

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

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In the Matter of Application 10673 of W. F. Cook to Appropriate
Water from an Un-named Creek Tributary to Lone Tree Creek
in San Joaquin County for Irrigation Purposes.

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Decision A. 10673 D. 519

Decided December 12, 1944.

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APPEARANCES AT INVESTIGATION CONDUCTED AT THE SITE OF THE PROPOSED
APPROPRIATION ON MAY 22, 1944:

For Applicant

W. F. Cook

W. F. Cook and L. B. Raab

For Protestants

C. E. Kelly

No appearance

D. O. Castle

In propria persona

Mrs. Jessie L. Carlson

In propria persona

Amelia W. McFall

Lucky McFall

For Division of Water Resources

Biscoe Kibbey, Associate Hydraulic Engineer, for Harold Conkling,
Deputy State Engineer in charge of Water Rights,
Division of Water Resources, Department of Public
Works, State of California.

O P I N I O N

General Description of the Proposed Development

Application 10673 was filed by W. F. Cook on July 14, 1943 for an
appropriation of 3 cubic feet per second of the waters of an unnamed
creek tributary to Lone Tree Creek in San Joaquin County to be diverted
at a point within the NE $\frac{1}{4}$ of NE $\frac{1}{4}$ of Section 9, T1S. R.3E., M.D.B.&M.,
throughout the year for the irrigation of 240 acres of general crops

within said Section 9.

Protests

Application 10673 was protested by C. E. Kelly, D. O. Castle, Jessie L. Carlson and Amelia W. McFall.

C. E. Kelly has Application 9519 before this office, which has been approved for an amount of water not to exceed 0.7 cubic foot per second, to be diverted from Lone Tree Creek at a point within the SE $\frac{1}{4}$ of SW $\frac{1}{4}$ of Section 13, T.1S., R.7E., M.D.B. & M from about April 1 to about November 1 of each season for the irrigation of 50 acres and stock watering purposes within Sections 13, 14, 23 and 24, T.1S., R.7E., M.D.B. & M. Mr. Kelly states that the applicant is seeking to appropriate more water than is available. He also claims that he has 200 head of cattle watering from the creek about 2 miles below the proposed point of diversion, and alleges in effect that should Application 10673 be approved, it would result in completely drying up the creek during periods of low stream flow, and would deprive him of sufficient water for his irrigation and stock watering use. Mr. Kelly's stock watering use, about 2 miles below applicant's proposed point of diversion, cannot be claimed under his Application 9519 and he has not stated upon what claim of right this use is based.

D. O. Castle has Application 9201 before this office, which has been approved for an amount of water not to exceed 3 cubic feet per second to be diverted from Lone Tree Creek at a point within the SW $\frac{1}{4}$ of SW $\frac{1}{4}$ of Section 10, T.1S., R.7E., M.D.B. & M. from about March 1 to about November 1 of each season for the irrigation of 80 acres within Sections 9, 10, 15 and 16 T.1S., R.7E., M.D.B. & M. He alleges in effect that the approval of Application 10673 would result in reducing the stream flow to such an

extent as to jeopardize his use, inasmuch as the average flow in the stream does not warrant the approval of any more applications to appropriate therefrom, and that in dry years it is extremely doubtful that the flow in the stream bed would be sufficient to satisfy the rights of the present users.

Henry L. and Jessie L. Carlson have licensed Application 2358 before this office for an amount of water not to exceed 0.56 cubic foot per second, to be diverted from Lone Tree Creek at a point within the SE $\frac{1}{4}$ of NE $\frac{1}{4}$ of Section 8, T.1S., R.7E., M.D.B. & M. from about February 1 to about September 1 of each season for the irrigation of 45 acres within Section 8, T.1S., R.7E., M.D.B. & M. Mrs. Carlson states that she irrigates 65 acres of clover and alfalfa from April 1 to November 1 of each season and also uses water for stock watering purposes, although under Application 2358, the use is limited to the irrigation of 45 acres only. She alleges in effect that should Application 10673 be approved, there would be no water left in the creek.

Amelia W. McFall has licensed Application 6397 before this office for an amount of water not to exceed 1.13 cubic feet per second to be diverted from Lone Tree Creek at a point within the NE $\frac{1}{4}$ of NE $\frac{1}{4}$ of Section 14 and at a point within the SE $\frac{1}{4}$ of SW $\frac{1}{4}$ of Section 13 T.1S., R.7E., M.D.B. & M. from about April 1 to about November 30 of each season for the irrigation of 90.3 acres within Section 14, T.1S., R.7E., M.D.B. & M. She also claims a riparian right. She states that she is using 1.47 cubic feet per second for the irrigation of approximately 117 acres of ladino clover and other crops, and alleges in effect that should Application 10673 be approved, it would result in depriving her of water to which she is entitled.

Field Investigation.

Stipulations to an informal hearing under Regulation 12^B of the Rules and Regulations of the Division of Water Resources having been signed by the applicant and all of the protesting parties and the stipulations having been approved by this office, an investigation was conducted at the site of the proposed appropriation on May 22, 1944. Present at the investigation were Jessie L. Carlson, Lucky McFall, D. O. Castle, W. F. Cook and his engineer, L. B. Raab. Although Mr. C. E. Kelly was informed of the proposed investigation by letter dated July 17, 1944, he was not present or represented.

In arriving at a decision in the matter, reliance is placed on the entire file in connection with Application 10673.

General Discussion

Lone Tree Creek to which the unnamed stream from which applicant seeks to appropriate rises in the foothills north of Oakdale and flows westerly some 27 miles to its junction with the San Joaquin River. The tributary on which applicant's point of diversion is located is about 14 miles in length and unites with Lone Tree Creek about 6 miles above the junction of Lone Tree Creek and the San Joaquin River and about 3½ miles above the diversion dam of protestant Jessie L. Carlson, who is the lowest protestant on Lone Tree Creek.

During the greater portion of the irrigation season, there is no natural flow in Lone Tree Creek and its tributaries, the water flowing therein being for the most part waste and seepage water from the lands irrigated by the Oakdale and South San Joaquin Irrigation Districts, from waters which originate in the Stanislaus River Watershed. The water which is present during the summer months in the source from which applicant proposes to appropriate, is largely drainage water from the irrigated lands of the Oakdale Irrigation District. This water cannot be claimed under the doctrine of riparian rights.

The Carlson property extends westerly from the Stockton-Manteca Highway on both sides of Lone Tree Creek. The place of use, described in Licensed Application 2258, lies northerly of the creek and, at the point of diversion, a concrete dam has been constructed with three 9' waterways with grooves for flashboards, by means of which, the water is backed up for a considerable distance. The flashboards are used to raise the water until it flows into a ditch, from which the licensed area, consisting of 45 acres, is irrigated. Some 15 acres on the south side of the creek are also irrigated, presumably under no claim of right, except to what natural flow may be present in the stream during the early spring or late fall months, which may be claimed under the riparian right doctrine. At the time of the investigation on May 22, 1944, the flow over the Carlson dam was about 25 cubic feet per second.

Although the channel of the creek between the Carlson dam and the highway is straight and even and has been rated by the U.S. Bureau of Reclamation, and a gauge designated as D-71 has been established below the highway bridge, the gauging station has been of little assistance to this office, as the rating curve applies to the unobstructed flow of the stream, and although Mrs. Carlson agreed at the time of the investigation to open the flush gate at the dam and release the water behind the dam as soon as the northerly field had been irrigated, this was not done.

The next protestant in upstream order is D. O. Castle, who diverts water by means of a concrete dam with flashboard opening 6.5 ft. wide through a ditch 320 feet long to a pump. At the time of the investigation, Mr. Castle was pumping water at a rate of 2400 g.p.m. or approximately 5.35 c.f.s., and approximately 19.5 c.f.s. were passing over and through the flashboards. He was irrigating about 25 acres of clover.

At the McFall-Kelly point of diversion, located on Lone Tree Creek about one-half mile above the mouth of the tributary from which applicant seeks to appropriate, a concrete dam has been constructed which has two 5' openings with flashboards over which approximately 17.7 c.f.s. were passing. The ditch from this point was carrying 5.6 c.f.s. The total flow, therefore, above the dam was about 23.3 c.f.s. C. E. Kelly irrigates about 25 acres and McFall about 90 acres, all of which is in pasture.

McFalls lower dam, which is located on Lone Pine Creek about one-half mile below the junction of the unnamed creek from which the applicant is seeking to appropriate, was used for a number of years to back the water up into the general distribution system on the south side of the creek and to irrigate some 16 acres on the north. According to Mr. McFall, this dam is used only in times of water shortage—when the flow at the upper point of diversion on Lone Tree Creek is insufficient—and that no water had been diverted at the lower dam for $1\frac{1}{2}$ years. This would appear to indicate that the flow in Lone Tree Creek above the junction with the unnamed tributary had been sufficient during that period to satisfy the irrigation requirements of both McFall and Kelly.

As Mr. Kelly was not present at the time of the investigation, his claim of use from the unnamed tributary for stock watering purposes was not verified. Suffice it to say that Mr. Kelly has initiated no right before this office to water his stock from this source, and apparently is not in a position to claim the water as a riparian owner, as the water which is present in the stream during the summer months is waste water having its origin in other sources, and had been brought into the watershed of the unnamed tributary by the operations of the Oakdale Irrigation District.

At the Cook place, a rectangular wooden weir with beveled edges and a 4.75' crest has been installed in the creek bed, but at the time of the investigation, a pipe through an earth dam just below the weir had become

partially clogged with trash, submerging the weir and rendering a measurement of flow by weir impossible at the time. It was estimated however, that upwards of 7 c.f.s. was entering Lone Tree Creek from the unnamed tributary. During the period from July 28 to October 11, 1943, readings on the weir gauge were taken at two-day intervals, and indicated that the flow varied from 8.1 c.f.s. to 2.2 c.f.s. During this period there was apparently sufficient flow in Lone Tree Creek above the junction of the unnamed tributary to satisfy the rights of all users of water on Lone Tree Creek.

Unfortunately, the records of the U.S. Bureau of Reclamation at the D-71 gauge cover the period from December 23, 1941 to May 31, 1942 only, and the only available records during the period of possible shortage are based on gauge readings made by L. B. Raab between September 26 and October 20, 1943, when the flow was found to fluctuate between 25 and 40 c.f.s.

The investigation was conducted at a time when there was an abundance of water in Lone Tree Creek, and on July 17, 1944, a letter was addressed to the protestants stating that observations of the stream flow during the coming summer, and possibly into the fall would be necessary before arriving at a decision in connection with Application 10673 and, accordingly, such observations would be made from time to time. Protestants were requested to notify this office at once should an actual shortage occur, in order that the situation could be looked into at the time.

On August 13, 1944, our engineer found that the water was backed up at the Carlson dam, as at the time of the field investigation on May 22, and approximately 25 c.f.s. were passing over the dam, of which amount approximately 5 to 8 c.f.s. were contributed by waste waters from the

South San Joaquin Drainage Canal which enters the stream a short distance above the Carlson dam. At this time there was apparently no water shortage for the upper divertors.

On August 29, 1944, a telegram was received from C. E. Kelly asking for an immediate investigation of the water situation, stating that he had been watering 400 head of cattle from the stream (the unnamed tributary) and that the water ceased to flow on August 28, 1944. He stated that unless the water was released in 3 days it would necessitate the removal of his stock.

Immediately upon receipt of the telegram, the Division telephoned to Mr. Raab's office in Stockton, and in his absence discussed the situation with his assistant, Mr. Moffatt, who agreed to investigate the situation. On August 30, Mr. Moffatt informed this office that Mr. Cook had been diverting the entire flow of the stream, which was about 4 c.f.s., but that Mr. Cook had agreed to release sufficient water for the watering of Mr. Kelly's stock. Mr. Moffatt stated that although the stream bed was dry at Mr. Kelly's place, there was approximately 8 c.f.s. flowing in Lone Tree Creek below the junction of the two streams.

On August 30, following Mr. Moffatt's call, Mr. Kelly informed this office by telephone that as no water had reached his place, he had removed his stock and indicated his intention of bringing suit against Mr. Cook.

Mr. Kelly has made no showing as to what claim of right he has to the water which flows in the unnamed tributary of Lone Tree Creek during the summer months. Surely he cannot claim the water under his application 9519, and as the water which enters this stream during the summer months is return or waste water from irrigation above and is foreign to the stream, it cannot be claimed under the doctrine of riparian rights. It would also appear that Mr. Cook had no right to the use of the 4 c.f.s.

which he was diverting at the time of the complaint, as his Application 10673 has not yet been approved. Assuming however that Mr. Cook's Application had been approved and that he had been diverting the 3 cubic feet per second applied for, the additional 1 cubic foot per second would probably have been ample for stock watering below.

On October 23, 1944, our engineer found that the flow at the Cook weir had decreased to 0.4 c.f.s. Mrs. Carlson informed him however, that there had been no scarcity of water at her dam during the irrigation season. In fact, there has appeared to have been a considerable surplus over the use at all times. The observed flow of the stream below the Carlson dam by our engineer on May 22, August 13, October 2 and October 23 indicated that the amount of water passing all diversions on Lone Tree Creek varied between 20 and 25 c.f.s. Mr. Raab also observed the flow to be approximately these amounts on various occasions excepting that during the months of June and July, 1944, the flow was somewhat less. On October 23, an attempt was made to see Messrs. McFall and Kelly, but neither was at home. Miss McFall, daughter of the protestant, stated that to her knowledge there had been no shortage of water along Lone Tree Creek that summer.

According to the investigating engineer, the 1944 summer flow was about normal, with prospects of increased flow in the near future. No reason therefore is apparent why Application 10673 should not be approved at this time.

Summary and Conclusion.

During a year of normal run-off and present methods of irrigation by the Oakdale and South San Joaquin Irrigation Districts, there is ample water in the stream system to satisfy the prior vested rights of those protestants who divert water from Lone Tree Creek.

It is possible that during the late summer, the water in the unnamed

tributary from which applicant seeks to appropriate may be insufficient in quantity to supply the needs of both applicant and protestant Kelly, who waters his stock from this stream. Mr. Kelly did not appear at the investigation, and has made no showing as to the basis of his claim of right. Certainly he is not in a position to claim the water under his Application 9519, which is for the appropriation of water from Lone Tree Creek above the junction of the two streams, and as the water is foreign to the stream, it cannot be claimed under the doctrine of riparian rights. Should Mr. Kelly have a right to water his stock in the unnamed creek during the summer months, it will be incumbent upon the applicant to allow sufficient water to pass on downstream for this use, but insufficient showing has been made by Mr. Kelly in support of his claim of right to justify the denial of Application 10673, either in whole or in part.

The protests are therefore dismissed, and Application 10673 should be approved subject to the usual terms and conditions.

O R D E R

Application 10673 for a permit to appropriate water having been filed with the Division of Water Resources, as above stated, protests having been filed, a field investigation having been made, a stipulated hearing having been held in accordance with Regulation 12B of the Rules and Regulations of the Division, and the Division of Water Resources now being fully informed in the premises:

IT IS HEREBY ORDERED that Application 10673 be approved subject to the usual terms and conditions as may be appropriate.

WITNESS my hand and the seal of the Department of Public Works of California, this 12th day of December 1944.

EDWARD HYATT, STATE ENGINEER,

BY Harold Conkling
Harold Conkling,
Deputy State Engineer.

