

M. Stoddard

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

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In the Matter of Application 8253 of Stephen T. Riolo to
Appropriate from Dry Creek, Tributary to the Sacramento
River in Placer County for Irrigation Purposes.

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DECISION A 8253 D 384

Decided *March 11, 1936*

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APPEARANCES AT HEARING HELD AT SACRAMENTO, DECEMBER 16, 1935.

For Applicant

Stephen T. Riolo

In propria persona

For Protestants

George M. Mett, Jr.
H. E. Blodgett
T. Giraud
W. R. Jefferson
Golda G. Whipple
R. G. Root and S. E. Chapman

In propria persona
" " "
" " "
" " "
Mr. Whipple
R. G. Root

EXAMINER: Everett N. Bryan, Supervising Hydraulic Engineer, for
Harold Conkling, Deputy in Charge of Water Rights, Division of
Water Resources, Department of Public Works, State of California.

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OPINION

GENERAL DESCRIPTION OF PROJECT

Application 8253 was filed February 23, 1935, by Stephen T. Riolo.
It proposes an appropriation of 1.5 cubic feet per second from Dry Creek, a
tributary of the Sacramento River in Placer County to be diverted from March
1st to October 1st of each season for the irrigation of 120 acres of land
within the $S\frac{1}{2}$ NE $\frac{1}{4}$ and NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 8, T 10 N, R 6 E, M.D.B.&M. The pro-
posed point of diversion is within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 8. The applica-

cation was protested by George M. Mott, Jr., H. E. Blodgett, T. Girard, W. R. Jefferson, Galda G. Whipple, R. G. Root and S. E. Chapman.

PROTESTS

All of the protestants with the exception of R. G. Root and S. E. Chapman who claim rights by virtue of riparian ownership, are either licensees or permittees before the Division of Water Resources.

Protestants allege in effect that during recent years there has been insufficient flow in Dry Creek to meet their irrigation requirements and should Application 8253 be approved it would result in depriving them of water to which they are entitled.

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

Application 8253 of Stephen T. Riolo 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 public hearing in accordance with Section 1a of the Water Commission Act on Monday, December 16, 1935, at 10:00 o'clock A.M. in Room 401 Public Works Building, Sacramento, California. Of this hearing applicant and protestants were duly notified.

WATER SUPPLY

The record indicates that there is ample water in Dry Creek during the winter and spring months to satisfy the demands of the users on the stream but that during the summer months, especially during July and August little or no water would be available for diversion, were it not for waste water discharged into the creek by the Pacific Fruit Express Company, the City of Roseville and the Southern Pacific Railroad Company.

The main source of such waste water is the water discharged into Dry Creek by the Pacific Fruit Express Company after use in the manufacture of ice. The water so used is obtained by pumping from deep wells located about 800 to 1,000 feet from the bed of Dry Creek and sunk to depths of some two or three hundred feet. There is no evidence to indicate that this water either supports the natural flow of the creek or contributes thereto. Mr. Parrish, a land surveyor and former employee of the engineering department of the City of Roseville testified in this connection as follows:

"I don't think that the Creek would affect the stratum that they pump from, because I understand these wells are two to three hundred feet deep, quite a depth there. They wouldn't get any of the channel water out of the Creek from the wells-- that is, the Pacific Fruit Express Company (Transcript p. 21).

Mr. Parrish had occasion to determine the amount of water discharged into the creek from the Pacific Fruit Express Ice Plant during the year 1928 and it was found that the discharge varied from 150 gallons per minute in the winter time when the plant was practically shut down to a maximum of 3,000 gallons per minute (6.68 c.f.s.) during the summer when the plant was operating 24 hours a day. This summer flow was well sustained.

The record indicates that the City of Roseville obtains its municipal water supply by purchase from the Pacific Gas and Electric Company. The water originates in the watersheds of the Yuba and Bear Rivers and is imported to a regulatory reservoir situated between the towns of Rocklin and Roseville from which it is piped into Roseville. The waste water or sewage after passing through a septic tank is discharged through a 22 inch outfall pipe into Dry Creek below the town of Roseville. Included in this discharge is the waste water from a commercial ice manufacturing plant and possibly a few others who pump from wells in Roseville. Mr. Parrish testified that measurements made

of the discharge from the outfall sewer into the channel of Dry Creek indicated that during the month of January, 1928, the average discharge was about 900,000 gallons per day and during the month of July, 1928, the average discharge was approximately 1,000,000 gallons per day (1.55 c.f.s.). Just what proportion of this water was contributed by the commercial ice plant and other private well owners does not appear in the record.

In addition to the discharge into Dry Creek from the Pacific Fruit Express Ice Plant and the discharge from the septic tank of the City of Roseville, the Southern Pacific Railroad Company discharges considerable water at Roseville after use at its round house and car shop. This water is purchased from the Pacific Gas and Electric Company and comes from the same sources as the supply used by the City of Roseville but instead of the waste water being discharged into the sewer system of the City of Roseville, it is discharged directly into Dry Creek. The record does not indicate the amount of water thus wasted.

From the above it would appear that during a year of normal use by the City of Roseville, by the Pacific Fruit Express Company and by the Southern Pacific Railroad Company there would be an amount in excess of 8.2 cubic feet per second made available for diversion and use below the City of Roseville.

The question before this office is whether or not this amount of water is in excess of the amount to which the users of water from Dry Creek are now entitled.

**FOREIGN AND DEVELOPED WATERS CANNOT BE CLAIMED
UNDER THE DOCTRINE OF RIPARIAN OWNERSHIP**

In the celebrated case of E. Clemens Horst Co. v. New Blue Point Mining Company (171 Pac. 417, 177 Cal. 631) the courts held that where the

flow of a natural stream is augmented by artificial means, that is, by water which, without the intervention of human agency, would never reach the stream, this artificial flow does not inure to the benefit of riparian owners but is merely in the nature of abandoned personalty which may be appropriated by the first person who can take it from the stream.

The principles of law enunciated in this case are applicable to the situation on Dry Creek. The sewage return, with the possible exception of that portion which is pumped locally by the commercial ice plant and others, is foreign water which has been abandoned after usage by the vendee of the importer and therefore cannot be claimed under the doctrine of riparian ownership.

As to the waters pumped by the Pacific Fruit Express Company, it appears that they do not contribute to the natural flow of Dry Creek which passes through the property of the applicant and the protestants and that only after a portion of these waters has been abandoned and discharged into the bed of Dry Creek, is it made available for diversion and use. In other words it would appear that these waters are strictly developed waters which, after use, are abandoned into Dry Creek and as such would not be available to the lower riparian owners as part and parcel of the stream flow.

These waters can then be claimed only under the doctrine of appropriation.

APPROPRIATIVE RIGHTS ON DRY CREEK

The following table shows existing appropriative rights initiated since December 19, 1914, to take water from Dry Creek.

Application	Permit	License	Name	Date Filed	Amount C. f. S.
4484	2187	713	* Geo. M. Mott, Jr.	2-17-25	0.410
4821	2450	1074	Eugenia A. Thomas	11- 2-25	0.070
5231	2805	1101	Wm. McLaughlin	10- 9-26	0.440
5373	2800	953	* W. R. Jefferson	3-10-27	0.080
5398	2963	--	E. C. Chatterton	4- 1-27	0.500 **
5801	2983	956	* T. Giraud	1-11-28	0.090
5828	3061	1370	* H. E. Blodgett	2- 8-28	0.017
6434	3408	--	* Golda G. Whipple	9-11-29	0.310
6678	3528	--	G. H. Moreland	5-14-30	0.300
8253	--	--	S. T. Riolo	2-23-35	<u>1.500</u>
Total					3.917 cfs

* Protestants

**This project has been inspected and amount will probably be reduced to 0.100 in license.

There are other users of water from Dry Creek but so far as the record shows, the right to divert is based upon claim of riparian ownership rather than upon appropriation initiated prior to the effective date of the Water Commission Act.

UNAPPROPRIATED WATER AVAILABLE

The record clearly indicates that during the summer season of 1928 there was an amount of water in excess of 8.2 cubic feet per second made available for the use of downstream appropriators by the operation of the septic tank of the City of Roseville and the ice plant of the Pacific Fruit Express Company, exclusive of the use of water by the Southern Pacific Railroad Company. No records were introduced to indicate how much water is available through these

agencies at the present time. However it appears from statements made at the hearing that the consumption of water by the City of Roseville during the past two years has increased (Transcript, page 16) and it would appear reasonable to assume that the sewage discharge is proportional to the municipal consumption.

As to the amount of water now wasted into Dry Creek by the Pacific Fruit Express Company the record indicates that while there has been a reduction in the manufacture of ice during the past few years resulting in a reduced return the Company is now operating under more nearly normal conditions and during the summer of 1935 there was plenty of water to meet the requirements of this applicant and the protestants.

Assuming that the amount of water available during the summer months under normal operating conditions is approximately 8.2 cubic feet per second there is an excess of 5.7 cubic feet per second over and above the amount which can be claimed under appropriative rights initiated subsequent to December 19, 1914, the effective date of the Water Commission Act and prior to February 23, 1935, the date upon which Stephen T. Biolo filed Application 8253.

In the absence of a showing that there are other legal claimants of this water it must necessarily be assumed that an appreciable portion, if not all, of the 5.7 cubic feet per second is available for appropriation under the Water Commission Act. Of this amount the applicant seeks to appropriate 1.5 cubic feet per second which the record indicates he has been using in the past apparently under a false claim of riparian ownership.

The record clearly indicates that during the months when the ice plant is not operating there is sufficient water to satisfy all claims and it is therefore the opinion of the Division that there is unappropriated water in Dry Creek sufficient in amount to justify the approval of Application 8253.

CONCLUSION

The record clearly indicates that during a period of a few years immediately preceding the year 1935, there was a scarcity of water in Dry Creek during the irrigation season apparently due to the curtailed production of the Pacific Fruit Express made necessary by the reduction in the shipment of fruit. During the year 1935 it appears however that the operations of the Pacific Fruit Express Company became more nearly normal and that there was plenty of water for everyone.

It is therefore the opinion of the Division that at such times as the agencies discharging water into Dry Creek are operating under normal conditions there is sufficient unappropriated water in Dry Creek to justify the approval of Application 8253. It should be understood however that the amount of water made available for appropriation during the summer months is entirely dependent upon the operation of the contributing agencies above and that no right of continuance or regularity of flow can be acquired under any permit which may be issued.

The purpose to which applicant proposes to put the water is a useful and beneficial one and Application 8253 should be approved subject to the usual terms and conditions.

ORDER

Application 8253 for a permit 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 said Application 8253 be approved and that a permit be granted 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 *11th* day of *March*, 1936.

EDWARD HYATT, State Engineer

BY _____

Deputy

WES:MP