated water. (Water Code Section 1225; People v. Shirokow (1980) 26 Cal.3d 301, 162 Cal.Rptr. 30, 35-36, 605 P.2d 859.) It is not appropriate to consider applications to appropriate unappropriated water or to determine quantities of unappropriated water (Water Code Section 1205 et seq.) in either court references or statutory adjudications. (Water Code Sections 1200 et seq., 2000 et seq., and 2500 et seq.) The proper forum to determine the availability of unappropriated water is before the SWRCB. (Water Code Section 1200 et seq.)

The Ditch Users also state that:

"[T]he SWRCB is also charged with making a report and recommendation with respect to priorities relating to water rights appropriation and quantities of unappropriated water." (Ditch Users' Opening Brief at 4:17-20.)

The Order does not require nor authorize the SWRCB to determine quantities of unappropriated water available for appropriation from Johnson Creek. The SWRCB determines whether there is unappropriated water available to supply an applicant pursuant to its statutory duties in acting on applications to appropriate unappropriated water. (Water Code Section 1375(d).) The application process is a separate process from a court reference and requires different procedures, including compliance with the California Environmental Quality Act. Processing Application 30251 as part of this court reference would not allow the filing of the Report of Referee with the Court in a timely manner. The SWRCB takes official notice that Application 30251 of the Ditch Users is pending; however, the SWRCB will not act on the application in this proceeding.

7.0 PRE-1914 APPROPRIATIVE RIGHTS

7.1 Applicable Water Law

Prior to December 19, 1914,⁴ an appropriative right for the diversion and use of water could be obtained two ways.⁵ First, one could acquire a nonstatutory (common law) appropriative right by diverting water and putting it to beneficial use. (Haight v. Costanich (1920) 184 Cal. 426, 194 P. 26.) After 1872 a statutory appropriative right could also be acquired by complying

⁴ December 19, 1914, was the effective date of the Water Commission Act of 1913. The Water Commission Act was codified in the Water Code in 1943.

⁵ After 1914, an appropriative right could only be obtained by complying with the provisions of the California Water Code for the appropriation and use of water. (Water Commission Act, Stats. of 1913, Chap. 586, p. 1012; Stats. 1923, Chap. 87, p. 162, Sec. 1c; Water Code Section 1225; People v. Shirokow (1980) 26 Cal.3d 301, 162 Cal.Rptr. 30, 35, 605 P.2d 859.)

with Civil Code Sections 1410-1422.⁶ (Id.) The appropriator could choose which method to use, neither one took precedence over the other.

Under the Civil Code, a person wishing to appropriate water was required to post a written notice at the point of intended diversion and record a copy of the notice with the County Recorders' Office. (Civil Code Section 1415.) The notice was required to contain the following information:

- the amount of water appropriated,
- the purpose for which the appropriated water would be used,
- the place of use,
- the means by which the water would be diverted, and
- the size of the diversion works.

(Id.) Within 60 days after posting notice, the claimant was required to commence construction of the diversion works and then to prosecute the work diligently and uninterruptedly to completion. (Civil Code Section 1416.) If completion of the appropriation occurred in compliance with the statutory requirements described above, the claimant's right to the use of water related back to the time the notice was posted. (Civil Code Section 1418.) Failure to comply with the statutory provisions resulted in forfeiture of the right. (Civil Code Sections 1419, 1420.)

The measure of an appropriative right is the amount of water that is put to reasonable beneficial use plus an allowance for reasonable conveyance loss. (Felsenthal v. Warring (1919))

⁶ Civil Code Sections 1410-1422 have been partially repealed and partially reenacted in the Water Code.

40 Cal.App. 119, 180 P. 67, 73.) The quantity of water to which an appropriator is entitled is generally limited to the amount actually used at the time of the original diversion. However, under the doctrine of gradual or progressive development, pre-1914 appropriations may be enlarged beyond the original appropriation. (Haight, *supra*, 194 P. at 28-29; Hutchins, The California Law of Water Rights, p. 118; 62 Cal.Jur.3d, Water Section 339.)

Under the gradual development doctrine, the quantity of water to which an appropriator is entitled is not unlimited. The increase in the appropriation must be within the scope of the original intent, and additional water must be taken and put to a beneficial use within a reasonable time by the use of reasonable diligence. (Haight, *supra*, 194 P. at 29. Senior v. Anderson (1896) 115 Cal. 496, 47 P. 454, 456; Trimble v. Heller (1913) 23 Cal.App. 436, 138 P. 376, 379.) Water could not be reserved for some future unplanned use.

The priority of a common law appropriative right is the date the appropriation was completed. Completion means that water was diverted and put to reasonable beneficial use. Appropriators who complied with the Civil Code have the benefit of the relation back doctrine which gives them a priority of the date of posting the notice. (Civil Code Section 1418.)

Water had to be continuously used to maintain the right. Civil Code Section 1411 provided that when an appropriator or his/her successor in interest ceased to use the water for a beneficial purpose, the right was forfeited. Although Section 1411 did not contain a specific period of time after which nonuse would result in forfeiture, the California Supreme Court determined that forfeiture would occur after five years of nonuse. (Smith v. Hawkins (1895) 110 Cal. 122, 42 P. 453, 454.)

litigation have a riparian right to divert and use the water of Johnson Creek under riparian right:

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<u>Name</u>	<u>Assessor's Parcel No.</u>
Mary Ann and Eugene Robinson	027-380-21
Mary Ann and Eugene Robinson	027-380-22
Mary Ann Robinson	027-380-23
Donald and Mary Ann Robinson	027-380-24
Richard M. Brown	027-380-18
Gaylen and Katherine Eslinger	027-380-19
Lester and Patricia Eldridge	027-380-20

The SWRCB finds and concludes that Parcel 8 is riparian to Montgomery Creek but not to Johnson Creek. Accordingly, Mr. Gerald Troxel, owner of Parcel 8 (Assessor's Parcel No. 027-370-05), may divert and use the water of Montgomery Creek under riparian right. In accordance with the SWRCB's findings in Sections 8.3 and 8.4, Mr. Troxell may not divert water from upstream of his parcel for riparian use on Parcel 8.

The SWRCB finds and concludes that none of the parties have pre-1914 appropriative rights to divert and use the water of Johnson Creek. The SWRCB finds and concludes that none of the parties have prescriptive rights to divert and use the water of Johnson Creek. Accordingly, the following parties have no valid right to divert and use the water of Johnson Creek:

<u>Name</u>	<u>Assessor's Parcel No.</u>
Thomas and Bonnie Kennedy	027-360-14
John and Joan Merrill	027-360-17
Barry and Lynn Sparks	027-360-07
John and Catherine Caton	027-360-08
Donna Blaylock	027-360-12
Thelma Renwick	027-360-11

(Seneca Consolidated Gold Mines Co. v. Great Western Power Co.
(1930) 209 Cal. 206, 287 P. 93; Prather v. Hoberg (1944)
24 Cal.2d 549, 150 P.2d 405; Hutchins, supra, pp. 218-234.)

Therefore, each of the Plaintiffs has a riparian right which is equal in priority to each of the other Plaintiffs' riparian rights.

If the Ditch Users are successful in obtaining a permit from the SWRCB pursuant to Application 30251 for the diversion and use of the water of Johnson Creek, the appropriative right will be junior in priority to all of the riparian rights and permitted Application 26015 of Mary Ann and Eugene Robinson.

11.0 DIVERSION AND USE OF WATER FROM INDIAN CREEK

The Order does not require the SWRCB to determine whether any of the Ditch Users has a valid right to divert and use the water of Indian Creek. However, the field investigation revealed that the water of Indian Creek is being diverted into the Upper Ditch and is used by the Ditch Users on their parcels. The SWRCB knows of no evidence which would authorize this diversion and it appears to be an unauthorized diversion of water subject to enforcement action pursuant to Water Code Section 1052. Unless a basis of right can be established for the diversion and use of water from Indian Creek, the Ditch Users should cease and desist from diverting and using this water.

12.0 DETERMINATION OF WATER RIGHTS

The SWRCB finds and concludes that Parcels 1 through 7 are riparian to Johnson Creek and the owners of those parcels have a riparian right to divert and use the water of Johnson Creek for proper riparian use on the portions of their respective parcels that are riparian to Johnson Creek. The riparian rights are equal in priority. Accordingly, the following parties to this

"An upstream appropriator can obtain a prescriptive right against a downstream riparian even if the riparian is not yet putting the water to a reasonable and beneficial use."

(Ditch Users' Opening Brief at 19: 20-23.) This claim does not accurately represent the law of riparian rights. Riparian rights are not created by use and they are not lost by nonuse. (Lux v. Haggin (1884) 69 Cal. 255, 391, 4 P. 919, 10 P. 674 (1886); Tulare Irrigation District v. Lindsay-Strathmore Irrigation District (1935) 3 Cal.2d 489, 45 P.2d 972, 989.) It necessarily follows that water which is not needed and therefore not used by a riparian claimant, cannot be subject to prescription because the required element of hostile and adverse use cannot be demonstrated. Here, no use of water is necessary and is not being made on Plaintiffs' parcels 3 and 5 because they are undeveloped. Therefore, a prescription claim would fail as against Mary Ann Robinson (owner of parcel 3) and Richard Brown (owner of parcel 5) for failure to demonstrate that the use was hostile and adverse to them.

The Ditch Users have failed to provide any evidence which would prove their claim of prescription and their legal arguments are without merit. Therefore, no claim of prescription can be found to exist in the Ditch Users as against the Plaintiffs.

9.3 Findings and Conclusions

The SWRCB finds and concludes that none of the parties has a prescriptive right to divert and use the water of Johnson Creek on their parcels.

10.0 PRIORITY OF WATER RIGHTS TO JOHNSON CREEK

The Order requires the SWRCB to determine the priority of the rights of the parties found to have a valid water right to Johnson Creek. The only valid water rights are riparian rights. Riparian rights are equal in priority and are correlative.

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9.2 Prescriptive Claims of the Ditch Users¹⁶

The Ditch Users claim a prescriptive right to divert water from Johnson Creek based upon their diversion of water since 1964. (Ditch Users' Opening Brief at 19:1-3.) After 1914, compliance with Division 2 of the Water Code is required to initiate a new right. As discussed in Sections 7.3 and 8.3, there is no evidence which would support a finding that the Ditch Users have pre-1914 appropriative rights or riparian rights to divert and use the water of Johnson Creek. Therefore, compliance with the provisions of the Water Code is required to initiate a new water right and the Ditch Users' claim of prescription must fail.

Even if the Ditch Users could establish a legal basis of right to divert and use the water of Johnson Creek (other than prescription), the claim would fail because each Ditch User must provide proof of each of the five elements to establish adverse possession as against each Plaintiff.¹⁷ This they have not done. There is no evidence that each Ditch Users' use of water has been actual, open and notorious, hostile and adverse to the original owner's title, continuous and uninterrupted for five years, and under a claim of exclusive right as against each Plaintiff. Further, even if the Ditch Users had established adverse possession as against some or all of the Plaintiffs, because the Plaintiffs have riparian rights, the Ditch Users would be restricted to the limitations applicable to riparian rights including the requirement that any water diverted must be used on riparian land within the watershed. Since none of the Ditch Users' parcels are riparian to Johnson Creek, water could not be used on their parcels under a claim of prescription.

The Ditch Users claim that:

¹⁶ The Plaintiffs do not claim prescriptive rights.

¹⁷ See Shirokow, *supra*, 26 Cal.3d at 312.

Thus, Shirokow established that one cannot initiate a right to divert water subject to appropriation without complying with the statutory process.¹⁵ However, since the issue of prescription between private parties was not before the Court, the Court did not decide the extent to which prescription may be relied upon in resolving disputes between competing water right claimants. Assuming that a water right of one party could be acquired by another party through prescription, the prescripting party cannot acquire a greater right than the other party held. Consequently, any determination of whether a given use of water may be undertaken pursuant to a water right acquired through prescription necessarily requires examination of the limitations on the water right prior to the alleged prescription.

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In the case of an appropriative right held under permit or license from the SWRCB, a party alleging to have acquired the water right through adverse possession would continue to be subject to the terms and conditions under which the permit or license was issued. Similarly, one who alleges to have acquired a riparian right through adverse possession cannot escape the limitations applicable to riparian rights including the requirement that any water diverted must be used on riparian land within the watershed. (Vail, *supra*, 11 Cal.2d at 529.)

To perfect a water right through adverse possession, in addition to having a legal basis of right, one must establish that the use of water has been actual, open and notorious, hostile and adverse to the original owner's title, continuous and uninterrupted for five years, and under a claim of exclusive right. (Lee v. Pacific Gas & Electric Co. (1936) 7 Cal.2d 114, 120, 59 P.2d 1005, 1008.) As stated above, one cannot initiate a water right by prescription.

¹⁵ See discussion by Scott Slater, California Water Law and Policy, Vol. I, 1995, Butterworth Legal Publishers, pp. 4-3 through 4-7.

injunctive relief. A number of cases decided prior to Shirokow, appear to recognize prescriptive rights as a separate type of water right distinct from appropriative and riparian rights. However, since no application or permit was required to initiate an appropriative water right prior to 1914, alleged "prescriptive rights" initiated prior to that time are correctly viewed as diversions under appropriative right (or riparian diversions) which may also have had the effect of prescribing someone else's water right. Following issuance of the Shirokow decision, it is established that post-1914 appropriations must comply with the statutory procedure and that prescription does not provide an avenue for acquiring a separate type of water right. To the extent that prescription may still be relevant in the post-Shirokow era, it is clear that it would apply only to instances where one party with a legal basis of right alleges to have prescribed the existing water rights of another, be they riparian or appropriative. Since prescription provides no basis for initiating a new type of water right, much of the discussion in early cases about the characteristics of a "prescriptive right" has no meaning following the Shirokow decision.

In Shirokow, 26 Cal.3d at 309, the California Supreme Court held that only riparians and pre-1914 appropriators were exempt from the water appropriation procedures established by statute. In a footnote to the decision, however, the Court clarified the scope of its ruling as follows:

"The extensive discussion in the concurring and dissenting opinion of our purported abolition of all property rights in water acquired by prescription . . . bears no relationship to reality. We hold here only that defendant's claim of prescriptive rights cannot lie as against the state when it seeks to enjoin unauthorized use pursuant to section 1052. It is unnecessary for us to reach the question of whether and under what circumstances prescriptive rights in water may be perfected as between private parties."
(26 Cal.3d at 312, footnote 15.)

appropriation procedures of division 2. [Citations omitted.]" (26 Cal.3d at 309, emphasis added.)

Since the enactment of the statutory appropriation process in 1913, the courts have recognized that the process is the exclusive means for appropriating water, even as between private parties. In Crane v. Stevinson (1936) 5 Cal.2d 387, 54 P.2d 1100, the Court held that an upstream riparian had not established sufficient evidence to prove that he had acquired rights to non-riparian water enforceable against an appropriator. Among the facts that he had failed to establish was that he had complied with the Water Commission Act. As stated by the Court,

"[S]ince the effective date (year 1913) of the Water Commission Act, an intending appropriator has been required to file his application with the water commission This the plaintiff did not do. To sustain his claim, the appropriation made by him must have been actually complete at some time prior to said 1913 date, and even that is not sufficient if the evidence shows a subsequent failure to maintain the beneficial use for the period of time prescribed by the statute, or for the period of time, five years, required under decisions prior to the statute. [Citations omitted.]" (5 Cal.2d at 398.)

Similarly, in State v. Hansen, (1961) 189 Cal.App.2d 604, the Court refused to recognize the purported water rights because, among other things,

". . . the defendant was not entitled to any [water] thereof as he had not obtained a permit from the State Water Rights Board (Wat. Code, § 1225; Crane v. Stevinson, 5 Cal.2d 387, 398 [54 P.2d 1100]), and, by statutory declaration, any diversion of such water was a trespass subject to injunction. (Wat. Code, § 1052.)" (189 Cal.App.2d at 610.)

In People v. Shirokow, *supra*, the Court held that Shirokow's storage of water was a use of water subject to appropriation and therefore conditioned upon compliance with the appropriation procedures of Division 2 of the Water Code. Shirokow's failure to comply with the procedure made his use a trespass under Water Code Section 1052 and subject to an action by the State for

California, particularly Article X, Section 2 of the California Constitution which provides in part:

"It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable . . . and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare."

The Court noted that Division 2 of the Water Code, which contains the statutory appropriation scheme, was enacted in furtherance of Article X, Section 2. (See Water Code Section 1050.) In addition, the Court examined Water Code sections which provide that all water within the State is the property of the people (Section 102), that the people have a paramount interest in the use of all water of the State (Section 104), and that the State shall determine the manner in which the water of the State should be developed for the greatest public benefit (Section 105). After reviewing the statutory and constitutional provisions governing the appropriation and use of water in California, the Court went on to state:

"These considerations lead us to conclude section 1201 should be interpreted in such a manner that the waters of the state be available for allocation in accordance with the code to the fullest extent consistent with its terms. In Bloss v. Rahilly, *supra*, 16 Cal.2d at pages 75-76, we observed the language of section 1201 evinces 'an intention to declare the waters of the state to be subject to appropriation in so far as that can be done without interfering with vested rights.' The Constitution, too, provides for the protection of appropriators, but only to the extent the appropriator is 'lawfully entitled' to water. (Cal.Const. Art. X, § 2.) The rights not subject to the statutory appropriation procedures are narrowly circumscribed by the exception clause of the statute and include only riparian rights and those which have been otherwise appropriated prior to December 19, 1914, the effective date of the statute. Any use other than those excepted is, in our view, conditioned upon compliance with the

establishes the exclusive method for initiating the right to use water subject to appropriation. (Water Commission Act, Stats. of 1913, Chap. 586, p. 1012; Stats. 1923, Chap. 87, p. 162, Sec. 1c; Water Code Section 1225; People v. Shirokow (1980) 26 Cal.3d 301, 162 Cal.Rptr. 30, 35, 605 P.2d 859.)

Water Code Section 1225 states in full:

"Except as provided in Article 2.5 (commencing with Section 1226) of this chapter, no right to appropriate or use water subject to appropriation shall be initiated or acquired except upon compliance with the provisions of this division."

The words "this division" refer to Division 2 of the Water Code, commencing with Section 1000. Part 2 of Division 2, entitled "Appropriation of Water" sets forth the procedure for obtaining a permit and license to appropriate water from the SWRCB. By the plain meaning of its terms, Water Code Section 1225 establishes that compliance with the statutory requirements is a prerequisite for initiating any right to use or appropriate water subject to appropriation.¹⁴ Once an appropriative water right has been established, it may be lost through non-use, revocation, or possibly even prescription, but the initial establishment of a right to divert water subject to appropriation must be in compliance with statutory requirements.

In addition to the plain meaning of the words of Water Code Section 1225, other statutory and constitutional provisions regarding water use in California require that Section 1225 be interpreted to mandate compliance with the statutory scheme. In People v. Shirokow, *supra*, the California Supreme Court examined the constitutional and statutory system governing water use in

¹⁴ Riparian water rights are not subject to the statutory requirements governing appropriation of water since such rights exist by virtue of the riparian status of the land contiguous to a water course. (Vail, *supra*, 11 Cal.2d at 528-529.)

to the BLM on a stream which is tributary to the stream to which riparian rights attach, no permission or easement has been granted to Mr. Troxell or to the Ditch Users to locate their diversion facilities on BLM land, and the intervening riparians have not consented to access to Johnson Creek across their lands even if diversion from the upstream tributary was authorized by law. Therefore, Mr. Troxell may not divert water from Johnson Creek for use on Parcel 8 under his riparian right.

8.4 Findings and Conclusions

The SWRCB finds and concludes that the Plaintiffs have riparian rights to divert water from Johnson Creek for reasonable beneficial use on Parcels 1 through 7. The SWRCB finds and concludes that Parcel 8 is riparian to Montgomery Creek and is not riparian to Johnson Creek. The SWRCB finds and concludes that Mr. Troxell, the owner of Parcel 8, may divert and use water from Montgomery Creek on the portion of his parcel that is riparian to Montgomery Creek under riparian right but he may not divert water from upstream of his parcel for riparian use on Parcel 8. The SWRCB further finds and concludes that Parcels 9 through 20 are not riparian to either Montgomery Creek or Johnson Creek. Accordingly, the SWRCB finds and concludes that water may not be diverted from either Montgomery Creek or Johnson Creek for use on Parcels 9 through 20 under riparian right. Finally, the SWRCB finds and concludes that the Upper Ditch is not a natural channel to which riparian rights would attach. Accordingly, the SWRCB finds and concludes that water may not be diverted from the Upper Ditch or Johnson Creek for use on any of the Ditch Users' parcels under riparian right.

9.0 PRESCRIPTIVE RIGHTS

9.1 Applicable Water Law

After enactment of the Water Commission Act, water rights cannot be initiated by prescription. The California Water Code

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The rule governing the relationship of the watershed of the main stream (Montgomery Creek) to the watershed of its tributary (Johnson Creek) is that for parcels located below (downstream of) the confluence of the two streams, both the main stream and the tributary stream are in the same watershed. (Holmes v. Nay, *supra*, 199 P. at 330; Vail, *supra*, 81 P.2d at 548.) Plaintiffs cite Anaheim Union Water Co. v. Fuller, *supra*, to argue that Montgomery Creek and Johnson Creek are in separate watersheds. They are in separate watersheds as to lands above (upstream of) the confluence of the two streams. Parcel 8 is riparian to Montgomery Creek and is located below the confluence of Montgomery Creek and Johnson Creek. Therefore, as to Parcel 8, the rule in Holmes v. Nay applies and Johnson Creek is in the same watershed as Montgomery Creek. Neither rule applies to Parcels 9 through 20 because they are not contiguous to either stream.

That both streams are in the same watershed does not grant riparian status to any of the Ditch Users' parcels, nor does it authorize the diversion of water from Johnson Creek for use on the Ditch Users' parcels or on Parcel 8. Parcel 8 is contiguous only to Montgomery Creek. A riparian owner may divert water upstream of his/her parcel on the same stream for use on the downstream riparian parcel, but only with the consent of the abutting and intervening owners. If consent to access is granted, the riparian owner is required to use the water reasonably and to use the water on riparian land. (Turner v. Eastside Canal & Irrigation Co. (1914) 168 Cal. 103, 142 P. 69, 72; Miller & Lux v. Enterprise Canal & Land Co. (1915) 169 Cal. 415, 441, 147 P. 567, 576-577.) Further, the water that they seek to divert must actually reach the parcel and cannot exceed the amount of water in the stream at the downstream parcel. (Miller & Lux v. Enterprise Canal & Land Co., *supra*, 147 P. at 577.) Here, the point of diversion is located on land belonging

Fuller (1907) 150 Cal. 327, 88 P. 978, 980; Hudson v. Dailey (1909) 156 Cal. 617, 105 P. 748, 751-752; Strong v. Baldwin (1908) 154 Cal. 150, 97 P. 178, 181; Vail, supra, 81 P.2d at 552.) There is no evidence to show that the riparian rights were preserved in the severed parcels at the time of severance. The deeds which were submitted as evidence do not contain any language which would preserve the riparian rights in the severed parcels. (Plaintiffs' Exhibit M; Ditch Users' Exhibit 22; see Ditch Users' Exhibits 25 and 26.) Further, there is no evidence which would show that preservation of the riparian right was implied at the time of severance. (Holmes v. Nay (1921) 186 Cal. 231, 199 P. 325, 328.) The Ditch Users have not submitted any evidence which shows that these parcels, at the time of severance, were dependent upon water from Montgomery Creek. Therefore, parcels 9 through 20 of the Ditch Users are not riparian to Montgomery Creek and water may not be diverted from Montgomery Creek for use on these parcels under riparian right.

The Ditch Users also contend that "[s]ince Johnson Creek is a tributary of Montgomery Creek, water from Johnson Creek under a riparian right may be used on the Ditch Users' parcels." (Ditch Users' Opening Brief at 17:36-18:1.) The Ditch Users' parcels 9 through 20 are not riparian to either Montgomery Creek or Johnson Creek so they are not entitled to divert and use water from Johnson Creek under riparian right.

The Ditch Users contend that they may use the water from Johnson Creek outside the watershed of Johnson Creek because:

"the diversion of the water from the tributary to the main stream watershed occurred prior to the conveyance of the Robinson group's parcels and therefore, as opposed to any downstream riparians, the water could be used in either watershed." (Ditch Users Opening Brief at 18:13-17.)

8.3 Riparian Rights of Ditch Users' Parcels

The Ditch Users contend that their parcels are riparian to Montgomery Creek and that they have the right to divert water from Johnson Creek because it is tributary to Montgomery Creek.

With one exception, the Ditch Users' parcels do not meet the criteria specified in Vail and cannot, therefore, be riparian to Montgomery Creek. None of the Ditch Users' parcels are riparian to Johnson Creek.¹³

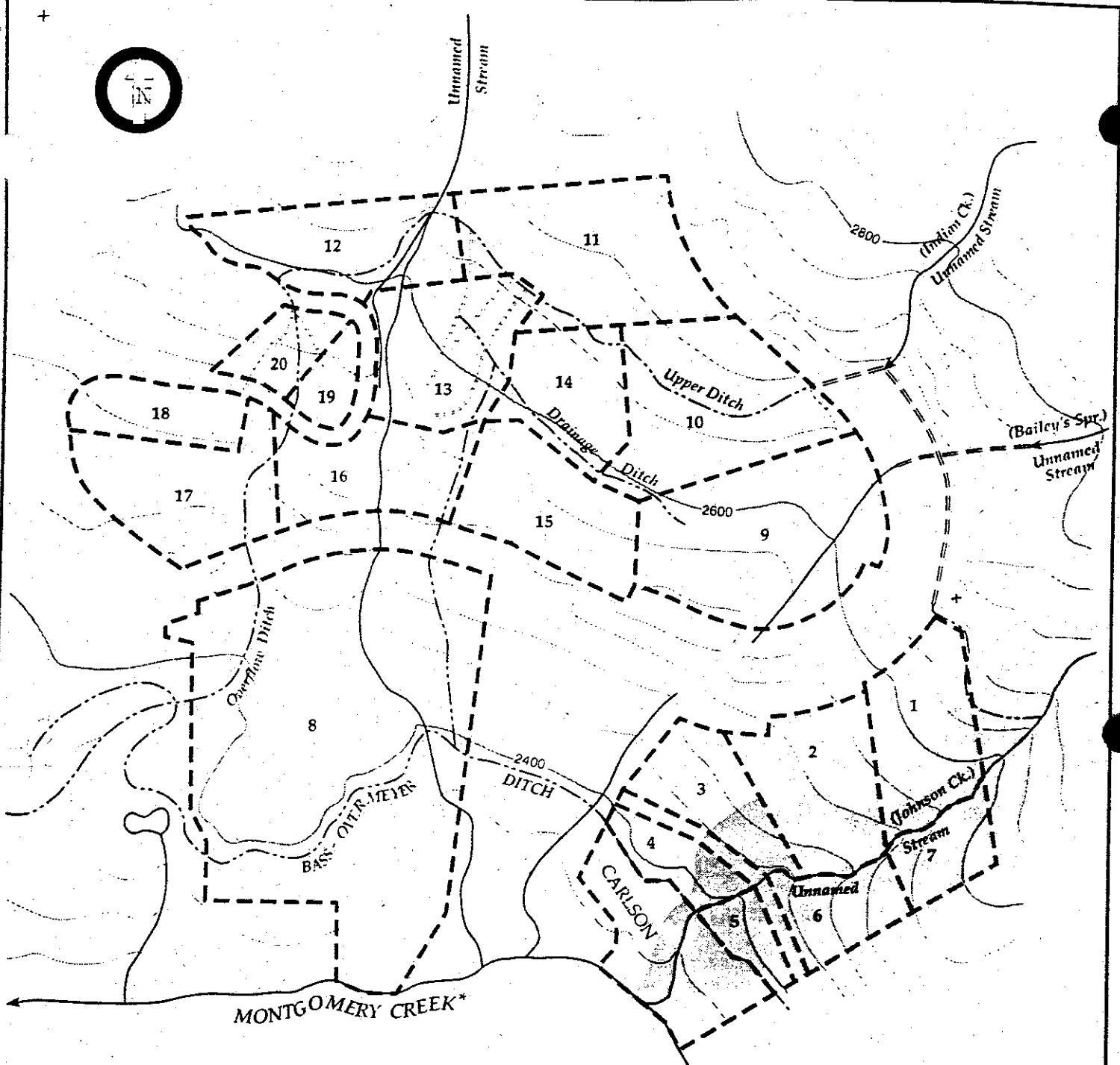
Parcel 8, owned by Gerald Troxell (APN 027-370-05), is contiguous to Montgomery Creek and is in the watershed of Montgomery Creek. It is also the smallest tract held under one title in the chain of title leading to Mr. Troxell. Therefore, Parcel 8 is riparian to Montgomery Creek. However, Parcel 8 fails to meet the criteria established in Vail regarding Johnson Creek because it is not contiguous to Johnson Creek. Therefore, Parcel 8 is not riparian to Johnson Creek.

The Ditch Users contend that the other parcels retained their riparian rights because:







"As evidenced by the 1976 Ditch Users Agreement, the parties intended to retain their riparian rights and to the extent that the deeds do not include such a right, one must be implied. [Citation omitted.]" (Ditch Users' Opening Brief at 18:30-33.)

The intent of the Ditch Users to retain their riparian rights is not relevant to the question of whether their parcels are riparian to Montgomery Creek. When riparian land is subdivided so that some parcels are no longer contiguous to a stream, the original riparian right can be preserved in the severed parcels only at the time of severance. (Anaheim Union Water Co. v.

¹³ Generally, riparian rights do not attach to water flowing in an artificial channel. (Green v. Carotto (1887) 72 Cal. 267, 13 P. 685, 686; Chowchilla Farms v. Martin (1933) 219 Cal. 1, 25 P.2d 435, 441.)



LEGEND

-  Stream
-  Ditch
-  Pipeline
-  Underground Pipeline
-  Parcel Boundary
-  Watershed Area

* All land shown is within the Montgomery Creek watershed.

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD
DIVISION OF WATER RIGHTS

MAP 2
Watershed Boundary of
Johnson Creek

RIECK, et. al., vs CATON, et. al.
 COURT REFERENCE

SCALE
 0 300 FEET

DATE: 1-22-96	DRAWN: D.L.O.	CHECKED: M.C.	DWG: 3567-1
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2. The land must be the smallest tract held under one title in the chain of title leading to the current owner, and
3. The land must be within the watershed of the stream.¹¹

Riparian rights are not created by use of water and they cannot be lost by nonuse. Further, a riparian right extends only to the direct diversion of the naturally occurring flow of a stream in a natural watercourse. Finally, riparian rights are correlative and generally are paramount to all other rights.

Water Code Section 5100 et seq. requires that persons diverting and using water under claim of riparian right file a Statement of Water Diversion and Use with the SWRCB.

8.2 Riparian Rights of Plaintiffs' Parcels

The evidence before the SWRCB shows that all of the parcels owned by the Plaintiffs (Parcels 1 through 7 as shown on Map 1) are contiguous to Johnson Creek. Therefore, the SWRCB finds that the first criterion of the test established in Vail has been met for all of the Plaintiffs' parcels.

The evidence before the SWRCB shows that each of the Plaintiffs' parcels is the smallest tract held under one title in the chain of title leading to each owner. None of the deeds in Plaintiffs' chain of title contain language which would have reserved or severed the riparian rights from the Plaintiffs' parcels nor were any of the Plaintiffs' parcels severed from contiguity with Johnson Creek. Therefore, the SWRCB finds that the second criterion of the Vail test has been met for all of the Plaintiffs' parcels.

¹¹ Although a parcel may be designated riparian because part of it is within the watershed of the stream and is contiguous to the stream, water from the stream may not be used pursuant to the riparian right on the part of the parcel that is not within the watershed of the stream.

discussion in Section 7.2, the notices are not sufficient to establish a pre-1914 appropriative right to divert the water of Johnson Creek for use on the Ditch Users' parcels. Further, the Ditch Users have not provided any proof that either Mr. Bass or Mr. Quistini installed the Upper Ditch prior to 1914 and that water was actually diverted from Johnson Creek and used on the Ditch Users' parcels continually since that time. (Ditch Users' Opening Brief at 5:1-6.)

The Ditch Users have only provided speculation and argument in support of their claims. Therefore, the evidence is not sufficient to support a finding that the Ditch Users have a pre-1914 appropriative right to divert and use the water of Johnson Creek. Although it appears that water was not used continuously since 1914, it is not necessary to discuss whether a pre-1914 appropriative right was forfeited or abandoned because the SWRCB finds that there is no pre-1914 appropriative right.

7.4 Findings and Conclusions

The SWRCB finds and concludes that none of the parties has a pre-1914 appropriative right to divert and use the water of Johnson Creek. Further, the Ditch Users do not have a pre-1914 appropriative right to divert water from Johnson Creek into the Upper Ditch for use on their parcels.

8.0 RIPARIAN RIGHTS

8.1 Applicable Water Law

A riparian right is a real property right to the reasonable beneficial use of water (a usufructuary right) on "riparian" land. For land to be riparian, it must meet three criteria established by the California Supreme Court in Rancho Santa Margarita v. Vail (1938) 11 Cal.2d 501, 528-529, 81 P.2d 533, 547 (Vail):

1. The land must be contiguous to the stream,

statement and the SWRCB knows of no support for this statement; indeed, it is contrary to California law. The measure of the right is limited to the amount of water established prior to 1914 and which has been diverted and put to beneficial use.

Reasonable conveyance losses are included in the measure of the right. (Felsenthal v. Warring, *supra*, 180 P. at 73; Haight, *supra*, 194 P. at 28; See discussion in Section 7.1, *supra*.)

The Ditch Users also contend that "the diversion need not be fixed by a definite, unvarying quantitative amount." (Ditch Users' Opening Brief at 14:3-4.) They cite Lindsay v. King (1956) 138 Cal.App.2d 333, 344, 292 P.2d 23 as support for this statement. Lindsay is a prescriptive rights case and the facts are not at all similar to the facts of this case. In Lindsay, there was no dispute about the amount of water at issue or that the spring and pipeline was the sole source of supply. The Court remanded the action to the trial court to determine the size of the diversion pipes (either one inch or one and one-quarter inch) to fix the amount "in order to prevent any misunderstanding in the future." (292 P.2d at 31.) Here, there is no evidence that the Upper Ditch existed prior to 1914, there appear to be many sources of water for irrigation of the Bass lands, and there is no evidence how much water was actually put to beneficial use for irrigation, what the source(s) of the diverted water was, or where it was used. All appropriative rights, whether pre or post 1914, are quantified by a specific amount of water authorized to be diverted from a specific source. (Civil Code Section 1415, Water Code Section 1260(b) and (c).)

Finally, the Ditch Users contend that the notices to appropriate water filed by Herbert Bass and John Quistini are sufficient to establish a pre-1914 appropriative right to divert water from Johnson Creek for use on the Ditch Users' parcels. The notices are described in Section 7.2 above. As explained in the

measured by all the circumstances of the case, after the original diversion, and which was reasonably necessary therefor." (Id.)

Haight does not hold that a right may be increased within a reasonable time as long as the increase does not adversely affect a subsequent appropriator as claimed by the Ditch Users. As stated in Section 7.1 above, the doctrine of gradual development turns on intent of the appropriator at the time of the initial diversion and putting water to beneficial use within a reasonable time. Here, the Ditch Users cannot claim the benefit of the doctrine of gradual and progressive development because there is no evidence that the scope of the original intent included any expansion of the irrigated acreage of Mr. Bass nor is there any evidence of a development plan at the time of the original appropriation or that water was put to use within a reasonable time.

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Prior to 1914, the amount of the diversion could be increased because all that was needed to establish a water right was to divert water and put the water to beneficial use. Only under the doctrine of gradual and progressive use could the quantity of the right increase after 1914. As stated above, the doctrine does not apply to the facts of this case. After 1914, the only way to obtain an appropriative right was to comply with the Water Commission Act and later with the Water Code. (Water Commission Act, Stats. of 1913, Chap. 586, p. 1012; Stats. 1923, Chap. 87, p. 162, Sec. 1c; Water Code Section 1225; People v. Shirokow (1980) 26 Cal.3d 301, 162 Cal.Rptr. 30, 35, 605 P.2d 859.) Enlargement of a pre-1914 right could only be accomplished by compliance with the Water Commission Act or the Water Code.

The Ditch Users also contend that the quantity of a pre-1914 appropriative right "should be measured by that amount used at least within living memory." (Ditch Users' Opening Brief at 14:37-15:1.) The Ditch Users cite no authority for this

completing the diversion works and putting water to beneficial use and had to continuously use the water. Further, the quantity of water to which an appropriator is entitled is limited to the amount of water actually beneficially used at the time of the original diversion plus an allowance for reasonable conveyance loss. Here, it is not known how much water was diverted and used prior to 1914 so the right cannot be quantified. There is evidence that water was not used for long periods of time. There is also evidence that the amount of water used over time has increased (see Plaintiffs' Exhibit P, pp. 10-13). Accordingly, any pre-1914 right that may have existed could not be expanded to accommodate the increase in water use after 1914.

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The Ditch Users claim that "the amount of the water right is not limited to the initial diversion, but may be increased within a reasonable time as long as the increase does not adversely affect a subsequent appropriator." (Ditch Users' Opening Brief at 14:22-25.) The Ditch Users cite Haight v. Constanich, *supra*, for support for this statement. The Ditch Users misrepresent what the Court stated in Haight.

In Haight, the Court stated:

"This right to take an additional amount of water reasonably necessary to meet increasing needs is not unrestricted; the new use must have been within the scope of the original intent, and the additional water must be taken and put to a beneficial use in keeping with the original intent, 'within a reasonable time by the use of reasonable diligence,' or the right to the water is subject to intervening claims." (Haight, *supra*, 194 P. at 29.)

The Court goes on to state that the quantity of the right:

"is the quantity actually used for beneficial purposes at the time of the original diversion, and which was reasonably necessary for such purposes, plus any additional quantity intended to be applied to future needs at the time of the original diversion, which has been actually put to use within a reasonable time,

first use of water was much later than 1914. Part H of the form provided by the SWRCB for a Statement of Water Diversion and Use asks: "Year of first use as nearly as known." The following responses to part H were given in Statements on file with the SWRCB:

<u>Statement No.</u>	<u>Name</u>	<u>Parcel No.</u>	<u>Year of First Use</u>
10052	Sparks	12	1976
10073	Watkins	20	1883*
10077	Kennedy	9	1976
10092	Troxell	8	1883
10101	Caton	13	1929*
10104	Shuffleton	10	1883
10123	Blaylock	14	1883
10924	Klein	19	1883*
10960	Stetler	17 & 18	1929 for irrigation 1963 for domestic

*Protest filed against Application 26015 states different year of first use (1979 for Watkins, 1963 for Caton, 1979 for Klein).

In Statement 10123, Ms. Blaylock also states:

"We do not obtain water from any other source other than rainfall or natural precipitation. . . . Some families are just beginning to develop and propose use of the acreage that will use more water. . . . Riparian rights were severed by State Division of Highways at their convenience for highway re-routing."

Ms. Blaylock's statements call into question whether, assuming that water was first appropriated prior to 1914, water has been continuously used since that time and the amount used has increased over time.

As discussed in Section 7.1 above, to establish and maintain a pre-1914 appropriative right, a claimant had to use diligence in

development plan that would authorize the expanded use of water by the Ditch Users under the doctrine of gradual and progressive use. The only use of water shown to have occurred from any source of surface water prior to 1914 was for irrigation, not domestic use. There is no evidence to show that a residential subdivision or additional agricultural use was ever contemplated prior to 1914. Moreover, the property originally owned by Bass (Lots 2, 3, 5, 6, and 8 of Section 31, T35N, R1E, MDB&M) was not further subdivided until 1962 and 1975, and the subdivision of the property had nothing to do with any development plan in existence prior to 1914. (Ditch Users' Exhibits 22, 26, 28.) Consequently, the doctrine of gradual and progressive use does not apply in this case. The Ditch Users would be limited to the quantity of water actually diverted and used prior to 1914 if a pre-1914 appropriative right was acquired and maintained through continuous use.

The Ditch Users claim that they, or their predecessors in interest, "have clearly been diverting water from Johnson Creek in the summer months for domestic and irrigation purposes since before 1914." (Ditch Users' Opening Brief at 13:28-30.)

Although Herbert Bass used water for irrigation during the summer months, the source and quantity of the water diverted and used cannot be determined from the evidence submitted to the SWRCB. There is no evidence to show that the source of the water was Johnson Creek and there is no evidence to show that the Upper Ditch existed prior to 1914. Further, there is no evidence to show that Mr. Bass used water from Johnson Creek for domestic purposes prior to 1914 (see Ditch Users' Exhibit 8).

Current claims made by the Ditch Users regarding when water was first used are inconsistent with prior statements. In Statements of Water Diversion and Use (Statement) submitted to the SWRCB, some of the Ditch Users state under penalty of perjury that the

The Ditch Users admit that "the evidence of use may at times be less than could be desired." (Ditch Users' Opening Brief at 14:30-31.) The Ditch Users also state that the Upper Ditch "has been in continuous use since at least 1929." (Ditch Users' Opening Brief at 16:15-18.)

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On October 2, 1891, Herbert Bass received a patent for Lots 2, 3, 5, 6, and 8 of Section 31, T35N, R1E, MDB&M from the United States. (Ditch Users' Exhibit 2.) This is the source of the Ditch Users' title to their respective parcels. Herbert Bass used water on his property for irrigation (see Ditch Users' Exhibit 8); however, the source and the amount of water used cannot be determined from the evidence submitted to the SWRCB.

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The Ditch Users have submitted deeds for transactions occurring prior to 1914. (Ditch Users' Exhibits 8, 9, 10, 11, 12.) On September 14, 1892, Mr. Bass sold Lots 2, 3, 5, 6, and 8 to Henry W. Wilkinson and Herman F. Ross. The deed stated:

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"Also all water ditches and water rights appurtenant to and now used for purposes of irrigation on the land above described." (Ditch Users' Exhibit 8 (emphasis added).)

It appears that the only crop which may have been irrigated was hay. (Ditch Users' Exhibit 18, p. 37.) There is no evidence to show that Johnson Creek was the source of the water used for irrigation. There is also no evidence which shows the quantity of water diverted and used for irrigation. Further, irrigation did not occur year-round so any pre-1914 appropriative water right which may have been acquired for irrigation could not later be expanded to year-round use. The source of water used for domestic purposes is not known.

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It appears that water use has increased over time. (Plaintiffs' Exhibit P, pp. 10-13.) The Ditch Users have not submitted any evidence to show that Bass, Wilkinson, and/or Ross had any

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Therefore, the evidence is not sufficient to support a finding that the Plaintiffs have pre-1914 appropriative rights to divert and use the water of Johnson Creek.

7.3 Pre-1914 Appropriative Rights of Ditch Users' Parcels

The Ditch Users contend that they have a pre-1914 appropriative right to divert water from Johnson Creek for domestic and irrigation use on their parcels. The Ditch Users claim that they, or their predecessors in interest, have continuously diverted water from Johnson Creek in the summer months for domestic and irrigation use since before 1914. (Ditch Users' Opening Brief at 13:28-30.) They claim that the Upper Ditch has been in existence since before 1914 and that "the property" has been inhabited continuously since before 1914. (Ditch Users' Opening Brief at 13:34-35, 14:14-15.)

The Ditch Users contend that their pre-1914 appropriative right can be traced back to the notices which were recorded by Herbert Bass and John Quistini (see Section 7.2 for description of the notices). They contend that although the notices did not specify the point of diversion, they were "clearly intended to benefit the property." (Ditch Users Opening Brief at 13:35-14:2.) Finally, they contend that they are not limited by the quantity of water originally used in the 1800's and the quantity of the right should be measured by the amount of water used within living memory. (Ditch Users' Opening Brief at 14:35-15:1.)

The Plaintiffs allege that the Ditch Users and other predecessors never had a pre-1914 appropriative right to divert and use the water of Johnson Creek; and even if they had a valid pre-1914 right, the right was lost by abandonment and forfeiture.

Claim 3

Claim 3 is for the diversion of water from an unnamed tributary to Montgomery Creek in township 36. Johnson Creek and the Plaintiffs' parcels are located in township 35. Claim 3 does not provide evidence of a pre-1914 appropriative right to divert and use the water of Johnson Creek for the same reasons as Claim 1.

Claim 4 and the Overmyer Claim

Claim 4 and the Overmyer claim are for the diversion of water from Montgomery Creek, not Johnson Creek. Quistini's claim does not state the source of the water to be diverted. These claims do not provide evidence of a pre-1914 appropriative right to divert and use the water of Johnson Creek.

As shown above, the contention that the Plaintiffs must have a pre-1914 appropriative right to divert and use the water of Johnson Creek because the Bass and Quistini claims were intended to benefit lands contiguous to the stream sources must fail because:

1. The notices filed by Mr. Bass are not clear whether the lands that were to be the place of use were contiguous to the stream or to the ditch, and there is no proof of posting of any of these notices at the point of diversion;
2. There is no evidence to show that water has been continually diverted from Johnson Creek since prior to 1914;
3. There is no evidence to show that water has been continuously used year-round since 1914 on the Plaintiffs' parcels; and
4. There is no evidence to show what quantity of water was diverted and put to beneficial use on the Plaintiffs' parcels.

there is no evidence to show when, if ever, water was first used on the Plaintiffs' parcels under Claim 1 and there is no evidence that water was continuously used year round on the Plaintiffs' parcels since initiation of the right (irrigation is generally not a year-round use). There also is no evidence to show the quantity of water, if any, actually diverted and used on the Plaintiffs' parcels pursuant to Claim 1.

Claim 2

Claim 2 is for the diversion of water from By Ginney Creek in township 36. Modern maps do not show the location of By Ginney Creek. According to the U.S.G.S. Topographic Map, 7.5 Minute Series, Montgomery Creek Quadrangle, By Gonney Spring is located in Section 30, T35N, R1E, MDB&M. Hobo Creek flows from By Gonney Spring to Montgomery Creek and is located in Sections 30, 25, and 36, T35N, R1E, MDB&M. There is no evidence that the notice of appropriation was posted at the point of diversion; such evidence may have established the actual location of the point of diversion.

As in Claim 1, the precise location of Mr. Bass' residence(s) is not known. The statement "for the purpose of irrigation on lands contiguous there-to" is ambiguous; it is not clear whether the lands are contiguous to the ditch or to the stream. Further, there is no evidence to show when, if ever, water was first used on the Plaintiffs' parcels under Claim 2 and there is no evidence that water was continuously used year round on the Plaintiffs' parcels since initiation of the right (irrigation is generally not a year-round use). There also is no evidence to show the quantity of water, if any, actually diverted and used on the Plaintiffs' parcels pursuant to Claim 2.

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inch pressure for irrigating purposes to be taken out of Montgomery Creek by means of a ditch at a point about three hundred yards above where the Meridian line crosses the Creek in Section 31-1 E. T. P. 35 N. R. M. D. M." (Plaintiffs' Exhibit D.)

D

None of the notices to appropriate water filed by Herbert Bass, John Quistini, and C. E. Overmyer were to appropriate water from Johnson Creek. As described more fully below, the notices are not sufficient to establish a pre-1914 appropriative right to divert the water of Johnson Creek for use on the Plaintiffs' parcels.

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Claim 1

Claim 1 is for the diversion of water from an unnamed tributary of Montgomery Creek in township 36. Plaintiffs' parcels are located in township 35 north. Montgomery Creek does not appear to be located in township 36 north, although the U.S.G.S. Topographic Map, 15 Minute Series, Montgomery Creek Quadrangle, shows two streams flowing through section 31. Whether one of them was named Montgomery Creek in the late 1800s is not known. There is no evidence that the notice of appropriation was posted at the point of diversion; such evidence may have established the actual location of the point of diversion.

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It appears that Mr. Bass's residence was located in the town of Montgomery Creek although the exact location of Mr. Bass's residence(s) is not known. According to Ditch Users' Exhibit 16, on March 16, 1898, Mr. Bass relocated the U. S. Post Office from the NE ¼ of the SW ¼ of Section 31, T35N, R1E (area of Parcel 8) to the NW ¼ of the SE ¼ of Section 36, T35N, R1W (area of town of Montgomery Creek) and combined it with the General Store.

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In Claim 1, the statement "for the purpose of irrigation on lands contiguous there-to" is ambiguous; it is not clear whether the lands are contiguous to the ditch or to the stream. Further,

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Sec 31 Mt. Diablo Meridian at a point about three fourths (¾) of one Mile East of My residence." [Spelling and punctuation errors in original.]

4. Claim recorded October 13, 1888 (Claim 4)

"I hereby certify that I claim Six hundred inches of water under a four inch pressure¹⁰ for irrigating purposes to be taken out of Montgomery Creek at a point about one half mile above my enclosure. Said water to be conveyed to my lands by means of a ditch." [Spelling and punctuation errors in original.]

John Quistini recorded one notice to appropriate water with the County Recorder of Shasta County on October 13, 1914. (Ditch Users' Exhibit 13.) Mr. Quistini claimed the following water right:

"The undersigned hereby gives notice to all whom it may concern:

- "1. That I claim the water flowing here to the extent of 200 inches measured under a four inch pressure.
- "2. That the purposes for which I claim it are for irrigating all irrigatable lands designated and described as follows, to wit:

Lots two (2), three (3), five (5), six (6) and eight (8) of Section Thirty-one (31), township thirty-five (35) N. R. 1 East, M. D. M.

- "3. That I intend to divert it by flume and ditch in size adequate to carry the above amount appropriated."

The Plaintiffs also submitted a notice filed on October 13, 1888, by C. E. Overmyer which claimed the following water right:

"I hereby certify that I have this day located a water right to the amount of Six hundred inches under a four

¹⁰ Six hundred miners inches is equal to 12 cfs.

1. Claim recorded March 30, 1883 (Claim 1)

"I hereby certify that I have taken out of (and claim) a tributary of Montgomery Creek on the north side (name unknown) at a point about one and one fourth (1¼) miles East of My residence, three hundred inches of Water under a four inch pressure⁷ by means of a ditch with sufficient capacity to carry the ammount of Water claimed, for the purpose of irrigation on lands contiguous there-to, In T.P. 36-1 Ea Sec 31 Mt. Diablo Meridian." [Spelling and punctuation errors in original.]

2. Claim recorded March 30, 1883 (Claim 2)

"I hereby certify that I have taken out of a tributary of Montgomery Creek Known as By Ginney Creek two hundred inches of Water under a four inch pressure⁸ by means of a ditch with sufficient capacity to carry the amount of Water claimed for the purpose of Irigation on lands contiguous there-to In T.P. 36 Range 1 Ea Sec 31 Mt. Diablo meridian, about one Mile (1) East of My residence. [Spelling and punctuation errors in original, emphasis in original.]

3. Claim recorded March 30, 1883 (Claim 3)

"I hereby certify that I have taken out of a tributary of Montgomery Creek in the north side (name unknown) Two hundred and fifty (250) inches of Water under a four inch pressure⁹ by means of a ditch with sufficient capacity to carry the ammount of water claimed for the purpose of Irigation in lands contiguous there-to In T P/ 36 R 1-E

⁷ One miners inch of water under a four inch pressure is equal to 0.02 cubic feet per second (cfs). Three hundred miners inches under a four inch pressure is equal to six cfs.

⁸ Two hundred miners inches is equal to four cfs.

⁹ Two hundred fifty miners inches is equal to five cfs.

Water Code Section 1706 provides that a pre-1914 appropriator may change the point of diversion, place of use, or purpose of use if others are not injured by the change. Section 1706 also authorizes the extension of diversion works to places beyond where the first use of water was made. However, after 1914 such a change must not initiate a new water right. Moving a point of diversion to a different source of water would constitute the initiation of a new right. (City of San Bernardino v. City of Riverside (1921) 186 Cal. 7, 198 P. 784, 793; Orange County Water District v. City of Riverside (1959) 173 Cal.App.2d 137, 343 P.2d 450, 481.) After 1914 compliance with the provisions of the Water Commission Act/Water Code became the exclusive method for obtaining a new appropriative right. (Water Commission Act, Stats. of 1913, Chap. 586, p. 1012; Stats. 1923, Chap. 87, p. 162, Sec. 1c; Water Code Section 1225; People v. Shirokow (1980) 26 Cal.3d 301, 162 Cal.Rptr. 30, 35, 605 P.2d 859.)

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Water Code Section 5100 et seq. requires that persons diverting and using water under a claim of pre-1914 appropriative right file a Statement of Water Diversion and Use with the SWRCB.

7.2 Pre-1914 Appropriative Rights of Plaintiffs' Parcels

The Plaintiffs contend that if the notices to appropriate water filed by Herbert Bass and John Quistini were for water from Johnson Creek, then they have valid pre-1914 appropriative rights to divert and use the water of Johnson Creek because both the Bass and Quistini claims were intended to benefit lands contiguous to the stream sources.

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Herbert Bass recorded four notices to appropriate water with the County Recorder of Shasta County. (Plaintiffs' Exhibit D; Ditch Users' Exhibits 5, 6, 7.) Mr. Bass claimed the following water rights:

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ERRATA SHEET

Two changes were made to clarify the Report of Referee. They are not substantive changes because these points were discussed elsewhere in the text of the report. These changes are:

1. On page 23, the "bolded" portion was added:

The measure of the right is limited to the amount of water **established prior to 1914 and which has been diverted and put to beneficial use.** Reasonable conveyance losses are included in the measure of the right. (Felsenthal v. Warring, *supra*, 180 P. at 73; Haight, *supra*, 194 P. at 28; **See discussion in Section 7.1, *supra*.**)

2. On page 31, the "bolded" portion of this sentence was added:

The SWRCB finds and concludes that Mr. Troxell, the owner of Parcel 8, may divert and use water from Montgomery Creek on **the portion of his parcel that is riparian to Montgomery Creek** under riparian right but he may not divert water from upstream of his parcel for riparian use on Parcel 8.