

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

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In the Matter of Applications 6378 and 7381 of Dana Burke  
to appropriate from Coyote Creek, Tributary to  
San Felipe Creek in San Diego County for  
Irrigation and Domestic Purposes.

Decision No. A 353

Decided *February 5, 1934* oOo

APPEARANCES AT HEARING HELD AT LOS ANGELES NOVEMBER 10, 1933.

For Applicant

Dana Burke

In Propria Persona

For Protestants

E. B. Glines )  
Charles K. Malott )  
Ferdinand M. Sersen )  
Oscar J. Brodin )  
Walfred B. Pallmen )

Charles K. Malott  
Walter Gould Lincoln

Orville H. Ensign

No appearance

Roy F. Ensign

No appearance

Division of State Parks

Charles B. Wing, Newton B. Drury  
and Guy L. Fleming

EXAMINER: Harold Conkling, Deputy in Charge of Water Rights,  
Division of Water Resources, Department of Public Works,  
State of California.

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O P I N I O N

Application 6378

On November 17, 1931, a public hearing was held in the matter of  
Application 6378 which at the time stood in the name of Southern California  
Fruitlands Corporation. The hearing was adjourned sine die as it appeared  
that applicant and protestants were not prepared to submit testimony.

Application 6378 was subsequently assigned to Dana Burks and was set for hearing on November 10, 1933, together with Application 7381. Application 6378 was withdrawn by the applicant at this hearing and consequently further consideration of Application 6378 is not necessary at this time.

#### GENERAL FEATURES OF APPLICATION 7381

Application 7381 was filed by Dana Burks on September 16, 1932. The source of the appropriation is Coyote Creek, tributary to San Felipe Creek in San Diego County.

Under Application 7381 it is proposed to appropriate 25 cubic feet per second by direct diversion and 25,000 acre feet per annum by diversion to underground storage at a rate not to exceed 1000 cubic feet per second. The point of direct diversion and recovery of stored water is within the NE $\frac{1}{4}$  of NE $\frac{1}{4}$  of Section 26, T 9 S, R 5 E, S.B.B.&M. The points of diversion to underground storage in Collins Valley are within Sections 4, 5, 8 and 9, T 9 S, R 5 E, S.B.B.&M. The water is to be used for irrigation and domestic purposes within an area of 6,760 acres located within Sections 5, 15, 17 and 19, T 10 S, R 5 E, and Sections 7, 11, 13, 17, 19, 21, 23, 25, 27, 29 and 33, T 11 S, R 6 E, S.B.B.&M. as shown on map filed in support of the application.

Application 7381 was protested by Charles K. Malott, Ferdinand M. Sersen, Walfred B. Fallman, Oscar J. Brodin, R. B. Glines, Orville H. Ensign and Roy F. Ensign.

#### PROTESTS

Charles K. Malott owns the greater portion of the East one-half of Section 25, T 9 S, R 5 E, S.B.B.&M. through which Coyote Creek flows. He

claims a riparian right and alleges in effect that should Application 7381 be approved he would be deprived of all surface and underground flow thereby rendering his property valueless. He also alleges that no right of way through his lands has been obtained without which it would be impossible for applicant to proceed with his project. Mr. Malott claims to have used water since December 1928 for recreational purposes for himself and friends.

R. E. Glines owns a small tract of land within the East one-half of Section 25, T 9 S, R 5 E, S.E.B.&M. He claims riparian rights, although the map filed in connection with Application 7381 does not show Coyote Creek passing through his property. He claims to have used water since 1930 for domestic purposes.

Ferdinand M. Sersen owns the SE $\frac{1}{4}$  of Section 24, T 10 S, R 6 E, S.E.B.&M., Walfred B. Pallen, the NW $\frac{1}{4}$  of said Section, and Oscar J. Brodin the SW $\frac{1}{4}$  of said section. All three of these protestants own the West 1/4 of Section 19, T 10 S, R 7 E, S.E.B.&M. They have drilled a well located near the center of Section 24, T 10 S, R 6 E, S.E.B.&M., installed a pumping plant and claim constant diversion from the subterranean flow of Coyote Creek, under riparian rights for the irrigation of four or five acres of land.

The grounds of protest of all five of these protestants may be summarized as follows:

1. That there is no unappropriated water in Coyote Creek.
2. That applicant can obtain no right to divert water from one watershed into another.
3. That applicant would acquire the absolute monopoly of the waters of the valley at the expense of all other land owners thereby not best serving the public interest and violating the provisions of Section 15 of the Water Commission Act.

4. That applicant has not acquired the necessary rights of access, right of way and floodage rights.

The other two protestants Orville H. and Roy F. Ensign own lands in Sections 4 and 9 respectively, T 11 S, R 6 E, S.B.B.&M. near the junction of Palm and Borego Valleys. Orville H. Ensign claims to have used about 2 cubic feet per second since May 1927 for irrigation purposes and Roy F. Ensign claims to have used 200 to 800 gallons per minute for irrigation and domestic purposes. These protestants pump from the underground waters and are concerned lest the appropriation proposed by the applicant will diminish the underground supply.

HEARING SET IN ACCORDANCE WITH SECTION 1a  
OF THE WATER COMMISSION ACT

Application 7381 was completed in accordance with the Water Commission Act and the rules and regulations of the Division of Water Resources and being protested was set for public hearing in accordance with Section 1a of the Water Commission Act on November 10, 1933, at 10:00 o'clock A.M. in Room 803 California State Building, Los Angeles, California. Of this hearing, applicant and protestants were duly notified.

PHYSIOGRAPHY AND HYDROLOGY

Coyote Creek, the source of the proposed appropriation, is a perennial stream rising in the vicinity of Lookout and Table mountains in Riverside County and flowing southwestward to Borego Valley in San Diego County.

The proposed point of diversion of the applicant is about one mile above the point where the creek debouches into Borego Valley. The drainage area above the point of diversion contains approximately 137 square miles. The total fall in a distance of ten miles above the mouth of the canyon is approximately 2500 feet.

There is little information available as to the runoff of Coyote Creek. John S. Brown in Water Supply Paper 497 of the United States Geological Survey describes the creek as follows:

"A number of small mountain streams west and north of Borego Valley have a perennial flow, and their water sinks into the gravel at the valley border. The largest stream is Coyote Creek, the flow of which is estimated by local residents at 100 to 300 miners inches (1,100 to 3,300 gallons a minute). There is considerable rainfall on the ranges to the west, which are above 5,000 feet in height and all the runoff of the eastern slope adds to the ground water of Borego Valley."

Testimony presented at the hearing indicated that the summer flow at applicant's proposed point of diversion was approximately 1500 miners inches of which approximately 200 miners inches were estimated as surface flow. This surface flow rapidly diminishes until it disappears entirely in the gravels of disseminated channels a mile or two below. During years of excessive runoff Coyote Creek is a torrential stream and flows through Borego Valley to its junction with San Felipe Creek and on through to the Salton Sea in Imperial County. Such years however are infrequent.

#### DISCUSSION OF PROTESTS

The several grounds of protest will be considered in the order named:

##### Unappropriated Water

Apparently the only surface diversion from Coyote Creek is that made under Application 12-1493 upon which Certificate 12-7 was issued on December 23, 1920, for 4 second feet to be diverted from Coyote Creek within the SW $\frac{1}{4}$  of NW $\frac{1}{2}$  of Section 25, T 9 S, R 5 E, S.B.B.&M. for the irrigation of 160 acres of land in Sections 30 and 31, T 9 S, R 6 E, S.B.B.&M. The point of diversion is approximately 800 feet below that described in Application

7381. Application 12-1493, Certificate 7 was recently assigned to Dana Burks.

The project under Application 12-1493, Certificate 7 was inspected by an engineer of this office on April 7, 1928, who reported that at the time of the inspection the entire surface flow of Coyote Creek at the point of diversion was 6.12 cubic feet per second which was probably twice the summer flow. This entire amount was being diverted although about 1.5 cubic feet per second returned to the stream. The last progress report submitted in connection with this project was filed November 28, 1930. This report indicated that the entire surface flow had been diverted.

It may therefore be assumed that under Application 12-1493 and Application 7381 if approved, Dana Burks will control the entire normal surface flow of Coyote Creek during the late spring and summer months and the question which confronts us is whether or not the diversion proposed by the applicant will deprive the protestants of the water supply which they claim as riparian owners and owners of land overlying an underground basin.

In Exhibit 1 of the protestants filed at the hearing, protestants allege in effect that the flow from Borego Spring which is located in an arroyo at the southerly extremity of Borego Valley at an elevation of approximately 450 feet, has appreciably diminished since diversion from Coyote Creek has been made under Application 12-1493 until now there is but a mere "trickle" of water present.

Relative to Borego Spring the following is quoted from U.S.G.S. Water Supply Paper 497 entitled "The Salton Sea Region California" by John S. Brown published in 1923.

"In the vicinity of Borego Spring there is every indication of the escape of a considerable amount of water held under slight artesian pressure. This is indicated by a marsh several acres in extent containing seeps of water and a rank growth of moisture-loving plants. Moreover in much of the lowest part of the valley west of this outlet, ground water is constantly being discharged at the surface, as is indicated by a luxuriant growth of salt grass and a slight incrustation on the soil.

"Conditions appear ideal in this valley for the development of a good-sized artesian basin. A considerable supply of fresh water from the mountains sinks into the valley and becomes confined beneath the impervious layers of fine silt and clay deposited lower in the valley. The artesian head is probably sufficient to give considerable flow in the lower part of the valley if wells were drilled deep enough and large enough to get its full benefit. Such wells should not be less than 300 feet in depth."

The water supply paper further states that the water from Borego Spring "escapes through the tertiary clay beds at the outlet of the valley."

Even though the flow of Borego Spring has decreased in recent years the fact that the springs are still flowing would indicate that the water level in the valley has not lowered appreciably.

Moreover the Indic quadrangle of the United States Geological Survey indicates that there is considerable drainage area aside from the 137 square miles above the proposed point of diversion of the applicant, the runoff of which contributes to the general underground water supply of the valley and it appears reasonable to assume that the underground basin is replenished by the occasional freshets which occur during periods of unusual rainfall.

No testimony was presented at the hearing to indicate that use of water in the valley exceeded the six or seven cubic feet per second claimed by protestants and just what effect the proposed additional diversion by the applicant would have upon this use was not shown. It would appear however that the appropriation proposed under Application 7381 if consummated,

would result in conserving a portion of the water which is presently wasted by evaporation, transpiration and overflow from Borego Valley, and that a portion of the water diverted would be returned to the underground water of the valley. If there results a lowering of the water plane in the valley necessitating a somewhat greater pumping lift this in itself would not justify the denial of the proposed appropriation. Pending the time the protestants, or others legally entitled thereto, make a more extensive use of the waters escaping from Coyote Creek we are of the opinion there is a surplus which is available for appropriation.

Right to divert water from one watershed into another.

Protestants contend that applicant can acquire no right to divert water from Coyote Creek to lands in the Palm Canyon watershed. That such is not the law is established by many court cases nor do protestants substantiate this contention by citing any authorities or cases. Such has been the practice in this and other states from the days of '49 and many permits have been granted by this office for diversions for use beyond the watershed in which the water originates.

Some of the California cases wherein uses beyond the watershed have been in issue are:

Armstrong v. Payne, 188 Cal. 585  
San Bernardino v. Riverside, 186 Cal. 730  
Holmes v. May, 186 Cal., 231  
E. C. Horst Co. v. New B. Pt. M. Co., 177 Cal. 631  
Gallatin v. Corning Irr. Co., 163 Cal. 406, 413  
San Joaquin etc. Co. v. Fresno Flume Co., 158 Cal. 626  
Burr v. MacLay etc. Water Co., 154 Cal. 428  
Montecito etc. Co. v. Santa Barbara, 151 Cal. 377  
Watchman W. Co. v. Pogue, 151 Cal. 105, 111  
Paige v. Rocky Ford C. Co., 83 Cal. 85  
Creighton v. Kaweah C. & I. Co., 67 Cal. 221  
Burnett v. Whitesides, 15 Cal. 35  
Butte Canal & D. Co. v. Vaughn, 11 Cal. 143  
Hoffman v. Stone, 7 Cal. 46



In view of these decisions this contention of the protestants may be dismissed as being an inadequate ground of protest.

Monopoly of the waters of the valley.

Section 15 of the Water Commission Act does not empower the Division to speculate upon what may or may not prove to be of general public welfare and then act according to its best estimate of what future developments of the State may prove to be in the public interest. Outside of a manifest and indisputable certainty as to what is against the public welfare we would hesitate to deny an application as not best serving the public interest. Application 7381 was filed for the purpose of appropriating unappropriated water only and we find nothing in this section or elsewhere in the Water Commission Act which would inhibit the applicant or any other applicant from appropriating water because of the prospect that others at a later date may seek to appropriate the same water.

Right of access, rights of way and floodage rights.

The map filed in support of Application 7381 indicates that the pipe line crosses the property of Charles K. Malott who contends that applicant has not approached him for permission to cross his property. Furthermore Mr. Malott states that right of way will not be granted and without it the topography is such that applicant would not be able to complete his project as contemplated.

Through the cooperation of the United States Government and the purchase of privately owned lands the Division of Parks, State of California, has acquired or is about to acquire certain lands in Coyote Creek watershed and vicinity for the purpose of establishing the Borego Desert Park. The boundaries of the park have not as yet been definitely established but the

record indicates that they will incorporate practically the entire watershed of Coyote Creek.

At the time of the filing of Application 7381 the lands upon which the waters were to be spread were privately owned but have since been deeded to a Mr. Marston of San Diego who is apparently holding them in trust for the Division of Parks and applicant admits that the construction of either the rock fill dam or spreading dykes will be entirely dependent upon the approval of the Division of Parks.

It appears from the record that applicant's place of use has not been definitely established and that as he acquires certain properties within the valley he will seek to change the place of use.

Uncertainty apparently surrounds applicant's ability to acquire the right of access to his points of diversion, rights of way for his conduit system, floodage right for spreading, etc., and his ability to serve the area designated as the place of use in the application. Until these matters are cleared up apparently applicant would not be in a position to proceed with his project and no purpose would be served by approving the application.

Although protestant Orville H. Ensign was present at the hearing no appearance was made either on behalf of himself or Roy F. Ensign and no testimony was presented by him. In fact the record indicates that the protests of Orville H. and Roy F. Ensign were withdrawn upon assurance from Mr. Burke that no interference with their vested rights was intended. (See Transcript of hearing, pages 48 to 50)

#### CONCLUSION

The purposes to which applicant proposes to put the water under Application 7381 are useful and beneficial ones and there appears at the

present time to be surplus water in Coyote Creek subject to appropriation by applicant. However, in view of the immaturity of applicant's plans it is our opinion that action on Application 7381 should be suspended awaiting a further showing as to his ability to secure the necessary rights of way and legal relationship to the lands to be served. Unless such showing is made in connection therewith within a reasonable time it will be necessary to consider Application 7381 for cancellation on the grounds of failure to complete.

Application 6378 as heretofore stated was withdrawn at the hearing and consequently may be cancelled.

**O R D E R**

Applications 6378 and 7381 for permits to appropriate water having been filed with the Division of Water Resources as above stated, protests having been filed, a public hearing having been held and the Division of Water Resources now being fully informed in the premises:

IT IS HEREBY ORDERED that Application 6378 be rejected and cancelled upon the records of the Division of Water Resources.

IT IS FURTHER ORDERED that action be deferred upon Application 7381 until further order is entered.

WITNESS my hand and the seal of the Department of Public Works of the State of California, this *Fifth* day of *February*, 1934.

EDWARD HYATT, State Engineer

BY HAROLD CONKLING

Deputy