

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

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In the matter of Application 7489 of W. P. Frick to appropriate from Middle Fork of Cosumnes River and Sopiago Creek in El Dorado County for Mining and Domestic Purposes and in the matter of Application 7582 of W. P. Frick to appropriate from Sopiago Creek for Mining and Domestic Purposes.

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DECISION A. 7489, 7582 D- 370

Decided

January 31, 1935

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APPEARANCES AT HEARING HELD AT SACRAMENTO, SEPTEMBER 11, 1934.

For Applicant

W. P. Frick

Stanley J. Smith

For Protestants

Mary K. Fond and C. P. Fond, Jr.
Henry Garibaldi
Lane Investment Company
Richard Detert, Executor of
Estate of W. F. Detert, deceased
C. T. Ooste

C. P. Fond, Sr.
A. L. Pierovich
Thomas R. White
Judson W. Reeves
O. E. Anderson

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 PROJECTS

Under Application 7489 it is proposed to appropriate 20 cubic feet per second from Middle Fork of Cosumnes River at a point within the NW $\frac{1}{4}$ of NW $\frac{1}{4}$ of Section 12, T 8 N, R 14 E, M.D.B.&M. and 5 cubic feet per second from Sopiago Creek (also known as Clear Creek) at a point within the NE $\frac{1}{4}$ of NE $\frac{1}{4}$ of Section 18, T 8 N, R 14 E, M.D.B.&M. diversion to be made throughout the

entire year for mining and domestic purposes on certain lands lying within the Brownsville, Indian Diggings, Fairplay, Slug Gulch and Cedarville Mining Districts lying between the South and Middle Forks of the Cosumnes River and being located within Sections 4, 5, 7, 8, 14, 15, 17 and 18, T 8 N, R 13 E, Sections 3, 10, 15 and 16, T 8 N, R 12 E, and Sections 32, 33, 34 and 36, T 9 N, R 12 E, M.D.B.M. The application states that after use for mining purposes the water will be returned to Middle Fork of Cosumnes River via Ferry Creek within the NW $\frac{1}{4}$ of NW $\frac{1}{4}$ of Section 19, T 9 N, R 12 E, to a tributary of South Fork of Cosumnes River within the SW $\frac{1}{4}$ of NE $\frac{1}{4}$ of Section 23, T 8 N, R 12 E, and to Cedar Creek thence tributary of South Fork of Cosumnes River within the NW $\frac{1}{4}$ of NW $\frac{1}{4}$ of Section 16, T 8 N, R 12 E, M.D.B.M.

Under Application 7582 it is proposed to appropriate an additional 10 cubic feet per second from Soplago Creek to supplement the amount already sought to be appropriated under Application 7489. The water is to be diverted throughout the entire year from the same point of diversion as described in Application 7489 and after use for mining purposes the water will be returned to Middle Fork of Cosumnes River via Ferry Creek in NW $\frac{1}{4}$ of NW $\frac{1}{4}$ of Section 19, T 9 N, R 12 E, to South Fork of Cosumnes River in NW $\frac{1}{4}$ of NE $\frac{1}{4}$ of Section 23, T 8 N, R 12 E, and to Cedar Creek in NW $\frac{1}{4}$ of NW $\frac{1}{4}$ of Section 16, T 8 N, R 12 E, thence to South Fork Cosumnes River in NW $\frac{1}{4}$ of SW $\frac{1}{4}$ of Section 18, T 8 N, R 12 E, M.D.B.M.

Both applications were protested by Mary E. Pond and C. P. Pond, Jr.; Henry J. Garibaldi; Lane Investment Company, and Richard Detert, Executor of Estate of W. F. Detert, deceased, prior to the hearing, and by C. T. Costa at the hearing.

PROTESTS

Mary K. Pond claims the ownership of the Stillwagon group of mining claims located at the junction of Sopiago Creek and the Middle Fork of Cosumnes River, and C. F. Pond, Jr. claims that he is the holder of a lease and bond on the Stillwagon mine together with its water right. These protestants claim a right to divert 200 miners inches of the waters of Sopiago Creek at a point within the SE $\frac{1}{4}$ of SW $\frac{1}{4}$ of Section 33, T 9 N, R 13 E, M.D.B.&M. near its junction with the Middle Fork of Cosumnes River, which right is based upon an appropriative right initiated prior to the effective date of the Water Commission Act and continuous use for many years. They allege in effect that during the months of June to November, both inclusive, there are no unappropriated waters in Sopiago Creek.

Henry J. Garibaldi claims a right to the use of water from Sopiago Creek which is based upon claim of riparian ownership and use begun prior to the effective date of the Water Commission Act. Mr. Garibaldi alleges in effect that for more than twenty years last past, he or his predecessors in interest have used the entire flow of Sopiago Creek during the dry season of the year. Water is used for irrigation purposes within Section 11, T 8 N, R 13 E, M.D.B.&M. and for mining purposes on other lands owned by him and located within the place of use described in Applications 7489 and 7582. Protestant also alleges in effect that applicant has not secured right of way across his lands.

The Lane Investment Company claims that for more than twenty years last past it and its predecessors in interest have used more than 2000 miners inches / of water from the Middle Fork of the Cosumnes River; the water being diverted at a point within the NW $\frac{1}{4}$ of Section 33, T 9 N, R 11 E, M.D.B.&M. and conveyed to the Town of Plymouth in Section 11, T 7 N, R 10 W, M.D.B.&M. where water is

furnished wholesale to one E. E. Randolph who in turn sells it for domestic purposes to the inhabitants of the town. It is also claimed that water is used along the ditch line by the owners of several mines and for agricultural purposes below the town of Plymouth. Protestant alleges in effect that should Applications 7489 and 7582 be approved the Company would be deprived of water to which it is entitled.

Richard Detert, executor of the estate of W. F. Detert, deceased, claims a right to appropriate from the sources named in Applications 7489 and 7582 which right is based upon riparian ownership and use commenced prior to the effective date of the Water Commission Act. He claims that use of water is made for the watering of 1300 to 2000 head of cattle and other livestock, for domestic purposes at work camps and the production of pasture and feed by sub-irrigation. Water is diverted from points where the water courses pass through or border on the lands of the estate in T 8 N, Ranges 12, 13 and 14 East, M.D.B.&M. Protestant alleges in effect that in order that the interest of the estate be protected, at least 80 miners inches of water should be left in each of the water courses below applicant's proposed points of diversion or that the period of diversion named in any permits which may be issued in approval of the applications should be restricted to the months of December to April, both inclusive, of each year. Protestant also objects to the conveyance of water through the property of the estate.

C. T. Oates, under Application 7478, Permit 4071, has the privilege of diverting 0.25 of a cubic foot per second from the Middle Fork of Coconino River at a point within the SE $\frac{1}{4}$ of NE $\frac{1}{4}$ Section 23, T 9 N, R 11 E, M.D.B.&M. for irrigation and domestic purposes. The point of diversion is below the points of diversion proposed by Mr. Frick and a portion of the water applied for under Applications 7489 and 7582 will be returned to a

different watershed. He is protesting against any diversion which would affect his interest. No protest in regular form was filed.

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

Applications 7489 and 7582 of W. P. Frick were completed in sufficient form for advertising in accordance with the Water Commission Act and the Rules and Regulations of the Division of Water Resources and being protested were set for a public hearing in accordance with Section 1a of the Water Commission Act on September 11, 1934, at 10:00 o'clock A.M. in Room 401 Public Works Building, Sacramento, California. Of this hearing applicant and protestants were duly notified.

SOURCES OF APPROPRIATION

The Middle Fork of the Cosumnes River and its tributary Sopiago Creek, the sources of proposed appropriation are typical of all low lying Sierra Nevada streams, having a considerable surplus of water in the winter time and a deficiency of supply in the summer time. There is little information available relative to the flow of these streams above the points of diversion from which applicant seeks to appropriate.

The drainage area above the intake of the Douglas ditch at the point where it takes out of the Middle Fork is approximately 35 square miles varying in elevation from about 4150 feet at the intake of the Douglas ditch to 7785 feet which is the elevation of Alder Hill. The drainage area of Sopiago Creek at the point where Douglas ditch crosses the creek is about 5 square miles varying in elevation from 3900 feet to about 5400 feet.

THE DOUGLAS DITCH

In 1853 the Cedar and Indianville Water Company, a corporation organized for the purpose of selling water for agricultural, mining and mechanical purposes constructed what is commonly known as the "Douglas Ditch". The intake of this ditch is located on the Middle Fork of the Cosumnes River at a point within the NW $\frac{1}{4}$ of NW $\frac{1}{4}$ of Section 12, T 8 N, R 14 E, M.D.B.&M. about 30 miles east of Fairplay. The ditch extends in a general southwesterly direction to a point near Indian Diggings where it discharges into the South Fork of the Cosumnes River.

In October, 1857, this ditch was conveyed to one Joseph Douglas who in turn transferred it to Emma Rose, Anna G. Lane and Hobart Estate Company who operated it primarily for mining purposes in the vicinity of Indian Diggings until about the year 1911 when this use ceased. From 1911 to 1917 the water was sold for irrigation purposes but this use was small consisting of the irrigation of not to exceed about 10 acres of land. Such water as was not used directly from the Douglas Ditch was turned into the South Fork of the Cosumnes River where it was rediverted by the Tyler and Simpson ditches for the purpose of augmenting the water supply for the town of Plymouth, for use at the Plymouth mine and for the service of a few irrigators en route.

The Plymouth mine was closed down for a number of years but operations were renewed about 1912 and an enlarged mill installed which required a constant water supply. In order to meet the demand a supply of water was obtained from the South Fork of the Cosumnes River through the Enterprise ditch which was also the property of Emma Rose, et al. This ditch headed at a point within the NW $\frac{1}{4}$ of NW $\frac{1}{4}$ of Section 33, T 9 N, R 11 E, M.D.B.&M. some 24 miles below the intake of the Douglas ditch. Both ditch systems were operated for the supply of the town of Plymouth and the Plymouth mine

until 1916 when an electric pump was installed on the Enterprise ditch and the Douglas ditch was operated solely for the small irrigation demand above mentioned.

No water was conveyed in the Douglas ditch in 1917 because of the washing out of a flume, the rebuilding of which was estimated to cost about \$1000.00 and, as the total cost of conditioning the ditch was estimated at approximately \$3000.00 and the revenue from the service did not warrant such expenditure, Emma Rose, et al. made application to the State Railroad Commission for discontinuance of the operation of the Douglas Ditch. By order dated January 19, 1918, Emma Rose, et al. were authorized to discontinue service of water through the Douglas Ditch provided that a stipulation was filed with the Commission wherein all applicants would agree to abandon the Douglas ditch and the right to divert water into it and would execute a deed conveying said property and right for a nominal consideration to any person or association of persons who might desire to undertake the operation of the ditch or provided that a statement from each and every person who was of record as a water user or had an existing claim for service from the Douglas ditch, was filed with the Commission waiving such rights or agreeing that service on Douglas ditch and branches might be abandoned. It was further ordered that if Emma Rose, et al. failed to comply with either of the two foregoing conditions on or before March 1, 1918, they should proceed to repair the ditch and provide for and maintain water service to existing consumers and others in the district who might apply for water therefrom.

Emma Rose, et al. applied for a rehearing which was denied but the previous order was modified to the effect that all interested parties make an effort to agree on terms for a discontinuance of service from said ditch

and within thirty days to file reports stating the result and that thereafter an appropriate order would be made by the Commission.

An agreement could not be reached and upon petition of the Fairplay Water Users Association a rehearing was finally granted and an order entered on April 9, 1921, rescinding the former order and authorizing Emma Rose, et al., to discontinue the operation of the so-called Douglas Ditch.

While the operation of the ditch was abandoned it appears from the testimony presented at the hearing held before the Railroad Commission on November 6, 1919, that the water right itself was not abandoned and that the water formerly diverted by the Douglas ditch was diverted further down the river at the intake of the Enterprise ditch (See Transcript of hearing held before R.R. Commission, page 136).

Prior to the order of abandonment, the farmers in the vicinity of Fairplay organized a mutual water association under the name of Fairplay Water Users Association and on July 8, 1917, filed Application 1365 to appropriate water from the Middle Fork of Cosumnes River through the Douglas ditch. On October 27, 1923, this application was cancelled on account of the failure of applicant to secure right of access to the stream at the proposed point of diversion.

On February 16, 1924, Application 3853 was filed by Fairplay Mutual Water Company, a corporation, which was virtually a reorganization of the Fairplay Water Users Association and a condemnation suit was initiated for the purpose of obtaining a right of way for the ditch but this suit was subsequently abandoned and the Water Company proceeded upon the assumption that it was incumbent upon the legal title holders of the Douglas ditch to permit the persons beneficially interested to continue the operation of the property in the public interest to which it was dedicated and signified its intention to take the necessary legal steps to clarify its right to the Douglas ditch.

insisting that it had an absolute right to the use of the ditch. Upon this showing and the evident intent of the Company to proceed with the work necessary to rehabilitate the ditch upon the approval of the application, it was approved after hearing on September 23, 1927, by the issuance of Permit 2893. Construction work was commenced but due to its inability to finance the project an order was entered by this office on January 26, 1933, revoking Permit 2893 for failure to comply with the terms and conditions thereof.

The testimony introduced at the hearing held in connection with Applications 7489 and 7582 now before this office indicates that on July 5, 1927, the following described property was sold to Charley Edner (President of Fairplay Mutual Water Company) by Charles P. Wood, tax collector of El Dorado County:

"Ditch and water right taking water from Middle Fork of Cosumnes River to Brownville and other places, 38 miles of ditch at \$425.00 per mile; ditch taking water from Middle Fork of South Fork of South Fork, 3 miles at \$283.00 per mile, Fairplay ditch and water right taking out of Brownville Creek about 1 mile west of Brownville running th. westerly to Cedar Grove and Fairplay, Houston ditch and water right taking out of Scott Creek th. to Indian Diggings, ditch taking water from the Douglas ditch or by way of Edner Ranch and Slug Gulch known as Bottle Diggs Ranch".

On September 22, 1927, Charley Edner and M. E. Edner his wife, deeded the above described property to Claire Simmons and on July 23, 1931, Claire Simmons deeded the property to W. P. Frick. Copies of the three instruments of transfer were entered as exhibits at the hearing. Mr. Frick claims that since 1927 all taxes on the property have been paid.

It appears from the record that some two years ago Mr. Frick, in a trade, conveyed certain lands to the Detert Estate through which the Douglas ditch passed. The instrument of transfer did not except from the lands conveyed any right of way for the Douglas ditch and the Detert Estate now claims that since the right of way was not excepted from the lands con-

veyed the Estate is the owner of the ditch as well as the land through which it passes and therefore the applicant has no right to flow water through its property. Applicant admits that such a transfer was made but urges that at the time of the transfer he was under the impression that the ditch system was entirely separate and apart from the lands conveyed. He admitted, however, that in the event that the ditch passed through the property conveyed by him to the Estate, it was not excepted therefrom.

It is questionable whether or not Mr. Frick obtained anything when the ditch and water right were sold to him. As stated above it would appear that there was no water right to be conveyed and whether or not he obtained a clear title to the ditch is a matter of uncertainty.

USE OF WATER BY THE PROTESTANTS

Mary K. Pond and C. P. Pond, Jr.

Mary K. Pond acquired title to the Stillwagon group of mining claims about the year 1932 and leased them to her brother C. P. Pond, Jr., with option to purchase. He has subsequently transferred his interests to Douglas Badger and associates who are now operating the Stillwagon mine. The record indicates that during the past four years some \$20,000 have been expended in developing the property.

Although the protestants claim an appropriative right to 200 miners inches of water from Soplago Creek initiated prior to the effective date of the Water Commission Act, little information was available relative to the past use of water except that during the thirteen years prior to 1931 or 1932 water had been used for maintaining the property and thereafter until recently for active mining operations and at the time of the hearing it was expected to resume active mining operations within thirty days. Whether or not the old appropriative right had been lost by non-user was

not established but in the event that it had been lost it would appear that the protestants may claim a right to the use of water under claim of riparian ownership.

The protest is directed against the proposed diversion from Sopiago Creek only, no objection being raised to the proposed appropriation from the Middle Fork of the Cosumnes River.

It appears that the protestants' ditch is of ample capacity to convey the 200 miners inches (5 c.f.s.) of water claimed by them and that the entire amount has been used and is necessary to operate the mill. It also appears that during the period from about May 15th to December 1st of a year of normal runoff there is no water in Sopiago Creek subject to appropriation.

Henry J. Garibaldi

The protest of Henry J. Garibaldi is also directed against any diversion from Sopiago Creek which may interfere with his use of water for irrigation and domestic purposes on lands within Section 11, T 8 N, R 13 E, M.D.B.M.

Sopiago Creek as well as the Douglas ditch passes through protestant's lands in Section 11 and his claim of right is based solely upon riparian ownership. The record indicates that ten acres of land have been irrigated in the past but that subsequent to 1929 no actual farming has been done and the water has been used only for irrigating meadow lands for cattle grazing.

Mr. Garibaldi also owns mining property through which the Douglas ditch passes which is in the development stage only. The record indicates that the land was purchased from the Lane Investment Company or its predecessors in interest and that no right of way through his property has been granted to the applicant.

Mr. Garibaldi has Application 5113 before this office which is subsequent to Mr. Frick's applications, seeking to appropriate 25 cubic feet per second from Sopiago Creek from about November 10th to about May 31st of each season for mining and domestic purposes on lands either owned or leased by him in Sections 5, 6, 8, 11, 16, 17, 18, 19, 20, 21, 28, 29 and 30, T 8 N, R 13 E, Sections 3, 4, 13 and 24, T 8 N, R 12 E, and Section 34, T 9 N, R 12 E, M.D.B.&M.

Lane Investment Company

The Lane Investment Company, successor in interest of Emma Rose, Anna H. Lane and Hobart Estate Company, claims appropriative rights initiated prior to the effective date of the Water Commission Act to divert 1000 miners inches of water (25 c.f.s.) through the Enterprise ditch which takes out on the Middle Fork of Cosumnes River within the NW $\frac{1}{4}$ of Section 33, T 9 N, R 11 E, M.D.B.&M. Water is conveyed to the town of Plymouth where it is sold to one Randolph for distribution to the residents of the town. Water is also sold along the ditch to farmers and miners. Use during the winter is confined only to mining and domestic purposes but during the summer months all available water is needed to supply the demand. The Company also has an intake on the South Fork of the Cosumnes from which most of the winter supply is obtained. The principal source of supply during the summer months is from the Middle Fork and as applicant proposes to return a portion of the water to the South Fork the amount available at the intake of the Enterprise ditch will be decreased.

Estate of W. F. Detert, Deceased

The Estate of W. F. Detert, deceased, owns a cattle ranch consisting of some 31,000 acres of land in Azador and El Dorado Counties, of which about 18,000 acres are included in the general area which may be affected by

the proposed appropriations. The claim of right is based upon riparian ownership and use begun prior to the effective date of the Water Commission Act.

The waters of the Middle Fork of Cosumnes River and of Sopiago Creek are used for stock watering purposes and for the sub-irrigation of grazing land. There is nothing to indicate that any diversion ditches have been constructed. About 1500 or more head of cattle are watered from the streams and some water is also used for camp purposes. Just what amount of water should be allowed to flow through protestant's lands to satisfy its prior rights is not determinable from the record but in its protest it is claimed that allowing for usage, seepage and evaporation, at least 80 miners inches of water below each proposed point of diversion are necessary throughout the year to insure sufficient water for the purposes described.

The Estate claims the ownership of that portion of the Douglas ditch which passes through its property and the land upon which both applicant's proposed points of diversion are located and aver that no right of way has been granted to Mr. Frick.

G. T. Oeste

Under Application 7478, Permit 4071 G. T. Oeste has the privilege of diverting 0.25 of a cubic foot per second from the Middle Fork of the Cosumnes River at a point within the SE $\frac{1}{4}$ of NE $\frac{1}{4}$ of Section 23, T 9 N, R 11 E, M.D.B.&M. for the irrigation of 20 acres of golf course and domestic purposes for a subdivision within Sections 23, 24 and 26, T 9 N, R 11 E, M.D.B.&M. The construction work has been completed and at the present time he is supplying water to 50 consumers who have cabins equipped with modern plumbing facilities. There are about 300 other lots which it is expected to supply in the future. The cabins are occupied during the summer time and during week ends throughout the year.

Mr. Geste has also filed Application 8111 which is subsequent to Mr. Frick's applications seeking to appropriate 2 cubic feet per second from the Middle Fork of the Cosumnes River at a point within the SW $\frac{1}{4}$ of NW $\frac{1}{4}$ of Section 24, T 9 N, R 11 E, M.D.B.&M. for power purposes for use in operating a hydraulic ram. The proposed use is throughout the entire year.

Both points of diversion are below the junction of Perry Creek and the Middle Fork of Cosumnes River where it is intended to return a portion of the water which Mr. Frick seeks to appropriate and it would appear that the only injury which may result from the proposed diversion would be a pos-sible contamination of the water with mining debris which would not in itself constitute sufficient grounds upon which to deny the appropriation.

APPLICATION 5646 OF STATE OF CALIFORNIA

On July 30, 1927, Application 5646 was filed by the State of California, Department of Finance under the provisions of Chapter 286, Statutes of 1927. This application proposes appropriations for irrigation and domestic purposes from (1) Middle Fork of the Cosumnes River at points within Section 9, T 8 N, R 14 E, Section 1, T 8 N, R 13 E, and Section 19, T 9 N, R 13 E, M.D.B.&M.; (2) South Fork of Cosumnes River at points within Section 14, T 8 N, R 11 E, Sections 31 and 34, T 8 N, R 13 E, and (3) Cosumnes River at points within Section 14, T 8 N, R 10 E, M.D.B.&M. The place of use was described as 100,000 acres in Townships 5 to 9 North, Ranges 8 to 13 East, inclusive, M.D.B.&M.

The projects under Applications 7489 and 7582 propose that part of the water diverted from the Middle Fork of the Cosumnes River at a point above the proposed points of diversion on the Middle Fork of the Cosumnes River, will be returned to the South Fork of the Cosumnes River. Therefore Applications 7489 and 7582 are more or less in conflict with Application

5646, but in view of the fact that they are to appropriate for purely local uses in areas naturally dependent upon these streams for a water supply it is believed that a determination of the relation of these priorities may wait upon the future.

WATER AVAILABLE FOR APPROPRIATION UNDER
APPLICATIONS 7489 and 7582

As no testimony was presented at the hearing by the applicant relative to the runoff of Sopiago Creek and no records of runoff are available to this office, the Division can only rely upon the statements of the protestants as to the season during which water may be diverted from Sopiago Creek under Applications 7489 and 7582 without interfering with their claims of prior rights.

Mr. Garibaldi in his protests stated that the entire flow of Sopiago Creek is used by him during the dry season of the year and this statement was supported by testimony presented at the hearing. (See Transcript, page 64.)

Mary K. Pond, in her protest, stated that it might be dismissed if the diversions proposed from Sopiago Creek were limited to the months of December to May inclusive. At the hearing her father testifying in her behalf, stated that there would be no objection to the approval of the applications provided that the season of diversion was amended to the six month period commencing November 1st of each year.

From the above it would appear reasonable to assume that considering the record protestants only diversion from Sopiago Creek may be made by the applicant during the period from about November 1st to about May 15th of a year of normal runoff without interfering with the prior vested rights of the record protestants.

As to the season of the year during which water may be diverted from the Middle Fork of the Cosumnes River without interfering with the claimed

rights of the protestants the testimony is very indefinite and the Division must therefore rely upon such data as is available in this office relative to the stream flow and uses of water by claimants upon the Cosumnes River.

From certain data submitted by protestants Emma Rose, et al. on November 9, 1921, in connection with Application 1365 of Fairplay Water Users Association, the mean date during the years 1916 to 1921, inclusive, at which all the waters of the Middle Fork of the Cosumnes River were diverted into the Enterprise ditch was July 26. As the period was one of rather low run-off it is probable that the average over a longer period of time would be about August 1st and if the uses proposed by the applicant under Application 7582 were truly non-consumptive and if it were intended to return all the waters to the Middle Fork it would appear that diversions might be made throughout the year.

Such, however, is not the case, as both consumptive and non-consumptive uses are proposed by the applicant and only a portion of the water diverted is to be returned to the Middle Fork above the intake of the Enterprise ditch. Furthermore the testimony presented before the State Railroad Commission at the time that the predecessors in interest of the Lane Investment Company were seeking abandonment of the Douglas ditch, indicated excessive conveyance losses in that ditch. Also due consideration should be given to the users of water on the lower reaches of the Cosumnes River.

From a study of the records of the Water Resources Branch of the United States Geological Survey and an estimate of the use of water in the Cosumnes River Basin made in connection with our action upon Application 3853 of Fairplay Mutual Water Company to appropriate from the Middle Fork of Cosumnes River at the intake of the Douglas ditch, which studies are set forth in Decision A. 3853 D. 131, it was the conclusion of the Division that

during years of normal runoff there was unappropriated water at the intake of the Douglas ditch during the period from about December 1st to about June 30th only, this conclusion being reached after due consideration of the rights of the users of water on the lower Cosumnes River.

While it is true that applicant proposes to return the water used for mining purposes to the Middle and South Forks of the Cosumnes River above the points of diversion of the users on the lower Cosumnes, it is our opinion that in view of the proposed domestic use which is a consumptive one and the excessive transportation losses in the Douglas ditch system it would appear to be advisable to limit the season of diversion from the Middle Fork to the period from about December 1st to about June 30th and also to limit the season of diversion from Sopiago Creek to the period from about December 1st to about May 15th of each season.

Such limitation of season would apparently be in order also as the applicant indicated at the hearing that it was his intention to limit the proposed diversions under Application 7489 and 7582 to the flood waters of the winter season.

APPLICANT'S RELATION TO PLACE OF USE

The record indicates the applicant owns no mining lands at the present time and has no use for the water himself except for resale to others. He has not applied to the Railroad Commission for any certificate of public convenience and necessity nor has he entered into any definite agreements with the owners of the places of use designated in his application except possibly the Baughman Brothers who own land in the Brownsville Mining District.

In July of 1933 the Baughman Brothers apparently arrived at some understanding with applicant whereby in return for reconstructing the flumes

and ditches in that portion of the Douglas ditch extending from Sopiago Creek to their diggings in Sections 6 and 7, T 8 N, R 13 E, M.D.B.M., they would be entitled to take 160 miners inches from Sopiago Creek in exchange for the labor and money expended in rehabilitating the ditch system when this amount was available, and after they had used enough water to reimburse them for their expenditure, water used would then be purchased from the applicant. This understanding or agreement was contingent upon the approval of Applications 7489 and 7582.

Under this arrangement the Baughman Brothers have reconstructed about 10 or 12 miles of ditch to a capacity of 1000 miners inches and during the winter of 1933-34 used water for approximately two months. The use was discontinued on account of the possibility of infringing upon prior rights below. No arrangements have been made with Mr. Frick to divert water from the Middle Fork of the Cosumnes River as the Baughman Brothers were of the opinion that they could obtain all the water which they needed from Sopiago Creek.

A petition was circulated by Baughman urging the approval of Applications 7489 and 7582 which was entered as Exhibit 4 at the hearing. This petition contains some 44 signatures of which about 17 were apparently interested from a mining standpoint. Others it appears were interested only in possible seepage and increase in the flow of springs occasioned by the flow of water in the ditch.

SUMMARY AND CONCLUSIONS

Where an applicant is neither the owner of the intended place of use nor the intended user of the water which he proposes to appropriate, legal relationship of applicant and user should be definitely established. If it is intended to distribute water as a public utility applicant should

be required to furnish the Division with a copy of the certificate of public convenience and necessity issued by the State Railroad Commission authorizing him to undertake service. If water is to be distributed under private agreement with the users, evidence of such agreement should be required contingent of course upon the approval of the application. Therefore, before favorable action is taken in connection with Applications 7489 and 7582, the legal relationship of Mr. Frick and the intended users of water under these applications should be definitely established.

While Mr. Frick asserts that he has the necessary right of way for the Douglas ditch, the record indicates some uncertainty on this point and a reasonable length of time should be granted in order to clear up this point if either of the parties so desires before the issuance of a permit. Unless an action is promptly initiated and actively pressed which terminates unfavorably to the applicant on this point, we see no obstacle to approval of Applications 7489 and 7582 limiting the season of diversion, however, on Middle Fork of Cosumnes River to the period from about December 1st to about June 30th of each year and the season of diversion on Sopiago Creek to the period from about December 1st to about May 15th of each season. For the present, however, it would appear advisable to withhold action upon Applications 7489 and 7582.

O R D E R

Applications 7489 and 7582 for permits to appropriate water having been filed with the Division of Water Resources as above stated, a public hearing having been held and the Division of Water Resources now being fully informed in the premises:

IT IS HEREBY ORDERED that action on Applications 7489 and 7582 be withheld until further order is entered.

WITNESS my hand and the seal of the Department of Public Works of the State of California, this 31st day of January, 1935.

EDWARD HIATT, State Engineer

BY WILFRED CONKLING
Deputy

WES:
RNB:MP