

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

oOo

In the Matter of Application 10946 of L. Lonero and Vincent Cortese to Appropriate Water from Penitencia Creek, Tributary to Coyote Creek in Santa Clara County for Irrigation Purposes.

oOo

Decision A. 10946 D. 537

Decided July 22, 1946

oOo

Appearances at Hearing held at San Jose on April 29, 1946.

For Applicants

L. Lonero and Vincent Cortese

L. D. Bohnett

For Protestants

E. E. and N. U. Blackburn et al. ) M. J. Rankin and  
Hanchett Securities Company ) C. E. Luckhardt

For Division of Water Resources

Gordon Zander, Supervising Hydraulic Engineer, Division of Water Resources, Department of Public Works, State of California.

OPINION

General Description of Project

Application 10946 was filed with the Division of Water Resources on January 4, 1945, by L. Lonero and Vincent Cortese for a permit to appropriate 2.5 cubic feet per second (not to exceed 110 acre feet per annum) of the waters of Penitencia Creek from January 1 to June 30 of each season, at a point near the intersection of Penitencia Road and Toyon Avenue in Pala Rancho for the irrigation of 55 acres of land bounded on the east by

Toyon Avenue and on the south by McKee Road. By letter dated August 9, 1945, applicants' attorney authorized the Division to amend Application 10946 by reducing the season of diversion to the period from January 1 to May 15 of each season in the thought that the reduction might result in the withdrawal of the protests. Although the application was so amended, none of the protests were withdrawn.

PROTESTS

A joint protest was filed by the following parties.

Table No. 1

<u>Name of Protestant</u>	<u>Acres Owned</u>
1. E. E. and N. U. Blackburn	50
2. Fred E. Lester	60
*3. Alfonso Sunseri	10
*4. M. Celic	10
*5. Paul Vlastelica and Pauline Vlastelica	10
*6. Harry B. Boos	10
*7. Cora A. Childrey	5
8. B. Namontano	8.5
*9. M. F. Barberio	7
10. Walter Ruge	20
11. Hobson Bros.	132
12. Mike Raineri	5
13. O. L. Lamson	17.75
14. Aileen A. Dixon	21
*15. V. Azzerello	20
16. Henry Imevalle	30

Table No. 1 (Cont'd.)

17. L. N. Lucich	15.5
18. George S. Kipirash	38
*19. Henry Wendt, Jr.	3
20. B. Martini	<u>11</u>
Total	483.75 acres

These protestants claim prior appropriative rights as well as riparian rights and the use of water from Penitencia Creek for many years. They claim that for many years they have taken all of the flow of Penitencia Creek during the spring months for the irrigation of their lands which are riparian to the stream below the proposed point of diversion of the applicant and allege in effect that during the irrigation season there is no unappropriated water available for diversion under Application 10946.

It was found however as a result of a preliminary investigation made by this office on May 21, 1945, that eight of the protestants whose names are preceded by an asterisk in the above Table, actually divert water from Penitencia Creek at points above the proposed point of diversion of the applicants.

Hanchett Securities Company, a Nevada Corporation owns a parcel of land, the northerly boundary of which runs in the center of Penitencia Creek for a distance of approximately 1,574 feet, the easterly extremity of which is approximately 574 feet westerly of the intersection of Penitencia Creek Road and Toyon Avenue. Protestant claims to divert water from a point located on its property and to use it for irrigation purposes under a right based upon use commenced prior to December 19, 1914, the effective date of the Water Commission Act, and also under a claim of riparian ownership. The company alleges in effect that there is no unappropriated water in Penitencia Creek available for appropriation under Application 10946.

Hearing Set in Accordance With the Water Code.

Application 10946 was completed in accordance with the Water Code and the Rules and Regulations of the Division of Water Resources and being protested was set for public hearing on Monday, April 29, 1946, at 10:00 o'clock A. M. in Department 4, Court Room, Court House, San Jose, California. Of this hearing applicants and protestants were duly notified.

GENERAL DISCUSSION

Penitencia Creek, the source of the proposed appropriation, rises on the westerly slope of Poverty Ridge in the Coast Range Mountains at an elevation of approximately 3,000 feet above sea level and flows in a general westerly direction to its junction with Coyote Creek just north of the city of San Jose. The watershed above the point where the creek debouches on to the valley floor contains an area of approximately 23.0 square miles.

Under the terms of a cooperative agreement entered into on January 1, 1930, between the Santa Clara Valley Water Conservation District and the Division of Water Resources an investigation of the water resources of Santa Clara Valley was undertaken, the results of which are incorporated in Bulletin 42 of the Division entitled "Santa Clara Investigation, 1933." According to this bulletin during the season of 1931-32 which was one of approximately normal precipitation the foothill and mountain runoff of Penitencia Creek above the valley floor was estimated as being approximately 8,330 acre feet of which amount about 2,920 acre feet were wasted into Coyote Creek below all diversions and valley percolation.

The runoff of Penitencia Creek is typical of all coastal streams in that locality, being flashy and intermittent depending almost entirely

upon the intensity of rainfall on the watershed. Normally most of the rainfall occurs during the months of January, February and March, but at times there are storms during April and May.

Testimony presented at the hearing indicates that all diversions by the protestants are made from Penitencia Creek above its confluence with King Road which is approximately three-quarters of a mile above the junction of Penitencia Creek and Coyote Creek and that any water which flowed past King Road was no longer available for the protestants' use.

For the past six years or more the Santa Clara Valley Water Conservation District has been diverting and spreading the surplus waters of Penitencia Creek without a permit from this office, without apparent objection from anyone and without protest to its Application 11010 filed with the Division on March 20, 1945, for a permit to appropriate 3,500 acre feet per annum of the waters of Penitencia Creek at a point approximately 100 yards upstream from the applicants' proposed point of diversion. As the matter now stands Application 10946 of Lonero and Cortese has an earlier priority than Application 11010 of Santa Clara Valley Water Conservation District and the District application, if approved, will be subject to any right which the earlier applicants may acquire under Application 10946.

In order to determine the approximate amount of unappropriated water in Penitencia Creek during recent years the amounts of water which the Conservation District has been diverting to underground storage without permit from the Division may be added to the amounts of water which passed King Road during the same period.

Fortunately, records of Penitencia Creek near King Road and records of the diversions by the Conservation District during the seasons of 1938-39 to 1944-45 inclusive are available and were introduced as exhibits

at the hearing (Transcript, pages 7 and 21). From these records the following table has been prepared. The index of wetness having been computed from the average precipitation at San Jose and at Lick Observatory and the amount of unappropriated water in Penitencia Creek being the sum of the amount of water passing King Road and the amount of water diverted by the Conservation District.

Table No. 2

<u>Season</u>	<u>Index of Wetness</u>	<u>Unappropriated Water Acre Feet</u>	<u>Season of Availability</u>
1938-39	71	207	Feb. 3 to Mar. 10
1939-40	112	4,051	Jan. 10 to Apr. 20
1940-41	145	7,844	Dec. 27 to May 15
1941-42	123	5,376	Dec. 15 to May 18
1942-43	96	3,366	Jan. 21 to May 2
1943-44	83	3,391	Jan. 24 to Apr. 27
1944-45	92	4,773	Jan. 28 to Apr. 16

The applicants are seeking to appropriate 2.5 cubic feet per second (not to exceed 110 acre feet per annum) from about January 1 to about May 15 of each season for the irrigation of 55 acres of orchard, which will probably require an average net duty of 1.5 acre feet per acre annually according to Bulletin No. 6 of the Department of Public Works, Division of Engineering and Irrigation entitled "Irrigation Requirements of California Lands". The 110 acre feet per annum which applicants seek to appropriate will provide a gross duty of 2.0 acre feet per acre per annum which is in conformity with good irrigation practice in that locality.

Table No. 2 indicates conclusively that 110 acre feet of unappropriated water is available for appropriation by the applicants even during an extremely dry season such as that of 1938-39.

At the hearing, the protestants endeavored to show that the flow of Penitencia Creek was extremely flashy and not reliable and was not well sustained after flood flows. While it is true that the flood periods are of short duration the records of unappropriated streamflow as determined by the amounts of water which passed King Road and the amounts of water diverted by the Conservation District indicate that the flows following the spring freshets are very well sustained as shown by the following table.

Table No. 3

Date of Termination of Storms	Sustained Period of Unappropriated water	Average Runoff c.f.s.	No. of days Flow Exceeded 2 $\frac{1}{2}$ c.f.s.	Dates of Slight Precipitation Within Sustained period of unappropriated Water
2-29-40	23 days	11.3	17 days	Mar. 10,15,16,19
3-31-40	20 days	17.6	17 days	Apr. 3,8
3-4-41	23 days	15.1	23 days	Mar. 13,14
4-10-41	18 days	24.0	18 days	
2-7-42	30 days	14.1	28 days	Feb. 21,24
4-17-42	31 days	5.7	26 days	Apr.,27,30 May,12,16
3-17-43	35 days	10.1	29 days	Mar. 21,22,29 Apr. 5,7,8
3-4-44	30 days	11.8	21 days	
2-5-45	21 days	13.0	21 days	Feb. 14,17,18

Although Table No. 2 indicates that during a season of normal precipitation there is little or no runoff in Penitencia Creek after May 1, the record covers a period of seven seasons only and the records of

precipitation at San Jose and Lick Observatory indicate that at times, even in seasons of less than normal precipitation the rainfall during the month of May is greater than during the month of April, (e.g., seasons of 1930-31, 1932-33, 1935-34, 1938-39) and we do not see the necessity of further limiting the season of diversion. The intermittent condition of flow in the stream however should constantly place the applicants on guard to so regulate their diversion as not to interfere with the prior rights below.

CONCLUSION

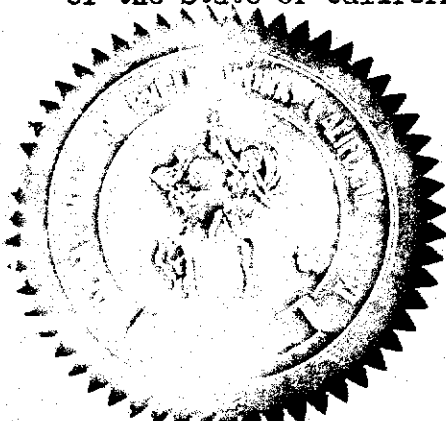
The testimony presented at the hearing held in connection with Application 10946 indicates conclusively that there is sufficient unappropriated water in Penitencia Creek during a season of normal runoff to justify the approval of Application 10946. The regimen of the stream is such however that the applicants must be constantly on guard to so regulate their diversion and use so as not to interfere with prior vested rights.

ORDER

Application 10946 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 now being fully informed in the premises.

IT IS HEREBY ORDERED that Application 10946 be approved and a permit issued 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 22 day of July, 1946.



  
Edward Hyatt, State Engineer