

Before the Division of Water Resources
Department of Public Works
State of California

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In the Matter of Application 5724 of Stevinson Water District to appropriate from Bear Creek, Owens Creek, Duck Creek and Deadman Creek, tributaries of San Joaquin River in Merced County for Irrigation Purposes; Application 5725 of Stevinson Water District, a corporation, to appropriate from Baldwin Slough, a tributary of San Joaquin River in Merced County, for Irrigation Purposes; Application 6069 of Daniel LeRoy and Edwin L. McNamara to appropriate from Mariposa Creek, a tributary to San Joaquin River in Merced County, for Irrigation Purposes; Application 6111 of Stevinson Water District to appropriate from McCoy Spillway, Arena Spillway, Livingston Drain, Bear Creek, Owens Creek, Duck Creek and Deadman Creek, tributaries of San Joaquin River in Merced County, for Irrigation Purposes; Application 6114 of W.P. Roduner (formerly Arthur J. Casebeer) to appropriate from Duck Slough, a tributary to San Joaquin River in Merced County for Irrigation and Domestic Purposes; Application 6160 of Eleanor E. Haun to appropriate from Mariposa Creek, a tributary of San Joaquin River in Merced County, for Irrigation Purposes; and Application 6807 of El Nido Irrigation District to appropriate from Deadman and Dutchman Creeks, tributaries of San Joaquin River in Merced County for Irrigation and Domestic Purposes.

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Decision A. 5724, 5725, 6069, 6111, 6114, 6160, 6807 D. - 471

Decided *March 10, 1941*

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APPEARANCES AT HEARING HELD JUNE 18, 1931 AT SACRAMENTO, CALIFORNIA.

For Applicants

Stevinson Water District and James J.
Stevinson, a corporation

Hatfield, Wood and Burke

Arthur J. Casebeer

A.L. Cowell & Arthur J. Casebeer

El Nido Irrigation District

A.L. Cowell & C.E. Graham

Daniel LeRoy and Edwin L. McNamara

No appearance

Eleanor E. Haun

No appearance

For Protestants

Crocker-Huffman Land and Water Co.	H. H. McPike
Merced Range Co., El Capitan Range Co. ✓ and W. M. Dennis	L. B. Harrell
Antone Furtado, John Furtado, J. A. ✓ Roduner and J. N. Saunders	C. Ray Robinson
Merced Irrigation District ✓	C. Ray Robinson & A. Blakesley
Arthur J. Casebeer ✓	In propria persona
F. Favier and F. Eyraud	F. Favier
West Stanislaus Irrigation District	L.L. Dennett and W.F. Woolley
Chas. S. Howard Co. & C. L. Best	A. E. Chandler
Water Users Assoc. of Highline Ditch, et al	J. E. Mount
East Side Canal and Irrigation Company	Hatfield, Woode & Burke
Stevinson Water Dist. & Geo. J. Hatfield	Hatfield, Wood & Kilkenny
Modesto Properties Company	J. W. Hawkins
Leslie Reininghaus	In propria persona
Mrs. Mina Reininghaus	John Reininghaus
California Packing Corporation	Madison & Sutro, by H.B. Seymour
Certain consumers of the East Side Canal and Irrigation Co.	Edson Abel
Geo. J. Hatfield and Lucas Kilkenny	Hatfield, Wood & Kilkenny
James J. Stevenson, a corporation	Hatfield, Wood & Kilkenny
El Nido Irrigation District	A. L. Cowell
G. S. Bloss Sr. and G.S. Bloss, Jr.	No appearance
Mamie F., Ella T., Robert E. & M.C. Rahilly	No appearance
Fernando, Joe and William Lord ✓	No appearance
W. A. Saunders	No appearance
Eleanor E. Haun	No appearance

For Protestants (continued)

E. N. Rector, et al	No appearance
C. A. Crane	No appearance
Vernalis Investment Company	No appearance
H. D. Vanvales	No appearance
Patterson Water Company	No appearance
Robert S. Lamborn	No appearance

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

O P I N I O N

Description of the Applications

The essential statistical data with respect to the several applications as presented at the hearing will be found set forth in Table I which is attached to and made a part of this opinion. There is, however, one common characteristic of all this group of applications which is of a peculiar and unusual nature and is not revealed by the tabulations. We refer to the origin of the supply which it is sought to appropriate.

The waters which it is sought to appropriate originate for the most part in the Merced River, a source foreign to the natural flow of the sources of proposed appropriation, and are diverted into the channels in part by release or spill from the irrigating canals of the Merced Irrigation District, in part from seepage or leakage from said district's and other irrigating ditches, in part from drainage wells operated by said district, in part as surface runoff from irrigated lands and in part by percolation from the underground water table.

Applications 5724 and 6111 were filed by Lucas E. Kilkenny and Robert S. Lamborn, respectively. On June 18, 1931, the applications were assigned to James J. Stevinson, a corporation, which in turn assigned them to the Stevinson

Appl.	Date Filed	Use	Name
5724	10-17-27	Irr.	Stevinson Water Dist.
5725	10-17-27	Irr.	James J. Stevinson, s
6069	9-27-28	Irr.	D. L. and E. L. McNair
6111	11-5-28	Irr.	Stevinson Water Dist.
6114	11-9-28	Irr. Dom.	W. P. Roduner (former Arthur J. Casebeer)
6160	1-14-29	Irr.	Eleanor E. Haun
6807	9-27-30	Irr. Dom.	El Nido Irrigation D.

Water District on July 3, 1931. By a petition filed November 19, 1940 in connection with Application 5724 and by an amended Application 6111 filed December 7, 1940 the District seeks to change the place of use to 7336.08 acres within the boundaries of the Stevinson Water District of which it proposes to irrigate 1622.32 acres of alfalfa and other general crops and 5713.76 acres of rice. Each application has been amended in accordance with the present plans of the District and also to indicate that the total simultaneous diversions from all sources should not exceed a total of 163.00 c.f.s. which is the ordinary requirement for the irrigation of the crops which the District proposes to irrigate.

Applicant has also been advised that if and when Applications 5724 and 6111 are approved, a clause will be inserted in the permits to the effect that the total simultaneous diversions under Application 1885, Permit 393 (which also proposes the irrigation of the same 7336.08 acres described above), Application 5724 and Application 6111 shall not exceed 163.00 cubic feet per second continuous flow.

Applications 5724 and 6111, it appears, are directed mainly toward the re-appropriation of waste waters of Merced Irrigation District as they appear in the various sources named therein. It appears, in fact, that insofar as the natural waters of the several natural water ways named in the applications are concerned, these now and have for many years been used in the irrigation of the same lands as those specified for service under these applications.

Application 5725 was assigned by James J. Stevinson, a corporation, to the Stevinson Water District on May 9, 1932. It involves the waters of Baldwin Slough, a tributary and branch of the San Joaquin River which waters have their origin in drainage from the irrigation of lands in the Turlock Irrigation District. No private agreement has been entered into by the applicant with the creator of this waste water and applicant appears to be standing only upon

its rights under Application 5725.

By petition filed November 19, 1940 the District asked that the place of use be changed from 1,462.04 acres of rice to 2772.71 acres of rice to include District lands lying north of the Merced River. As no increase in the amount of the appropriation is involved the application has been so amended.

Application 6069 of D. L. and E. L. McNamara involves the use of water in Mariposa Creek. No appearance was made by the applicants at the hearing and the application does not indicate in any way its peculiar nature. From our general knowledge of the situation in this area however we are convinced that previous to the irrigation of lands above no waters were available during the irrigation season in this source at the point of diversion designated, sufficient to justify an application, and that applicant could only have been prompted to file an application by reason of the prospect of seepage water and spill resulting from the irrigation of lands above.

Application 6114 of Arthur J. Casebeer, subsequently assigned to W.P. Roduner involves the waters of Duck Slough. Statements made by Mr. Casebeer at the hearing of June 18, 1931 indicate that he had in mind not only the appropriation of flood waters which are of occasional occurrence but also seepage and spilled water resulting from irrigation of lands in Merced Irrigation District.

Application 6160 of Eleanor E. Faun involves the waters of Mariposa Creek. She was not represented at the hearing of June 18, 1931, but, as in the case of Application 6069 referred to above, our general knowledge of the situation leads us to believe that what is particularly sought are the spill and seepage waters resulting from the irrigation of lands in the Merced Irrigation District.

Application 6807 of El Nido Irrigation District as presented at the hearing proposed an appropriation of 80 cubic feet per second from Deadman

and/or Dutchman creeks. On January 15, 1941 there was received from the applicant a request that Dutchman Creek be stricken from the application as a source of appropriation and the application has been so amended. Applicant intends not only to appropriate thereunder natural storm waters but also surface spill and seepage return waters in Deadman Creek to which it already asserts a claim by virtue of a private agreement with Merced Irrigation District.

TABLE II

PROTESTS

Protestants	Applications Protested						
	5724	5725	6069	6111	6114	6160	6807
C. L. Best ✓	:	:	:	:	x	:	:
Geo. S. Bloss, Sr. and Geo. S. Bloss, Jr. ✓	:	o	:	:	o	:	:
Geo. S. Bloss, Jr., et al	:	o	:	:	o	:	:
Arthur J. Casebeer ✓	:	o	:	:	:	:	:
C. A. Crane ✓	:	x	o	:	:	:	:
Crocker-Huffman Land & Water Company ✓	:	o	:	:	o	:	:
W. M. Dennis ✓	:	o	:	:	o	:	:
East Side Canal & Irrigation Company ✓	::	:	:	:	:	:	x
El Capitan Range Company ✓	:	o	:	:	:	:	:
Fernando I. Freitas, et al ✓	:	o	:	:	:	:	:
Geo. J. Hatfield ✓	:	:	:	:	:	:	x
Eleanor E. Haun	:	o	:	:	:	:	:
Chas. S. Howard Company ✓	:	x	:	:	x	x	x
Lucas E. Kilkenny ✓	:	:	:	:	:	x	x
Robert S. Lamborn	:	:	:	:	:	x	x
Merced Irrigation District ✓	:	o	o	x	o	x	o
Merced Range Company ✓	:	o	:	:	o	:	:
Modesto Properties Company ✓	:	:	:	:	x	:	:
Patterson Water Company ✓	:	:	:	:	x	:	x
Ella T., M.C., and Mamie F. Rahilly ✓	:	o	:	:	:	o	:
Robert E. Rahilly ✓	:	o	:	:	:	:	:
E. N. Rector, et al	:	o	:	:	:	:	:
Leslie and Mrs. Mina Reininghaus ✓	:	:	:	:	:	:	x
J. A. Roduner ✓	:	o	:	:	o	:	:
J. W. Saunders ✓	:	o	:	:	o	:	:
W. A. Saunders ✓	:	o	:	:	o	x	:
Stevinson Water District ✓	:	:	:	:	:	:	x
James J. Stevenson, a corporation ✓	:	:	:	x	:	x	x
M. D. Vanvles ✓	:	:	:	:	x	:	:
Vernalis Investment Company ✓	:	x	x	:	:	:	:
Water Users Association of High Line Ditch, et al	:	:	:	:	x	:	:
Water Users from East Side Canal ✓	:	x	x	x	x	x	x
West Stanislaus Irrigation District ✓	:	x	x	x	x	x	x

x Signifies that protestant is downstream from applicant.
o Signifies that protestant is upstream from applicant.

Description of Protests

Essential statistical data with respect to the several protests received prior to the hearing are set forth in Table II which is attached to and made a part of this opinion. Briefly the substance of each of the protests is as follows:

C. L. Best

C. L. Best objects to the approval of Application 6111 insofar as it proposes appropriations from Livingston Drain. He claims that the waters are not subject to appropriation on account of the fact that they are flowing in an artificial channel and also that these waters were conveyed to the Bloss Land and Cattle Company, his predecessor in interest, by certain agreements entered into between the Company and Drainage Districts Nos. 1 and 2 of Merced County.

George S. Bloss, Sr.
George S. Bloss, Jr.

George S. Bloss, Sr., now deceased, and George S. Bloss, Jr., objected to the proposed appropriations under Applications 5724 and 6111 insofar as they relate to Duck Creek, Deadman Creek and Owens Creek.

Diversion by George S. Bloss, Sr. was made from Owens Creek within Section 20, T 8 S, R 12 E, M.D.B. & M. under claim of riparian and appropriative rights.

George S. Bloss, Jr. claims riparian rights and an appropriative right to divert from Duck Slough under Application 5386, License 1518 for an amount of water not to exceed 20.00 c.f.s. The point of diversion described in the license is within the NE $\frac{1}{4}$ of SW $\frac{1}{4}$ of Section 13, T 8 S, R 13 E, M.D.B. & M.

George S. Bloss, Jr. et al

On November 7, 1934, subsequent to the hearing George S. Bloss, Jr., C. A. Crane, W. A. Saunders, Mary S. Saunders and Edna T. Thorne protested Applications 5724 and 6111 upon the grounds that the only water available for their

lands is water which is sought for appropriation under these applications, that the lands of James J. Stevinson, a corporation, have already adequate water supplies including:

- (1) Waters of the San Joaquin River diverted through the canal of the East Side Canal and Irrigation Company.
- (2) Waters of the San Joaquin River pumped, or capable of being pumped directly on said lands.
- (3) Water of the Merced River pumped or capable of being pumped directly on said lands.
- (4) Water of the Merced River agreed to be delivered to the said lands by the Merced Irrigation District.
- (5) Underground water under said lands and close to the surface thereof and required to be removed in order to prevent the water logging of said lands.

They allege in effect that their lands are riparian to the creeks from which applicant seeks to appropriate and that these creeks contain a large amount of abandoned water discharged therein from lands within the Merced Irrigation District, that both the natural flow and the abandoned water has been used by the protestants who were not aware of the necessity of appropriating the same but were of the opinion that their use of the abandoned waters gave them a right to enjoy the same; that it would be against public policy to now deprive them of a reasonable quantity of water for the irrigation of their lands and that the approval of the applications should be made subject and subordinate to the right of the protestants to a reasonable quantity of water for the irrigation of said lands.

Arthur J. Casebeer (W. P. Roduner)

Arthur J. Casebeer objects to the approval of Application 5724 insofar as it proposes appropriation of water from Duck Creek. He claims riparian rights and rights initiated by appropriation prior to the effective date of the Water Commission Act. On November 9, 1928 Mr. Casebeer filed Application 6114 with the Division to appropriate from Duck Slough at points within the NE $\frac{1}{4}$ SE $\frac{1}{4}$

of Section 21, T 8 S, R 13 E, M.D.B.M. The records of this office were changed on September 14, 1936 to indicate that W. P. Roduner had succeeded to his interest in Application 6114.

C. A. Crane

C. A. Crane objects to the approval of Application 5724 insofar as it proposes appropriations from Bear Creek, Duck Creek and Owens Creek. He claims rights acquired by riparian ownership and beneficial use. He is also concerned lest an easement be acquired across his property for the drainage of water from the Merced Irrigation District.

Crocker-Huffman Land and Water Co.

Crocker-Huffman Land and Water Company objects to the proposed appropriations from Duck Creek and Owens Creek under Applications 5724 and 6111 on the grounds of possible interference with its riparian rights to divert water from these streams. Its points of diversion on Owens Creek are within Section 17, T 8 S, R 13 E and Section 13, T 8 S, R 12 E, M.D.B.M. Its point of diversion on Duck Creek is within Section 26, T 8 S, R 12 E, M.D.B.M.

W. M. Dennis

The protest of W. M. Dennis is directed against the approval of Applications 5724 and 6111 insofar as they propose appropriations from Duck Creek (or Duck Slough). He claims a riparian right and an appropriative right initiated prior to the effective date of the Water Commission Act. His point of diversion is located near the NE corner of Section 27, T 8 N, R 12 E, M.D.B. & M.

East Side Canal and Irrigation Company

East Side Canal and Irrigation Company objects to the approval of Application 6807 of El Nido Irrigation District to appropriate from Deadman and Dutchman Creeks upon the grounds of possible interference with its right initiated prior to the effective date of the Water Commission Act to intercept the flow

in Deadman Creek by the East Side Canal. It avers that it would be deprived of water to which it is legally entitled and which has been dedicated to public use.

El Capitan Range Company

El Capitan Range Company objects to the approval of Applications 5724 and 6111 insofar as these applications propose appropriation of water from Duck Creek. Riparian rights and use of water since 1902 are claimed. Protestants' point of diversion is within the SE $\frac{1}{4}$ of Section 27, T 8 S, R 12 E, M.D.B. & M.

Fernando I. Freitas, et al

Fernando I. Freitas, Antone Furtado, John Furtado, Joe Lord and William G. Lord protest Application 5724 insofar as it proposes an appropriation from Deadman Creek. Both riparian rights and rights initiated prior to the effective date of the Water Commission Act are claimed. Their point of diversion is located within the NW $\frac{1}{4}$ of Section 34, T 8 S, R 14 E, M.D.B. & M.

George J. Hatfield

George J. Hatfield protests the approval of Application 6807 of El Nido Irrigation District to appropriate from Deadman and Dutchman Creeks on the grounds of possible interference with his diversion from the San Joaquin River within T 7 S, R 10 E, M.D.B.M. under claim of adjudicated riparian rights and rights by appropriation initiated prior to the effective date of the Water Commission Act.

Eleanor E. Haun

Eleanor E. Haun objects to the approval of Application 5724 insofar as it proposes an appropriation from Duck Creek. Rights are claimed by virtue of riparian ownership and appropriation initiated prior to the effective date of the Water Commission Act. Protestant claims that her lands located in Section 23, T 8 S, R 13 E, M.D.B.M. are benefited by the overflow of Duck Creek and that water

has been diverted from this stream at a point near the east line of Section 22,
T 8 S, R 13 E, M.D.B. & M.

Charles S. Howard Company, a corporation

Chas. S. Howard Company, a corporation, objects to the approval of Applications 5724 and 6111 insofar as they propose diversion from Bear Creek and Owens Creek and to the proposed appropriation of water from Livingston Drain under Application 6111. It also objects to the approval of Application 6114 of Arthur J. Casebeer (W. P. Roduner) to appropriate from Duck Slough and Application 6807 of El Nido Irrigation District to appropriate from Deadman and Dutchman creeks. Rights are claimed under the doctrine of riparian ownership and appropriative rights initiated prior to the effective date of the Water Commission Act. Protestant alleges in effect that Livingston Drain is an artificial water course and that the waters flowing therein are not subject to appropriation. Furthermore that the waters flowing in Livingston Drain are in part the property of the protestant having been acquired under a private contract by his predecessor in interest, the Bloss Land and Cattle Company, from the County of Merced. Diversion by the protestant is made from numerous sloughs and water ways in Sections 5, 6, 7, 8 and 9, T 8 S, R 11 E, M.D.B. & M.

Lucas E. Kilkenny

Lucas E. Kilkenny objects to the approval of Application 6114 of Arthur J. Casebeer (W. P. Roduner) to appropriate from Duck Slough and to the approval of Application 6160 of Eleanor E. Haun to appropriate from Mariposa Creek. He claims rights by virtue of riparian ownership, appropriative rights initiated prior to the effective date of the Water Commission Act and appropriative rights initiated under Applications 5724 and 5725 which have subsequently been assigned to Stevinson Water District. The points of diversion

described in the protest are those described in Application 5724.

Robert S. Lamborn

Robert S. Lamborn objects to the approval of Application 6114 of Arthur J. Casebeer (W. P. Reduner) to appropriate from Duck Slough and to the approval of Application 6160 of Eleanor E. Haun to appropriate from Mariposa Creek. He claims rights by virtue of riparian ownership, appropriative rights initiated prior to the effective date of the Water Commission Act and rights initiated under Application 6111 which has subsequently been assigned to the Stevinson Water District. The points of diversion from which he claims to divert water are those described in Application 6111.

Merced Irrigation District

Merced Irrigation District objects to the approval of Applications 5724, 5725, 6069, 6111, 6114, 6160 and 6807 on the grounds that the water which applicants seeks to appropriate has already been appropriated by the District under rights acquired from the Crocker-Huffman Land and Water Company, by adverse use, and by rights initiated under its Application 1224, Permit 914 to appropriate from the Merced River; that this water has never been abandoned by the District but on the contrary it claims ownership therein and the right to recapture the water which as a result of its operations flows in the channels from which it is proposed to appropriate, that the extent to which this water will be available depends wholly upon the operations of the District and that the granting of permits to the applicants would result in impairing the existing rights of the District and might prevent the recapture, use, sale and exchange of water and water rights in connection with the District's operations as provided by law.

Merced Range Company

The Merced Range Company objects to the proposed appropriations from

Deadman Creek under Applications 5724 and 6111 on the grounds of possible interference with its riparian rights and use of water from this source. Its point of diversion is described as being within the $SE\frac{1}{4}$ $SE\frac{1}{4}$ of Section 34, T 8 S, R 12 E, M.D.B. & M.

Modesto Properties Company

Modesto Properties Company objects to the approval of Application 6111 insofar as it proposes an appropriation from Livingston Drain. It claims that Livingston Drain is an artificial water course and that the water flowing therein is not subject to appropriation. Furthermore, protestant claims that it has the right to the use of this water by virtue of agreements entered into between Merced Drainage Districts 1 and 2 and its predecessor in interest Bloss Land and Cattle Company. The lands of this protestant are below the points of diversion described in Application 6111.

Patterson Water Company

Patterson Water Company objects to the approval of Application 6111 of Stevinson Water District and Application 6807 of El Nido Irrigation District on the grounds of possible interference with its riparian rights and appropriative rights initiated prior to the effective date of the Water Commission Act to divert water from the San Joaquin River in Section 15, T 5 S, R 8 E, M.D.B.M.

Ella T., M.C., and Mamie F. Rahilly

These protestants object to the approval of Applications 5724 and 6114 insofar as they propose appropriation of water from Duck Creek (or Duck Slough). Riparian rights and appropriative rights initiated prior to the effective date of the Water Commission Act are claimed. Their points of diversion are located near the east line of Section 22, T 8 S, R 13 E, and the east line of Section 18, T 8 S, R 14 E, M.D.B. & M.

Robert E. Rahilly

Robert E. Rahilly objects to the approval of Application 5724 insofar as it relates to the appropriation of water from Duck Creek. He claims rights by virtue of riparian ownership and appropriative rights initiated prior to the effective date of the Water Commission Act. Water is diverted at a point at or near the east line of Section 22, T 8 S, R 13 E, M.D.B.M. and within Section 28, T 8 S, R 13 E, M.D.B.M.

E. N. Rector, et al

E. N. Rector, A. L. Silman, F. Favier and F. Eyraud object to the approval of Application 5724 insofar as it relates to the appropriation of water from Duck Creek. Rights are claimed by virtue of riparian ownership and appropriative rights initiated prior to the effective date of the Water Commission Act. Their point of diversion is described as being within Section 30, T 8 S, R 13 E, M.D.B.M.

Leslie and Mrs. Mina Reininghaus

Mrs. Mina Reininghaus and her son Leslie object to the approval of Application 6807 of El Nido Irrigation District upon the grounds of possible interference with their rights to divert water from Deadman and Dutchman Creeks. Rights are claimed by virtue of riparian ownership and appropriative rights initiated prior to the effective date of the Water Commission Act. Their point of diversion is within the $E\frac{1}{2}$ $SE\frac{1}{4}$ of Section 36, T 8 S, R 12 E, M.D.B.M.

J. A. Roduner

J. A. Roduner objects to the approval of Applications 5724 and 6111 insofar as it is proposed to appropriate from Owens Creek. He claims that water was first used by him in 1923 (presumably under claim of riparian ownership). His point of diversion is located near the N.E. corner of $SE\frac{1}{4}$ of Section 16, T 8 S, R 13 E, M.D.B.M.

J. N. Saunders

J. N. Saunders objects to the approval of Applications 5724 and 6111 insofar as appropriations are proposed from Bear Creek. Riparian rights are claimed to the waste and foreign water flowing in Bear Creek. His points of diversion are in Sections 9 and 10, T 8 S, R 12 E, M.D.B.M.

W. A. Saunders

W. A. Saunders objects to the proposed appropriation under Applications 5724 and 6111 insofar as they relate to Deadman Creek, Owens Creek, Duck Creek and Bear Creek, and to Application 6114 of W. F. Roduner to appropriate from Duck Slough. He claims a right to divert water from these streams by virtue of the ownership of land riparian thereto and by virtue of an agreement entered into on November 3, 1926 between C.A. Crane, George S. Bloss and W.A. Saunders, parties of the first part, and Merced Irrigation District, party of the second part, whereby in return for the privilege of enlarging Owens Creek through their properties and using said Creek for conveying water, the parties of the first part reserved the same rights to divert water from the creek as they would have had if the natural channel had been preserved and that it was agreed among themselves that each of the parties of the first part had a right to appropriate one-third of the water flowing therein at the east line of Section 14, T 8 S, R 12 E, M.D.M. which no other party had the right to appropriate as against themselves.

The points of diversion of this protestant are located as follows:

Duck Slough $N\frac{1}{2}$ Section 25, T 8 S, R 12 E, M.D.B.M.
Bear Creek Sections 9 and 10, T 8 S, R 12 E, M.D.B.M.
Owens Creek Section 14, T 8 S, R 12 E, M.D.B.M.

Stevinson Water District

Stevinson Water District objects to the approval of Application 6807 of El Nido Irrigation District to appropriate from Deadman and Dutchman Creeks

on the basis of possible interference with rights initiated under Applications 5724 and 6111 of Stevinson Water District, with its riparian rights and appropriative rights initiated prior to the effective date of the Water Commission Act. Its points of diversion are those described in said Applications 5724 and 6111.

James J. Stevinson, a corporation

James J. Stevinson, a corporation, objects to the approval of Applications 6069, 6114, 6160 and 6807. It claims the ownership of several thousand acres of land which are riparian to the Merced and San Joaquin Rivers below the proposed points of diversion and appropriative rights initiated prior to the effective date of the Water Commission Act. Diversion is made within T 7 S, R 9 E, T 7 S, R 10 E, and T. 6 S, R 10 E, M.D.B.M.

M. D. Vanvales

M. D. Vanvales objects to the approval of Application 6111. He claims that he has an agreement with the East Side Canal Company to supply him with water until 1937. His point of diversion is located on the McCoy Spillway.

Vernalis Investment Company, a corporation

Vernalis Investment Company, a corporation, claims a right to appropriate from the San Joaquin River based upon use commenced prior to December 19, 1914, the effective date of the Water Commission Act. Its point of diversion is near and above the confluence of the Stanislaus and San Joaquin rivers. It alleges in effect that the waters of the San Joaquin River to which the sources of diversion named in Applications 5724 and 5725 are tributary are fully appropriated after June 1st and that the proposed diversions would not only deplete the amount of water now necessary for the present users but would result in increased cost of pumping.

Water Users' Association of High Line Ditch, et al

Water Users' Association of High Line Ditch, Water Users' Association of Hotel Ditch, Water Users' Association of Goose Neck Ditch, Water Users' Association of Stork and Straight Ditches, and Water Users' Association of Bull Hill Ditch protest the approval of Application 6111 upon the grounds that for over 15 years their lands have been benefited by the water spilled into the various channels by the Merced Irrigation District. The ditches named are laterals of the East Side Canal and appropriative rights initiated prior to the effective date of the Water Commission Act are claimed.

Water Users from East Side Canal

Thelma Van Amringe, Joe Baumgart, Frank Estey, Henning Koch, Thomas Archer, John M. Palm, Frank Derving, D. R. Reade and J. E. Mount, users of water from the East Side Canal, claim that their lands are irrigated from the canals of the East Side Canal and Irrigation Company and are benefited by the water spilled by the Merced Irrigation District at the McCoy Spillway, Arena Spillway, Livingston Drain, Bear Creek, Owens Creek, Duck Creek and Deadman Creek. Rights initiated prior to the effective date of the Water Commission Act are claimed.

Subsequent to the hearing a protest was filed by J. E. Mount on behalf of L. J. Jacobsen and some 53 other users of water from the East Side Canal against the approval of Applications 5724, 5725, 6069, 6111, 6114, 6160, and 6807 upon the grounds that the sources named therein contribute to the waters of the East Side Canal from which their water supply is obtained.

West Stanislaus Irrigation District

West Stanislaus Irrigation District has Application 1987, Permit 2758 before the Division for the appropriation of 262.15 cubic feet per second from the San Joaquin and Tuolumne rivers to be diverted at a point within the SE $\frac{1}{4}$ of NE $\frac{1}{4}$ of projected Section 10, T 4 S, R 7 E, M.D.B.M. Claiming rights initiated

under this application and permit as well as rights by virtue of riparian ownership it objects to the approval of Applications 5724, 5725, 6069, 6111, 6114, 6160 and 6807. It claims that its appropriation under Application 1987, Permit 2758 includes waters released by the Merced Irrigation District as the Merced Irrigation dam was constructed subsequent to the filing of Application 1987. Protestant avers that a shortage of water occurs in the San Joaquin River during dry years.

Conditions of Law and Rules and Regulations Fulfilled

Applications 5724, 5725, 6069, 6111, 6114, 6160 and 6807 were completed sufficiently for advertising in accordance with the Water Commission Act and the requirements of 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 June 18, 1931 at 10:00 o'clock a.m. in Room 401 Public Works Building, Sacramento, California. Of this hearing applicants and record protestants were duly notified.

Litigation

Subsequent to the hearing action has been delayed pending the termination of litigation, involving the rights to the use of water from the several sources of proposed appropriation. Although final judgment has not yet been entered in all of the cases yet a majority have been definitely decided and the policy of the court established. Decrees have been rendered in the following cases before the Superior Court of the State of California in and for the

County of Merced:

<u>Cases</u>	<u>Streams Involved</u>
Nos. 8915, 8961, 8963	Mariposa and Duck Creeks
Nos. 8918, 8962, 8965	Deadman and Dutchman Creeks
Nos. 8919, 8960, 8964	Owens and Miles Creeks
Nos. 8966, 8967, 9088, 9380	Bear Creek

Case No. 9088 was affirmed by the Supreme Court on appeal. No appeals were taken in the other cases noted and the decrees have become final.

The result of the litigation insofar as it concerns an appropriator from any of the streams may be briefly summarized as follows:

(1) An appropriator may take from that part of the natural flow, which is in excess of the amount reasonably required for riparian use on riparian lands when diverted and applied for such riparian use by reasonable methods of diversion and use.

(2) An appropriator has the right to take, divert and use such of the foreign flow in the creeks as may at the time be abandoned by the Merced Irrigation District (not at the time being delivered by valid contract to any other party).

As to those who owned land riparian to the several creeks the court held that they were not entitled to the diversion and use of any foreign waters which were abandoned by the Merced District into those creeks.

It was also the opinion of the court that the Merced Irrigation District was not obligated to continue the abandonment of its waters or to discharge or allow them to drain into the channels of the creeks.

Applications 5724 and 6111

Stevinson Water District and its predecessors in interest have for many years been diverting into the East Side Canal the waters which appear in the various sources from which it now seeks to appropriate. A large portion of this water is water which has been abandoned by the Merced Irrigation District and is unappropriated by any other person or agency. This water does not include however water which is delivered under contract to James J. Stevenson, a corporation, El Nido Irrigation District and to Modesto Properties Company, Charles S. Howard Company and C. L. Best, successors of interest of Bloss Land and Cattle Company as that water is considered as not having been abandoned by the District.

Most of the protestants as seen from Table II are upstream from the

point of diversion proposed by Stevinson Water District and it is physically impossible for the applicant to interfere with any rights which these protestants may have.

Many of the protestants can only claim a right as riparian owners to a portion of the natural flow and are not entitled to the foreign waters abandoned into the streams.

As to the lower protestants the record clearly indicates that during a year of normal runoff there is ample water in the sources from which they divert to satisfy any prior vested rights which they may claim and also a surplus which is subject to appropriation.

With reference to Livingston Drain the record indicates that the successors in interest of Bloss Land and Cattle Company divert from the North and Main Branches of the drain rather than from the South Branch. Recognizing this fact and having no right of access to points of diversion on the North and Main Branches, Application 6111 was amended at the request of the applicant by striking therefrom all reference to diversion from these branches. While apparently some use of water from the South Branch of Livingston Drain has been made by C.L. Best, the record clearly indicates that much of the return water in this branch passes beyond the control of both the Merced Irrigation District and C.L. Best and is available for use by the applicant.

While it is true that waste or seepage water is probably not subject to appropriation until it reaches some natural water course it has been the practice of the Division to accept applications and to allow them to take their regular course when it appears that applicant desires a permit for the purpose of establishing of record the date on which the use of water was begun for use in case of future controversy with any other users from the same artificial water course.

Application 5725

Baldwin Slough from which it is sought to appropriate under Application 5725 is a branch slough of the San Joaquin River. At high stages the natural flood waters of the San Joaquin River enter it at the southerly end, flow throughout its length and return to the San Joaquin River at the northerly end. At low stages of the river the waters which flow therein have their origin in the return waters and abandoned waters of the Turlock Irrigation District and the flow is apparently reversed, discharging at the southerly or upstream end.

The evidence which is before us indicates that the flow in Baldwin Slough during the irrigation season varies normally from 50 to 70 cubic feet per second and is never less than 10 cubic feet per second and that the only downstream protestant who would ever in past years have been deprived of water by an appropriation such as is proposed is the Patterson Water Company which in 1924 and 1931 was obliged to throw a sack dam across the San Joaquin River at its point of diversion below Baldwin Slough, in order to pump the water to which it was entitled and even then there was only a short period in each year when it was unable to divert the full quantity of water necessary for its use.

So far as the West Stanislaus Irrigation District and other downstream protestants to this application are concerned, it appears that there has been and will in the future continue to be sufficient water available regardless of any diversions which may be made under Application 5725, the West Stanislaus Irrigation District and other users below Patterson Ranch Company being supplied by inflow from the Tuolumne River.

Both 1924 and 1931 were abnormally dry years with exceptionally low river stages and we are of the opinion that our action in this case or any similar case should not be governed by infrequent periods of shortage. Except in years of unusual drought, and then for short periods of time only, there is ample

water in the San Joaquin River below the confluence of Baldwin Slough to satisfy any prior rights of the downstream protestants.

The proposed diversion from Baldwin Slough involves the same principle of law as laid down in the cases involving Applications 5724 and 6111 in regard to the appropriation of natural flow and of foreign flow, the latter being released by the Turlock Irrigation District from its irrigation and drainage system, apparently without further claim thereto (below the point of release) on the part of said district, hence inuring to the appropriator.

Applications 6069 and 6160

These applications involve appropriations from Mariposa Creek and, insofar as the normal flow thereof would continue on to the East Side Canal and there be useful under the prior and existing rights of Stevinson Water District or its rights under Applications 5724 and 6111, there is no water subject to appropriation. However in times of freshet it appears that there may be a surplus in this source which is unnecessary to serve the needs either of Stevinson Water District or any other of the protestants.

During the irrigation season this stream would normally dissipate itself before reaching the East Side Canal or any of the other protestants, and in fact until the return waters of the Merced Irrigation District began to appear therein in recent years we doubt that there were any waters in this source sufficient to impel an attempt to take and use them. It appears that in recent years these return waters have begun to manifest themselves in the stream bed and that a considerable portion are dissipated by evaporation and percolation before reaching any other claimants. Under the circumstances it is our opinion that these two applications may be approved.

Application 6114

The circumstances surrounding this application are similar to those

surrounding Applications 6069 and 6160 except that it is not so clear that the return waters during the irrigation season do not frequently commingle with the waters of the Merced Irrigation District which are in transit, the source (Duck Slough) being used by the District for the transportation of its irrigation water. It further appears that at times the return waters would continue on to the East Side Canal and there become subject to appropriation and use under the prior applications of Stevinson Water District. However the evidence upon this point was conflicting and uncertain and furthermore it appears that applicant during a part of the year would divert storm waters which exceed the needs of the prior claimants downstream. We are therefore of the opinion that Application 6114 should be approved.

Application 6807

This application involves the appropriation not only of freshet storm water but also return water from irrigation, a portion of which at least is covered by contract between applicant and Merced Irrigation District.

Litigation is now pending in the Superior Court of Merced County consisting of Cases 8861, 8862, 8863 and 8864 wherein James J. Stevinson, a corporation, Stevinson Water District, George J. Hatfield and East Side Canal and Irrigation Company, a corporation, respectively, are the plaintiffs and El Nido Irrigation District and Merced Irrigation District are the defendants. These cases have been tried, findings and amendments thereto prepared but final decision has not yet been entered. We have been informed by the attorneys for the plaintiffs that the Court holds in accordance with the following:

- (a) Neither Merced nor El Nido Irrigation District claims any of the natural flow of Duck Creek.

- (b) Both claim the foreign flow of Duck and Deadman Creeks; Merced District as the developer of that water from the Merced River, El Nido as assignee under contract with Merced District.
- (c) El Nido claims that there are times when Deadman and Dutchman Creeks have a natural flow of a quantity in excess of needs of prior rights, at said times carrying enough excess for its appropriation.

The attorneys for the plaintiffs have also advised this office to the effect that the fact that the findings have not been settled and signed need not occasion further postponement of consideration by the Division.

The testimony presented at the hearing clearly indicated that freshet waters appear at times in quantities exceeding what may be used beneficially by claimants downstream and they are therefore subject to appropriation. Frequently, it also appears, that water flowing in the proposed sources of appropriation is dissipated by seepage and evaporation before reaching any other claimants.

We are therefore of the opinion that Application 6807 should be approved and when the water to which prior claimants have a right would, if unobstructed by applicant flow through to them, applicant must necessarily curtail its diversion.

Summary and Conclusions

The uses of water proposed under the several applications are beneficial and the applications should be approved subject to the usual terms and conditions. As stated above a special clause should be incorporated in permits issued in approval of Applications 5724 and 6111 to the effect that the total amount of water diverted simultaneously under these applications shall not exceed 163.00 c.f.s.

O R D E R

Applications 5724, 5725, 6069, 6111, 6114, 6160, and 6807 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, briefs having been submitted and the Division of Water Resources now being fully informed in the premises:

IT IS HEREBY ORDERED as follows with respect to these several applications:

That Applications 6069, 6114, 6160 and 6807 be approved and that permits be granted to the applicants subject to such of the usual terms and conditions as may be appropriate;

That Application 5724 be approved and that a permit be granted to the applicant subject to such of the usual terms and conditions as may be appropriate and subject also to the following special term or condition, to wit:

"The total amount of water diverted under the permit together with the amount diverted simultaneously under approved Applications 1885 and 6111 shall not exceed 163.00 cubic feet per second continuous flow."

That Application 5725 be approved and that a permit be granted to the applicant subject to such of the usual terms and conditions as may be appropriate.

That Application 6111 be approved and that a permit be granted to the applicant subject to such of the usual terms and conditions as may be appropriate and subject also to the following special term or condition, to wit:

"The total amount of water diverted under this permit together with the amount diverted simultaneously under approved Applications 1885 and 5724 shall not exceed 163.00 cubic feet per second continuous flow."

WITNESS my hand and the seal of the Department of Public Works of the State of California this *10th* day of *March* 1941.

EDWARD HYATT, State Engineer

(Seal)

WES:m

By

Harold Conkling
Deputy