

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

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In the matter of Application 7611 of Tom O. Riley
to appropriate water from an unnamed spring
tributary to Wolf Creek in Nevada County
for irrigation and domestic purposes.

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DECISION A 7611 D - 358

Decided *August 13, 1934*

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APPEARANCES AT HEARING HELD AT SACRAMENTO MARCH 20, 1934

For Applicant

Tom O. Riley

Robert Tharp

For Protestant

Nevada Irrigation District

William Durbrow

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

GENERAL DESCRIPTION OF PROJECT

Application 7611 was filed by Tom O. Riley on July 6, 1933. It proposes an appropriation of 0.01 of a cubic foot per second or approximately 6500 gallons per day from an unnamed spring within the watershed of Wolf Creek to be diverted throughout the entire year for irrigation and domestic purposes. The irrigation season is designated as being from about April 1 to about September 30 of each year. The point of diversion and place of use are within the NW $\frac{1}{4}$ of SE $\frac{1}{4}$ of Section 23, T 16 N, R 8 E, M.D.B.&M. The

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area to be irrigated contains 1.34 acres. Water will be used for domestic purposes at applicant's residence and lunch counter and for the watering of lawns and garden. Application 7611 was protested by the Nevada Irrigation District.

PROTEST

The Nevada Irrigation District claims a right to divert from Wolf Creek at a point within the SE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Section 10, T 15 N, R 8 E, M.D.B.&M. some five miles below the spring from which applicant proposes to divert. Protestant states that this right is based upon continuous use since 1911 and an application filed with the Division of Water Resources. The records of this office indicate however that the District has no application before us to appropriate from Wolf Creek. While the District has applications to appropriate from South Wolf Creek the spring from which applicant proposes to divert is not situated in the watershed of South Wolf Creek.

Protestant alleges in effect that should Application 7611 be approved it would result in applicant acquiring water to which protestant already has a prior vested right without compensation to the protestant at its established rates for service.

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

Application 7611 was completed in accordance with the Water Commission Act and the requirements of the rules and regulations of the Division of Water Resources and being protested was set for a public hearing in accordance with Section 1a of the Water Commission Act on March 20, 1934, at 1:30 o'clock P.M. in Room 401 Public Works Building, Sacramento, California. Of this hearing applicant and protestant were duly notified.

GENERAL DISCUSSION

The testimony presented at the hearing clearly indicates that on the hillside just above applicant's proposed point of diversion, there is considerable seepage which would naturally be dissipated by evaporation and transpiration were it not for the fact that applicant has constructed a sump at the point where he intends to divert into which this seepage is collected and brought to a focus in a small live stream, the water of which he now seeks to appropriate and conserve for a beneficial use.

Without a doubt this water is within the watershed of Wolf Creek and if the flow from the source were large enough it would eventually reach the applicant's intake at the head of the Tarr ditch some five miles below. That there is little or no deep percolation is evidenced by the testimony to the effect that underlying the marshy ground which is only a few feet in depth is a clay bed rock formation which is impervious to water.

It is protestant's contention that the seepage which applicant has developed is just one of many seepages and moist areas which contribute to the flow of Wolf Creek and that as a land owner within the boundaries of the Nevada Irrigation District applicant should avail himself of the privilege of purchasing water from the District rather than to endeavor to acquire an appropriative right to the use of water to which the District has a legal claim.

Mr. Durbrow, manager of the Nevada Irrigation District stated that although he was familiar with the general conditions in the vicinity of the spring he had never actually inspected the spring nor had he been to the applicant's intake. On the other hand witnesses for the applicant presented testimony based upon actual observation to the effect that the waters which applicant seeks to appropriate, if allowed to flow down the hillside, would

be entirely dissipated within 1000 or 1500 feet from the spring.

In the opening brief filed on behalf of applicant much stress is placed upon the fact that applicant is entitled to the water by virtue of his riparian ownership. It is not seen however where this has any bearing upon the point at issue as it is well established that riparian rights are separate and distinct from appropriative rights and are neither impaired nor improved by the filing of an application to appropriate under the Water Commission Act.

In its reply brief protestant contends that inasmuch as applicant is seeking to appropriate from the spring itself rather than from a natural stream flowing therefrom, the Division of Water Resources has no jurisdiction in the matter as the only waters subject to appropriation under the Water Commission Act are waters flowing in a "river, stream, canyon, ravine or other natural channel." Protestant quotes from Section 11 of the Water Commission Act.

In this connection it may be said that the testimony introduced at the hearing clearly indicated that due to the operations of the applicant a surface stream emanated from the spring and in view of Section 42 of the Water Commission Act which declares that "whenever the terms stream; stream system, lake or other body of water or water occurs in sections of this act relating to applications to appropriate water or permits or licenses issued pursuant to such applications, such term shall be interpreted to refer only to surface water and to subterranean streams flowing through known and definite channels", this office has no alternative but to assume jurisdiction.

CONCLUSION

The record clearly indicates that there is unappropriated water in the source from which applicant proposes to appropriate which if not conserved by the applicant would be dissipated by evaporation and transpiration. The uses to which applicant proposes to put the water are useful and beneficial ones. It is therefore the opinion of this office that Application 7611 should be approved subject to the usual terms and conditions.

ORDER

Application 7611 for a permit to appropriate water having been filed with the Division of Water Resources as above stated, a protest 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 7611 be approved and that a permit be granted to the applicant subject to such of the usual terms and conditions as may be appropriate.

WITNESS my hand and the seal of the Department of Public Works of the State of California, this *15th* day of *August*, 1934.

EDWARD HYATT, State Engineer

BY *Harold Conkling*
Deputy

