

STATE OF CALIFORNIA
DEPARTMENT OF PUBLIC WORKS
BEFORE THE STATE ENGINEER AND
CHIEF OF THE DIVISION OF WATER RESOURCES

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In the Matter of Application 10914 by Stella V. D. Johnson and
Application 11993 by Frank Globin to Appropriate Water from
Cold Creek Tributary to Lake Tahoe in El Dorado County for
Irrigation Purposes and for Domestic and Municipal Purposes,
Respectively.

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Decision A. 10914, 11993 D. 822

Decided March 2, 1955

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Appearances at Hearing Held at Sacramento on July 7,
September 15 and 16, 1953:

For the Applicants

Stella V. D. Johnson Arthur C. Devlin, Attorney at Law

Frank Globin Sherman C. Wilke, Attorney at Law

For the Protestants

Sierra Pacific Power Company William H. Orrick, Jr., Attorney at Law

Truckee-Carson Irrigation District James W. Johnson, Jr., Attorney at Law

Washoe County Water Conservation
District John E. Robinson, Attorney at Law

Elwood Johnson Clifford R. Lewis, Attorney at Law

California State Fish and Game
Commission Charles K. Fisher

EXAMINER - LESLIE C. JOPSON, Principal Hydraulic Engineer,
Division of Water Resources, Department of Public Works, for
A. D. EDMONSTON, State Engineer

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OPINION

General Description of the Projects

Under Application 10914 Stella V. D. Johnson seeks to appropriate 2.5 cubic feet per second from April 1 to November 1 of each season from Cold Creek at a point within the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11, T12N R18E, MDB&M. The water is wanted for the irrigation of 200 acres of wild hay and pasture located within the NW $\frac{1}{4}$ of Section 2 and the NE $\frac{1}{4}$ of Section 3 of the same township. Diversion is to be effected by means of an earth, rock and lumber dam, 4 feet high by 25 feet long, conveyance by some 11,600 lineal feet of earth ditch. The applicant asserts ownership of the land at the proposed point of diversion and the land whereon the water is to be used. She claims also another water right, stating in that connection:

"The waters of Cold Creek are already held by applicant under vested rights which consume the normal flow. This application is intended to use any surplus in the source."

Under Application 11993 Frank Globin seeks to appropriate 2.7 cubic feet per second from January 1 to December 31 of each season from Cold Creek at a point within the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 11, T12N R18E, MDB&M. The use to which the water is to be applied is described as "domestic and municipal including fire protection with small industrial use". The proposed place of use is described as "Al Tahoe, Tahoe Sierra and adjoining future subdivisions", located

in portions of Sections 31 and 32 of T13N R13E and portions of Sections 2, 3 and 4 of T12N R13E, MDB&M, "containing 1,556 acres more or less, all being rapidly subdivided and sold". The applicant states that as a public utility serving the area mentioned on demand, under regulation of the Public Utilities Commission, he already holds an appropriative right of 1.8 cubic feet per second, established prior to 1914. He estimates that his water requirements will rise from 1.8 cubic feet per second in July 1946 to 4.5 cubic feet per second by July 1962.

Protests

Application 10914 is protested as follows:

Frank Globin (initiator of Application 11993) protests that Applicant Johnson's proposed appropriation would result in loss to him during the summer months of "an adequate ... supply for ... consumers and users of said water and in the operation of the Al Tahoe Hotel and Highway Hotel by me". He bases his claim of a right to the use of water upon "actual and continuous use of the water of Cold Creek for many years last past and prior to December 14, 1914 for domestic purposes. As to the extent of his use he states:

"The present use is distribution to about 70 independent water users who have homes at El Tahoe; for the El Tahoe Hotel and Highway Hotel; both operated by me; for use in the laundry, store, garage, service station and other purposes connected with said hotel businesses. Water is used particularly during the months from about April 1 to November 1 of each year; said use has been continuous each and every year, and the same commenced prior to 1914."

He describes his point of diversion as being located approximately 300 to 400 yards below Applicant Johnson's proposed point of diversion and he states that the protest may be disregarded and dismissed:

"If applicant guarantees that there would be no interruption at any time of the year in the use of said water for domestic and other purposes by me individually and by the consumers of said water company, and that the amount of water that has been heretofore used would not be restricted or limited."

The Globin protest contains a supplemental statement as follows:

"Frank Globin is and has been taking water from Cold Creek by means of a diversion dam and a 22-inch intake at said dam. The water is then carried by a 9-inch pipe approximately 5 miles to El Tahoe There the water is sold to approximately 70 home owners for domestic uses and consumption. The distribution of said water is subject to the rules and regulations of the Railroad Commission of this State. At the present time there are approximately 22 additional persons who have made application for the use of the water in their homes for domestic purposes and it is expected that there will be many more and additional applications made next year. . . . During the summer months from June 15 to September 15 he has an average of about 300 guests at his hotels daily. . . . During the summer months when the cabins and homes are occupied and the hotels filled with guests, and when the flow of water in Cold Creek is low, Globin uses and has used substantially all of the flow of said creek for the domestic purposes above mentioned. The use of the water and the diversion made from Cold Creek has been in force and effect for many years and prior to 1914. Mr. Globin has acquired, by conveyances, certain rights on the real property known as the 'Sierra House' property, which include, among other rights, the right of way for a pipe line and ditch ... right to enter upon said property to maintain or build ... and right

to construct and maintain a reservoir. If applicant's application were granted it would only tend to interfere with the vested right to use said water for domestic purposes by Globin and the other consumers"

Elwood Johnson protests that the diversion proposed by Stella

V. D. Johnson

" ... would cause a shortage of water in the stream after July 1 of each year which would deter me from the irrigation of lands which have been irrigated from this stream for a period of at least 40 years ... on the so-called Martin lands, the Sierra House, the point of my diversion being approximately one-quarter of a mile below applicant's point of diversion"

Protestant Elwood Johnson bases his claim of a right to divert from Cold Creek upon "use prior to December 19, 1914, riparian claim and prior division of the waters by users thereof". As to the extent of present and past use he states:

"For over 40 years the protestant by himself and predecessors in title have irrigated approximately 100 acres of land, commencing generally on the 1st of July and continuing through the growing season for the purpose of growing grasses and pasturage."

As to terms under which his protest may be disregarded and dismissed he states:

"The provisions in the agreement heretofore made wherein the stream is divided $\frac{1}{3}$ to Globin and the remaining $\frac{2}{3}$ divided between the applicant with $\frac{2}{3}$ and the protestant with $\frac{1}{3}$. Protestant will agree to withdraw protest if rotation of the use of water could be made after July 1 of each year, giving to each time of use and use of water as their interests may appear; this to be adjusted and regulated under control of the Division of Water Resources ... with proper division boxes to be installed in the stream at the expense of the parties concerned."

Washoe County Water Conservation District states as its basis of protest:

"We as a signer of the Truckee River Agreement have acquired certain storage rights in Lake Tahoe for the construction of Boca Reservoir. Such storage is predicated on the Tahoe watershed inflow and any acquisition of any inflow depletes the over-all storage in the lake."

It bases its claim of a right to the use of Cold Creek waters upon "prior rights of the Government and this District by virtue of the 1915 Decree and the Truckee River Agreement". As to its present and past use of water it states:

"Water has been used for vested water rights since the year 1861 to users in this District. The Government appropriation of storage waters of this lake is now used by the Sierra Pacific Power Company, the Truckee-Carson Irrigation District and by this District by virtue of the Truckee River Agreement. Any further tributary appropriation to the lake would decrease the supply now being utilized by the above named organizations."

Sierra Pacific Power Company asserts in its protest:

"Protestant is the owner of rights to the use of the waters of Lake Tahoe and the Truckee River and their tributaries and is and for many years last past has been in the exercise of said rights.

"Protestant's use of said waters is as follows: generating electric power at the five (5) plants on the Truckee River ... ; domestic use in the cities of Reno and Sparks; and irrigation use upon lands lying under the Highland Ditch in the State of Nevada."

For a more detailed description of its water rights ... protestant then refers to and makes a part of its protest the Final Decree in the action in the District Court of the United States, in and for the District of Nevada entitled: "The United States of America, Plaintiff, vs. Orr Water Ditch Company, et al", Equity Docket No. A-3.

The protestant asserts further:

"All of the water of Cold Creek is necessary to satisfy the storage requirements in Lake Tahoe as set forth in said final decree All of the waters of Lake Tahoe and its tributaries are fully appropriated and are required in order to satisfy such appropriations, and no basis for further appropriation exists"

Truckee-Carson Irrigation District protests for the following reasons:

"All of the natural flow of the Truckee River and its tributaries has been appropriated for many years last past, and during all of that time such waters have been put to beneficial use. There are no unappropriated waters in said stream system . . .

"All of the natural flow of said stream system is required for the irrigation of lands under the Newlands Reclamation Project of the United States and other lands in private ownership possessing similar rights of diversion and use, and, in addition thereto, except in occasional years, it is necessary to utilize for said purposes all of the waters artificially stored as aforesaid in Lake Tahoe; and in many years the entire natural flow of said stream system and the entire artificial storage in Lake Tahoe have been insufficient to properly irrigate the lands which have been entitled to the use of water from such sources

"If applicant should divert and use any of the waters as applied for the water shortages above mentioned would be aggravated and increased

"The waters which this protestant is entitled to divert ... are also used for the operation of a power plant at the Lahontan Dam ... and such operations would be hampered and curtailed by such diversion and use on the part of the applicant.

"Protestant claims a right to the use of water from the source from which applicant proposes to divert which right is based upon the following:

'(a) The right of the United States to store in Lake Tahoe all waters which naturally flow into that lake, both surface and underground, with a priority as of the year 1903.

'(b) The right of the United States to divert water from the Truckee River and its tributaries to the extent of 1,500 c.f.s. with a priority as of the year 1902, for storage, irrigation, power and domestic use upon the ... Newlands Reclamation Project.

'(c) The transfer of possession ... of works to the Truckee-Carson Irrigation District ... all as set forth in a certain contract between the United States and protestant dated December 18, 1926.'"

Application 11993 is protested as follows:

Stella Van Dyke Johnson (initiator of Application 10914) protests the application, stating in part as follows:

"I have prior rights on the source applied for both under the riparian law ... as well as rights by appropriation ... , both existing prior to the adoption of the Water Code of California and by prior application to appropriate under the existing Water Code. There is usually a critical shortage of water for my existing uses particularly during the grazing and irrigation season. Further appropriations would invade and impair my prior rights.

"Due to the critical shortage of water during the period of the year when applicant proposes to use water in greatest quantity I feel that the protest should be sustained and the application denied. The waters of Cold Creek have been diverted and used by protestant and her predecessors in interest continuously for more than 50 years last past."

Elwood Johnson protests on the same grounds as set forth in his protest against Application 10914.

California State Fish and Game Commission protests, alleging that the proposed appropriation would result in

"destruction of trout, property of the State of California, because the amount of water to be diverted ... is greater than total flow of the stream at times";

The protestant Commission alleges further that "trout spawn and are present in Cold Creek and are planted there by the State". It states that its protest may be disregarded and dismissed if such permit as may be issued contains a clause requiring the applicant to bypass 2.5 cubic feet per second or the natural flow, whichever is least, past the proposed point of diversion for the protection of fish life.

Truckee-Carson Irrigation District and Sierra Pacific Power Company protest upon substantially the same grounds as set forth in their protests against Application 10914.

Answers

Answers to protests against Application 10914:

Applicant Johnson answers the protest by Elwood Johnson by stating

that the appropriation she is seeking would not prevent that protestant from continuing the use of water "to the extent of the quantity lawfully appropriated and/or used upon his said lands".

As to the protest by Frank Globin the answer sets forth:

"Applicant admits that Frank Globin has a certain right for the use of a limited and reasonable amount of water for domestic purposes at Al Tahoe but states in this connection that the amount of water which is being diverted by Frank Globin for domestic purposes has increased since his right became fixed and established and that the amount so diverted is each year being increased by protestant in order to serve third parties who are renting units either in the hotel or as independent units as well as for the various independent businesses which have been established at Al Tahoe.

The amount of water in the source varies from time to time depending upon the snowfall in the mountains and as a consequence applicant's prior rights to the use of the water have suffered from time to time because of the increased use of water by protestant ... without ... lawful right. That at intermittent times the protestant has wrongfully diverted water from said Cold Creek to the irreparable injury of protestant."

The answer to protest by Washoe County Water Conservation District contains statements as follows:

"The applicant seeks to beneficially use unappropriated water only. The protestant is making claims for water which it has not legally appropriated.

"Applicant denies, according to information and belief, that the protestant has any title whatever to any water or water rights in the source of supply

"Applicant further denies that any title whatever to the water supply involved by virtue of the so-called 1915 Decree is vested in protestant, and alleges that said protestant is not the real party in interest to any water or water rights in the source applied for, or in Lake Tahoe

"That applicant herein is not a party to the so-called 1915 Decree, nor any agreement referred to in said protest and the same are not binding upon the applicant."

Extracts from answer to protest by Sierra Pacific Power Company:

" ... applicant states that she was not and is not a party to the suit referred to ... and states that the purported decree in said cause is not binding upon applicant in any way or manner and is wholly immaterial as to her.

" ... the applicant ... alleges that she is not bound by the purported final decree ... in that she was not and is not a party to said suit."

Extracts from answer to protest by Truckee-Carson Irrigation

District:

"Applicant alleges that large quantities of water of the Truckee River flow to waste in Pyramid Lake each year.

"Applicant ... states on information and belief that protestant ... owns no water or water rights whatever in the Truckee River or in Lake Tahoe or its tributaries.

"Applicant ... denies ... that all the natural flow of said stream system is required for the irrigation of lands under the Newlands Project, or that it is necessary to utilize for irrigation purposes all the water alleged to be artificially stored in Lake Tahoe.

"Applicant ... alleges ... that Truckee-Carson Irrigation District has no title to any waters in Lake Tahoe or its tributaries upon which to found a claim of right entitling it to protest this application."

Answers to protests against Application 11933 contain statements as follows:

In answer to protest by California State Fish and Game Commission:

"Denies that the granting of Application 11993 would destroy trout ... and denies that the amount of water applied for is greater than total flow of the stream at any time.

"Alleges that the allowance of said application will in no way interfere with the flow of the natural stream to the extent that any fish therein planted ... will die for lack of water; that at all times there has been and there is sufficient and abundant water to permit the allowance of the application without material injury to protestant's rights."

In answer to protest by Elwood Johnson:

"Denies that the granting of Application 11993 will cause a shortage of water in Cold Creek after July 1 of each year, or at any time.

"Denies that said Elwood Johnson would be deterred in any way from irrigating his said lands.

"It is not the intention of applicant to in any way interfere with the use heretofore made by said Elwood Johnson of the said waters of Cold Creek ... but applicant alleges that the granting of his application will in no way interfere, restrict or minimize the rights that said Elwood Johnson has heretofore actually made of the waters of said Cold Creek."

In answer to protests by Sierra Pacific Power Company and Truckee-Carson Irrigation District the applicant denies that those protestants have any right to the use of waters of Cold Creek and asserts that the appropriation he seeks will in no way interfere with rights of those protestants on Truckee River.

In answer to protest by Stella Van Dyke Johnson:

"Denies that this protestant has any prior rights to the waters of Cold Creek except such amount that she has heretofore diverted for a long number of years last past to irrigate about two hundred acres of land, said point of diversion being upstream from diversion of applicant;

"Denies expressly that there is, or usually is, a critical shortage of water for the existing use of protestant, particularly during the grazing or irrigation season or at any time; denies that the granting of the application would invade and/or impair any prior rights of protestant except her rights as hereinbefore specified;

"That while it is true protestant and her predecessors in interest have diverted some of the waters of Cold Creek at a point of diversion above applicant, the amount diverted and actually used by protestant has been insignificant and has during said period been put to very little or any beneficial use; but applicant proposes to use the waters applied for for domestic consumption and use by persons owning summer cabins at Al Tahoe and the surrounding territory; that the granting of said application will in no way affect any of the claimed or vested rights of said protestant.

Hearing Held in Accordance with the Water Code

Applications 10914 and 11993 were completed in accordance with the Water Code and the rules and regulations of the Division of Water Resources and being protested were set for hearing under the provisions of the California Administrative Code, Title 23, Waters, on Tuesday, July 7, 1953, at 10 o'clock a.m. in Room 10, Public Works Building, Sacramento, California. Of the hearing the applicants and the protestants were duly notified. The hearing opened at the time and place designated, was continued to September 15, 1953, reopened on that date and extended through the next.

The hearing session July 7, 1953 was limited to preliminary discussion and no testimony was taken. The hearing was then

continued to September 15, 1953 in order to enable the parties to explore further the possibility of settlement of the matters in controversy and to enable further measurements to be made of the flow of Cold Creek.

On July 24, 1953, Applicant Johnson submitted a petition to amend Application 10914, that petition reading in part as follows:

"1. I ... hereby petition to amend my application ... by reason of domestic purposes to which this water can at present be used and also future domestic use arising out of subdivision development

"2. I hereby present a list of developments ... all in Section 33, Township 12 North, Range 18 East, N.D.B. & M. These properties are immediately south of the highway near Bijou, California, and at present can be served with water from Cold Creek by the 'Big Ditch' ... together with its lateral extension

- a. Properties sold (12 houses on 14 acres listed).
- b. Rental properties (7 properties listed).
- c. The following property was sold by me for subdivision purposes (30 acres in Section 33, 110 acres in Section 2). It is my estimate that about two-thirds ... of the 140 acres could be served by the 'Big Ditch' ... and the (remainder) by pumping and constructing a lateral
- d. The undersigned has also used water from Cold Creek by means of the 'Big Ditch' for a nine hole golf course . . . In Section 33, 35 acres; in Section 3, 4 acres; in Section 2, 20 acres.

"3. I also earnestly petition to consider potential developments for domestic use on my property during the next 5 to 10 years ... as follows:

- a. In Section 33 ... 8 acres ... hotel and rented unit.
- b. Certain lots ... in Section 3 (enumerated in the document and totaling 337 acres). A portion of these lands (about 200 acres) are the same properties (as described in Application 10914). According to my estimates about 273 acres of these lands are riparian ... to Trout Creek.
- c. Also in Section 2 the following properties lent themselves to subdivision (a total of 170 acres).

"4. At the prehearing ... it was suggested ... that I state what lands ... were riparian lands. After an examination ... I hereby state that in my opinion the following lands are riparian to Cold Creek and/or Trout Creek:

<u>Lot</u>	<u>Riparian acreage</u>
East $\frac{1}{2}$ Lot 5	20
East $\frac{1}{2}$ Lot 6	13
East $\frac{1}{2}$ Lot 10	40
East $\frac{1}{2}$ Lot 11	40
$\frac{1}{2}$ Lot 12	40
$\frac{1}{2}$ Lot 13	40
Total	<u>193</u>

"WHEREFORE, applicant hereby petitions that she be permitted to amend her application to include the above allegations and statements concerning domestic use of water of riparian rights "

The petition to amend Application 10914 was protested by Frank Globin who denied the petitioner's allegations and stated:

"Protestant hereby refers to his protest heretofore filed herein and by such reference adopts the same for all purposes as a protest and objection to said amended application hereinabove referred to."

Hearing Testimony

At the hearing session of September 15 testimony by witnesses included the following:

Raymond Nesbit testified (pages 8 to 24 of transcript) to the effect that he made certain streamflow measurements between July 21 and September 8, 1953 at points as follows:

- a. -- Inflow into Applicant Globin's upper pond
- b. -- Inflow into the Stella Johnson ditch
- c. -- Cold Creek above all diversions
- d. -- Flow over weir between Applicant Globin's ponds
- e. -- Flows over outlet weir into the Elwood Johnson ditch
- f. -- Flow into the Globin pipeline

Witness Nesbit testified that according to his measurements the flows at the points mentioned, in cubic feet per second, were:

Date	A	B	C	D	E	F
7/21	3.72	3.86	26.38	2.74	2.13	0.61
7/28	3.56	4.65	23.45	2.64		
8/ 5	3.57	4.57	19.48	3.09	2.56	0.53
8/15	3.36	4.31	17.02	3.09	2.40	0.69
8/19	3.34	4.10	—	2.83	2.32	0.51
8/27	3.40	3.85	14.11	2.83	2.40	0.43
9/ 8	3.10	3.16	13.12	2.64	2.13	0.51

Witness Nesbit testified further that he estimated flow at Point C on September 13, 1953 to be 10.65 cubic feet per second, that on September 8, 1953 Cold Creek, about one-fourth mile above its junction with Trout Creek measured 5.98 cubic feet per second, that in his judgment the low flow for the year would be about 10 cubic feet per second and that "the stream will start to increase very shortly, if it hasn't now, because of the cold nights".

Stella V. D. Johnson, applicant, testified (pages 27 to 86 of transcript) to the effect that she owns approximately 1,000 acres within Cold Creek and Trout Creek watersheds, that she is the widow of Knox Johnson who died in 1931, that she has been familiar with the locality in question since 1918, that the 1,000 acres that she owns represents purchases by her husband's father, Chris Johnson, Sr., from Charles Sibeck and Caroline Sibeck, that the purchases were two in number, the first on September 13, 1934 (sic) and the second on June 18, 1908, that Chris Johnson, Sr., died after 1912 and his property went to Knox Johnson, who was Applicant Johnson's husband, and to Chris Johnson, Jr., who was Elwood Johnson's father, that by deed dated May 14, 1931 Knox Johnson granted his share of said property to her (Stella Johnson) and also his share, an undivided half interest in the Martin Ranch, that by quit claim deed dated May 24, 1940 Chris Johnson, Jr., granted her (Stella Johnson) all

of the Sibeck property and she in turn gave Chris Johnson, Jr., a quit claim deed for the Jacques or Martin place, about 1,400 acres, that according to her understanding her property when deeded had certain rights including riparian rights pertaining to it, part of the property facing on Cold Creek and part on Heavenly Valley Creek, that the 1,400-acre Jacques or Martin place, known also as the Sierra House Ranch, passed by deed dated September 19, 1912 from Mary G. Jacques to Chris Johnson, Sr., that the deed last mentioned, according to her understanding, reserves to the Jacques Estate and its assigns certain rights of way and a right of up to 1/3 of the flow of Cold Creek, that according to her understanding that reservation is the basis of Frank Globin's present right, that the Sibeck lands were patented in 1866, 1872, 1873 and 1874. Witness Stella Johnson testified further to the effect that since 1931 she has owned and managed and has personally supervised, part time, the irrigation of both the Sibeck place and the Jacques place, that she is a practical irrigator and farmer and thoroughly knows the cattle business, that in 1918 when she first knew the property some 500 acres were under irrigation, that on the whole, aside from occasional drouths and minor variations of water supply, about the same acreage has been irrigated right along, that irrigation has mostly been by wild flooding, partly by sub-irrigation, that waste has been small, that no experienced irrigator could irrigate better, that some 193 acres of her property are riparian

to Trout Creek below the junction with Cold Creek, that of that acreage about 100 acres could be irrigated by gravity, that the golf course is about 59 acres in extent, that it has been irrigated from the ditch since 1927 or 1928, that she has started to develop about 8 acres adjoining the golf course, that she has built houses and apartments thereon to take care of 40 people besides hired help, that when she can get the money she expects to build non-housekeeping units and a hotel to accommodate a total of 150, possibly 200 people, that that development could be served from Cold Creek but is presently served by wells, that wells in the locality serve satisfactorily if they are properly cared for, that when demand is sufficient, a certain 400 acres of her property will warrant subdividing, that one object in applying for water is to beautify that area to improve its salability, that with the 2.5 cubic feet per second applied for she can irrigate certain lands along Trout Creek which cannot otherwise be irrigated. On cross-examination Applicant Stella Johnson testified (pages 57 to 81 of transcript) to the effect that the deeds earlier mentioned made her sole owner of the Sibeck property and Chris Johnson, Jr., sole owner of nearly all of the Martin property, also called Jacques Estate or Sierra House Ranch, that in 1918 she was not a resident of the locality but visited it for several weeks and traveled over it frequently by automobile and on horseback, that between 1918 and

1931 she visited it every Sunday or every alternate Sunday, that her land is riparian to Cold Creek below but perhaps not above its confluence with Trout Creek, that the ditch by which she now diverts from Cold Creek was in existence in 1918, that the ditch ends at a point near Bijou, that the flow in the ditch is more or less constant during irrigation seasons, that a certain amount of water reaches the end of the ditch and runs out onto the meadow, that the ditch is supplied in part from Heavenly Valley Creek but mostly from Cold Creek, that the ditch has been repaired from time to time and a new culvert installed, that the capacity of the ditch has not been increased however, that Mr. Globin's diversion ditches, reservoir and facilities were used prior to 1924 to take water to the old Al Tahoe Company, that there was a ditch and pipe line in 1918, that the pipe line and the point of diversion are located in the same place now as then. On recross-examination (pages 81 to 86 of transcript) Mrs. Johnson testified to the effect that she considers that she has a prescriptive right to divert Cold Creek waters to certain lands not riparian to that stream, such water having been so used since prior to 1908, that Chris Johnson, Sr., at one time owned both the Sibeck place and the Jacques Estate, that on his death in 1912 or 1914 that property went to Knox and Chris Johnson, Jr., in common ownership, that in 1931 Knox's half interest went to her (the witness), that after 1940 it was not jointly owned, that in 1918 the ditch appeared to have

been in use for a long time, that the works leading to the Al Tahoe Company had the same appearance.

Fred Dressler testified (pages 87 to 102 of transcript) to the effect that he has been in the cattle business for 40 years or more, that he has maintained mountain meadow properties like the Stella Johnson property, that he is familiar with the Stella Johnson property and has visited it and examined it several times, that the Stella Johnson lands are irrigated in the same manner as are other mountain meadow lands, that the best possible use is made of water in irrigating, that the supply carried by the ditch appeared about correct for the amount of land under irrigation, that no wastage was apparent, that 2.5 cubic feet per second is about the right amount to apply to the 200 acres that Mrs. Johnson proposes to irrigate, that he is a close friend of Mrs. Johnson but that his opinion is not prejudiced on that account, that his opinion is from the viewpoint of a cattleman, that there are occasional spots on the Johnson property where water "pools up" due to unevenness of the ground surface, that water grass grows in such areas, that the condition is not noticeably different now from what it was in 1947, that the vegetation indicates that the lands in question have been irrigated for a long time, that on frequent visits during the past 20 years he has noticed the place to be irrigated, the ditch often

full, but he has not noted any increase in the amount of land irrigated.

George Smith testified (pages 103 to 112 of transcript) to the effect that he is an old friend of the Johnson family having known Knox Johnson, Knox Johnson, Jr., and Mrs. Johnson for a period commencing in 1923 or 1924 when he lived at the Sierra House, that he took care of the Johnson Ditch until about 1932, that about 500 acres were irrigated at that time under the Johnson ditch, irrigation extending from June to September, that water was diverted into the Johnson ditch at a point above the Globin Dam, that in his opinion good methods were used in farming and irrigating, that the land irrigated was native mountain pasture, uneven as to surface, that some water grass is bound to grow when irrigated land is uneven, that the land that is now the golf course was then wet and that there was a good deal of water grass on it, that its condition was due to water backing up from the lake or due to springs or to natural obstacles to drainage and was not due to excessive irrigation, that the method followed in irrigating is the only practical way there is, the season being too short to justify the cost of leveling, that he is speaking from the viewpoint of a cattle man.

Knox Johnson testified (pages 113 to 131 of transcript) to the effect that he is Stella Johnson's son, that he has irrigated Stella Johnson's lands since about 1940, that the Stella Johnson Ditch heads about 100

feet above the Globin intake, that a new headgate has been installed recently at the head of the Johnson Ditch, that it is the metal culvert referred to in earlier testimony, that it affords better control than the wooden box it supplanted, that the level of the water in the creek depends not on the headgate but upon a temporary rock dam which is renewed each spring, that the ditch is about 5,000 feet long, that the water flows all the time but to different places at different times, that the system of irrigation is the same that is used by almost everyone in the locality, that it is the only practical and economical way to irrigate that type of land, that the expense of leveling is not warranted, that when the sod is broken it takes many years for grass to grow again, that the ditch has never been enlarged, that an even flow into the ditch is maintained as far as possible by adding rocks to the dam as the flow of the creek diminishes, that the 200 acres that Mrs. Johnson hopes to irrigate under Application 10914 will require an additional 2.5 cubic feet per second at least, the land being high and sandy and very poor, that it requires a nearly continuous application of water for the first few years in order that a sod may form, that in meadows water grasses sometimes occur whether the land is irrigated or not, that they are due to standing water which may result from faulty drainage, that at the lower end of the golf course there is a backing up of water which causes a rank

growth, that there are some underground springs and some water grass, that the condition is not caused by the ditch, that the cattle eat all of the feed there every fall, that the first plan is to develop the 8 acres in Section 33, that the long range program is to develop the flat country between the meadows that will be subdivided some day, that growth may warrant subdivision within 10 or 15 years, that such subdivision could be served by the "same water" served possibly by pipe, that the matter would have to be gone into with the public utilities and engineering and sanitation features considered, that enough water is allowed to pass the Stella Johnson intake to satisfy Globin's needs, Elwood Johnson's needs and "our" riparian rights on Trout Creek, that in dry years from 1 to 2 cubic feet per second pass the Globin intake, that the golf course has been improved since 1940, that it is patronized by from 50 to 80 players on week days, by more on week ends, that it may be further improved and extended with a view to tournament play, that streamflow in 1953 is judged to be 10 per cent above normal.

At the hearing session of September 16, 1953 Attorney Orrick made the following statement (pages 132 to 134 of transcript) in behalf of Sierra Pacific Power Company, Washoe County Conservation District and Truckee-Carson Irrigation District:

"It is our contention that all the waters of Cold Creek are appropriated and that there remain no unappropriated waters in the stream or in any other streams tributary to Lake Tahoe. Our rights are as set forth

in the protest and the other documents referred to in the respective protests filed on behalf of these three protestants.

" ... it is not our policy to actively contest applications for domestic use of water in the Lake Tahoe watershed. We are anxious to see the area developed We have accordingly entered into an agreement with Mr. Globin pursuant to which we have transferred and conveyed to him an irrevocable license to use for domestic and commercial purposes only two and seven-tenths second-feet of water to be diverted from Cold Creek We have made also a similar offer to Mrs. Johnson to use water for domestic and commercial purposes only and that is in accordance with our general policy and with the policy as stated in the Joint Engineers' Report."

The examiner then inquired

"Mr. Orrick is it our understanding that this agreement which you have filed in the proceeding is a withdrawal of the (protests) ... against Mr. Globin's application?"

Mr. Orrick replied

"No, it is not, Mr. Examiner. We would continue our protest to any finding that there would be any unappropriated waters in Cold Creek."

The examiner inquired

"As far as you are concerned, this is a release of claim to that much water, is that what you mean?"

Mr. Orrick replied

"Well, we transfer our right to that additional water. It is water that is in addition to the water to which Mr. Globin is already entitled."

The examiner then stated

"The agreement will be made a part of the official record and considered in the light of the explanation herein made in our findings on the application."

Mr. Devlin remarked

"I take it when, as and if Mrs. Johnson should develop that eight acres she testified to, your group would be -- "

Mr. Orrick replied

"We will grant a license for her to use the water for domestic purposes, domestic and commercial purposes only . . . not irrigation. We are quite opposed to any use for irrigation purposes"

The taking of testimony was next resumed.

Frank Globin testified (pages 135 to 177 of transcript) to the effect that he has lived in the Al Tahoe area since 1952, that he operates several businesses including a hotel, grocery, laundry, water utility, that his resort has facilities for accommodating about 500 people, that he normally has a "capacity house" in July and August, that as a public utility he supplies water to all of the resort activities, that his facilities include a 15,000,000 gallon reservoir, an intake structure, about 16,000 lineal feet of 10-inch pipe and some 10 miles of distribution system pipe of various dimensions, that his system serves 43 to 45 fire hydrants and that more hydrants are to be installed. As to the scope of his service he states further:

"Originally we supply Al Tahoe. In 1949 we absorb a smaller utility, Bijou Pine, with an average number of customers around 150 homes. Two years ago we extended our service at the request of Young Brothers of Bijou.

We extended our service toward Lakeside an additional mile and a half. We supply at the present time a large resort already including the camp ground of El Dorado which has facilities to accommodate fifteen hundred people. We are serving Lake Glen Village which has maybe thirty large cottages. We have several grocery stores along Highway 50. We have on file with the Public Utilities Commission a map covering the area in which we are serving at the present time. That includes all the territory around Bijou, six hundred feet from Highway 50. We have made plans for extension of the main line at the request of consumers according to the rules and regulations of the utility."

Further testimony by Witness Globin was to the effect that his system serves 450 consumers, that 75 applications are on file for services to additional consumers, that demand for service has more than doubled within the last five years, that population in the last five years has increased 600 per cent, that his present supply is insufficient to serve all the people who want service, that in the immediate future his main must be increased in size from 10 inches to 18 inches, that the water he serves is used for domestic and commercial purposes, that under the rules of the Public Utilities Commission he is obligated to serve all consumers located within his territory including Stella Johnson and Elwood Johnson, should they so request, that Elwood Johnson has requested service to lots in his subdivision, that he (the witness) does not think he can furnish that service without increasing the size of his transmission line, that in his judgment the flow of Cold Creek has been a little above normal during 1953, that within his experience there has always been water at his point of diversion, that in 1924 Al Tahoe Company was a going concern and

was supplying water to 27 families, that the transmission line that then existed has been relocated, that the point of diversion in 1924 was the same that it is today, that it then appeared to have been in existence for a long time, that he (Globin) owns no land on Cold Creek but has rights to 600 feet on each side of the Creek -- "rights to build a power plant and a powerhouse, reservoir, telephone company and anything I want" -- that he and his predecessors have been taking the water since 1908, that "I own one-third of the creek", that his deed so states, that his claim of ownership of water is based upon his predecessors' and upon the purchase of the water right from the Jacques Estate, that "at no time I can remember to be a serious shortage of water in Cold Creek", that he maintains and operates his water system all year round, maintaining a continuous flow both in summer and in winter, that the flow of Trout Creek always reaches Lake Tahoe, even in dry years, that Cold Creek heads in Star Lake which is supplied from a "tremendous spring on the side of that mountain".

Alfred S. Wheeler (an engineer of the Division) testified (pages 178 to 181 of transcript) to the effect that the 1.6 cubic feet per second reported as being used by Frank Globin on August 19, 1947, was ascertained by measuring the amount entering the Globin flume or ditch and subtracting the amount that was going into the Elwood Johnson ditch.

G. H. Mellin testified (pages 182 to 215 of transcript) to the effect that he has practiced civil engineering since 1915, that in 1946 Frank

Globin employed him to investigate his water system at Lake Tahoe, that he re-investigated the situation in 1953, that on September 14, 1946 the flow entering the Stella Johnson ditch measured 1.3 second-feet, that diversion was by means of a miner's inch box, that on June 28, 1953, he noted that the miner's inch box had been replaced by a corrugated iron pipe with a slit gate at its head to afford regulation, that it is of larger capacity than the miner's inch box, that on September 14, 1946 the flow entering the Globin pipeline measured 1.43 second-feet, that on the same date the flow of Cold Creek below the Globin intake measured 6-2/3 second-feet, that on the same date the flow of Cold Creek at the culvert under the old Sierra House road measured 10.3 second-feet, that on June 28, 1953 he determined that 1.8 second-feet were entering the Globin pipeline at about 9:30 a.m. and 1.6 second-feet at about 5 p.m., that he calculated the capacity of the pipeline to be about 1,000 gallons per minute, that at present the Globin system serves up to nearly 10,000 people during the peak summer months, that it is doubtful if any larger number can be served through the existing pipeline, that on September 14, 1946 he did not measure the flow at the Stella Johnson ditch which however appeared to be filled to capacity, that 1946 was a year of lower flow than 1953 by about 10 per cent.

Hearing Exhibits

Examiner's Exhibits

1. Aerial map of the locality
2. Map of Irrigation Project of Stella V. D. Johnson

Applicant Johnson's Exhibits

- Deed, 9/30/04, Charles Sibeck and Caroline Sibeck to
Chris Johnson
- Deed, 6/18/08, Charles Sibeck and Caroline Sibeck to
Chris Johnson
- Deed, 5/14/31, Knox Johnson to Stella Van Dyke Johnson
- Deed, 5/24/40, Knox Johnson to Stella Van Dyke Johnson
- Deed, 2/19/12, Mary G. Jacques (Admr.) to Chris Johnson

Applicant Globin's Exhibit -- Title Report

Protestants' Exhibit -- Agreement between the Nevada protestants
and Frank Globin

Briefs

Subsequent to the hearing, briefs were submitted as
follows:

A brief on behalf of Stella V. D. Johnson (submitted November 5,
1953) summarizing the history of the Johnson property including
water rights, arguing that Applicant Johnson has shown a certain
prescriptive right and certain riparian rights and that her use of
water has been in accordance with approved practice, asserting that

Applicant Johnson's present and contemplated future domestic and commercial uses of water are consistent with the views expressed in the joint report relating to the Lake Tahoe watershed by the State Engineers of Nevada and California and issued in June, 1949, discussing Applicant Globin's water rights, present and prospective, discussing the residual amount of water in Cold Creek after all diversions, arguing that there has been no change in capacity of the Stella Johnson dam or ditch since 1918. The last paragraph of the brief reads:

"In conclusion, Applicant Stella V. D. Johnson prays that if the Division should make a finding that in normal years there is surplus unappropriated water in Cold Creek, that in making any award thereof for the needs of the Globin utility, that the substantive rights long standing of Applicant Stella V. D. Johnson be considered and protected, including the plans for future domestic, commercial and recreational use of her property."

A summary of position of California Department of Fish and Game

(submitted November 9, 1953) reads in part as follows:

"Rainbow trout and eastern brook trout spawn in this creek and exist naturally. The Department plants additional numbers of these fish in this stream annually. Kokanee salmon have been planted in the stream, and an effort is being made to establish a run of this species in this stream, which would contribute to populations of this fish present in Lake Tahoe.

"This stream is mentioned as a trout fishing stream because of its accessibility to the large center of recreation at Lake Tahoe.

"Approximately the lower 2 miles of this stream comes under the effect of control of its natural flow by diversions

"We, therefore, request that our original protest be revised, in light of further information gained as mentioned and that further recommendations be included and noted as a part of our statement of position;

'As pertains to Application 10194: We recommend that if a permit is issued ... that the following words be included in the permit: Permittee shall release 5 cfs or the natural flow of the stream, whichever is less, into the natural stream channel past the point of diversion for protection and maintenance of fish life.

'As pertains to Application 11993: We recommend that if a permit is issued ... that the following words be included in the permit: Permittee shall release 5 cfs or the natural flow of the stream, whichever is less, into the natural stream channel past the point of diversion for protection and maintenance of fish life."

A reply brief on behalf of Elwood Johnson (submitted November 25, 1953) sets forth that it is addressed to the contentions in the applicants' opening briefs and that he (Elwood Johnson) feels both applications to be premature as to quantity based upon need. It contains among others the following passages:

"It would ... seem that both applicants have accepted without dispute the figures of Mr. Nesbit From these figures it is quite apparent that the requests of both Stella V. D. Johnson and Frank Globin are excessive in view of the present amount used by each of the applicants, and in further view of the failure of either applicant to show any and certain future need.

"It is the suggestion of this protestant that the waters of Cold Creek should be diverted to the best possible use in the future. As it appears in

the records this protestant is as interested as either applicant in the development of the Tahoe area from a commercial and residential standpoint and feels that ultimately the waters of Cold Creek may be completely essential for the satisfaction of these purposes. However this protestant further feels that at the present time it would be impossible to in any way fix a definite amount for either applicant and that to be equitable this Commission should await actual developments prior to assigning definite portions of the water of the creek to any applicant.

A reply brief on behalf of Frank Globin (submitted November 25, 1953) contains among others the following passages:

"A careful reading of Applicant Stella Johnson's brief fails to disclose upon what grounds, if any, Stella Johnson is opposing the application of Frank Globin. By her failure to point out her opposition, we must assume that she is conceding that the use to which Frank Globin desires to put the additional water he is seeking is both beneficial and economical and would greatly aid in the over-all development of the South Tahoe area."

"In support of her own application Stella Johnson has made several fallacious statements and arguments "

"It is the contention of Applicant Stella Johnson that Frank Globin does not own a vested right to one-third of the full flow of Cold Creek but that he owns something less than one-third She bases this conclusion upon the false premise that at the time of the conveyance by the Jacques Estate to the Al Tahoe Investment Company a portion of the full water rights upon the Sierra House Ranch had already been divested The language used in both the Jacques conveyance to Al Tahoe Investment Company and to Chris Johnson, Sr., does not support her position. The language of the two conveyances very positively reserves to the Jacques Estate one-third of the water which may run at any time in the creek; not one-third of something less than all This was the interpretation placed upon the conveyances by Chris

Johnson, Sr., the predecessor in interest of Stella Johnson. At the time Chris Johnson, Sr., purchased the Sierra House Ranch from the Jacques Estate, he was already the owner of the Sibeck property; therefore when he accepted delivery of the deed from the Jacques Estate of the Sierra House Ranch, he accepted it upon the condition and understanding that there was withheld from the conveyance one-third of all the water flowing in Cold Creek. . . . It was not until Stella Johnson ... acquired an interest in the Sibeck property that anyone even contended that the Al Tahoe Investment Company or Frank Globin owned anything less than one-third of the flow of all water in Cold Creek."

"Stella Johnson has not shown that she has acquired a prescriptive right to divert any amount of water from Cold Creek."

"There is no evidence whatsoever that the use of water through the big ditch was adverse for any period of five years."

"It is the contention of Applicant Stella Johnson that because the testimony of her witnesses indicates that the method of irrigation she has maintained ... is in accordance with the accepted method of irrigating mountain meadow lands, this form of irrigation must be considered as an economical and beneficial use of water. Merely because others irrigate in the same manner does not prove that this method makes the best possible use of the water available in Cold Creek."

"The amendment by Applicant Stella Johnson to her application, to seek unappropriated water for domestic purposes comes clearly as an after-thought. From 1945 to 1953 she made no claim to use water for domestic purposes"

" ... Applicant Stella Johnson states that 'Frank Globin claims to presently own 1.8 second-feet of Cold Creek water'. This is far from the fact. Applicant Globin claims a vested right to use considerably more than 1.8 second-feet of Cold Creek. He is claiming a

vested right to one-third of the flow of Cold Creek, which, during the year 1953, would have varied from 8.79 cfs in July to 4.37 cfs in September. As we have shown in our opening brief, Frank Globin owns a water right which is tantamount to that of a riparian owner, and has all the attributes of a riparian right. A riparian right obtained by grant cannot be lost or diminished by non-use; therefore, Applicant Frank Globin still has a vested right to a full one-third of the flow of Cold Creek."

Answering brief of the protestant Truckee-Carson Irrigation District (submitted December 4, 1953) contains, among others, the following passages:

"The Truckee-Carson irrigation district, as trustee and agent of the water users of the Newlands Project, claims a vested right to all of the waters of the Truckee River with a priority of May 21, 1903."

"During the months of July and August 1953 the California Division of Water Resources made certain measurements of water being diverted from Cold Creek"

"These records show that during the period of time in which these measurements were taken ... stored water was being withdrawn from Lake Tahoe and Lahontan Reservoir, that storage space was available in both Lake Tahoe and Lahontan Reservoir and that through the appropriative rights of the Truckee-Carson Irrigation District none of the waters of the Truckee River were available for appropriation or diversion during this period."

"The Truckee-Carson Irrigation District is the owner of certain lands in Placer County, California, that are litoral on Lake Tahoe and riparian to the Truckee River. The Truckee-Carson Irrigation District claims litoral and riparian water rights on these lands."

"The evidence does not show that Charles M. Jacques, deceased, was ever the owner of any water rights on Cold Creek. Water rights exist only by appropriation or by waters claimed on riparian lands. No evidence was presented to show that Charles M. Jacques, deceased, ever made any appropriation for any water on Cold Creek. Any water rights he might have had would then have been of necessity a riparian right Riparian rights cannot be conveyed to non-riparian lands."

"Nor can a riparian owner as such rightfully sell or divert to non-riparian lands water which he has a right to use on riparian lands, but which he does not so use."

"In any case, a water right is only for water that can be and is being used beneficially. A deed purporting to convey one-third or any other fraction of an indefinite amount of water that might be flowing in any stream at some time is of no force and does not convey anything."

" ... No evidence was presented to show that Stella V. D. Johnson had or has a prescriptive right to anything."

"The Truckee-Carson Irrigation District affirms that Stella V. D. Johnson, or Elwood Johnson, does not have any vested or appropriative rights on either the waters of Cold Creek or Trout Creek. The evidence does not show how their predecessor in interest acquired any appropriative rights"

"The Truckee-Carson Irrigation District claims that all the waters of Cold Creek and Trout Creek subject to appropriation have been appropriated and used with a priority of 1903."

A memorandum submitted on behalf of Truckee-Carson Irrigation District, Washoe County Water District and Sierra Pacific Power Company on March 10, 1954 contains among other passages the following:

"As prerequisite to the issuance of a permit to appropriate water the fact must exist that there must be unappropriated water available to supply the

applicant'. Here the fact is that all the water in Cold Creek is appropriated, and the Department, accordingly, lacks authority to issue to either applicant a permit"

"Neither applicant ... questioned or could question the long and well established rights of the Nevada protestants in and to all of the waters in Lake Tahoe and its tributaries, including Cold Creek"

"Indeed, both applicants, by accerting licenses from the Nevada protestants ... recognized and concede the prior and superior rights which the Nevada protestants have in and to such waters. Applicant Globin accepted from the Nevada protestants a non-revocable license and right to divert or store from Cold Creek 2.7 cfs ... to be used only for domestic and commercial purposes ... and Applicant Johnson accepted from the Nevada protestants a non-revocable license and right to divert or store from Cold Creek, from January 1 to December 31 of each year, 9/10 of 1 c.f.s. of water to be used only for commercial or domestic purposes and 1.6 cfs of water to be used only for the recreational purpose of supplying water to that certain golf course "

"Thus the question before the Department as to whether the applicants are entitled to take additional water from Cold Creek is moot. Both applicants have received from the Nevada protestants the right to divert and store sufficient water from Cold Creek to meet their respective needs."

"Both applicants seek in effect an adjudication of their respective legal rights in and to the waters of Cold Creek, an adjudication which is beyond the jurisdiction of the Department to make."

"It is noted that neither applicant seriously contends that there is any unappropriated water in Cold Creek, i.e., water which is not already in use under prior and existing rights."

"An appropriation of unappropriated water can be made only for beneficial purposes ... and proof must be made of the fact that the intended use must be beneficial, before a permit can be issued "

"To issue additional permits for use involving diversion from tributaries of Lake Tahoe would, we submit, be not only unauthorized by law, but would create confusion and hardship."

"The doubtful benefit which would result therefrom to lands in California would not only be infinitesimally small compared with the detriments which would accrue to the long established users in Nevada, but would result in injustice, confusion and controversies which it should be the object of all to avoid."

An opening brief on behalf of Frank Globin (submitted November 6, 1953) summarized the background of the applicant's claim of vested rights, argues that the evidence supports no claim of any appropriative or prescriptive right to divert onto the one time Sibeck property, argues that Applicant Globin owns a vested right to one-third of the full flow of Cold Creek on the Sierra House Ranch, a right tantamount to a riparian right, argues that the rights of the Nevada interests need not be considered because of the granting by those interests to Globin of "an irrevocable license" to the 2.7 cubic feet per second sought in Application 11993, argues that Elwood Johnson is not solely dependent upon the flow of Cold Creek, argues that in 1953 Globin's right ranged between 8.79 and 4.37 cubic feet per second (his claimed one-third of the stream), that in that year unappropriated water remaining in

Cold Creek ranged from 17.59 to 8.75 cubic feet per second, asserts that almost one-half of the water diverted by Stella Johnson is wasted, argues that water would be better conserved by allowing his existing utility to supply water to future consumers than to permit Applicant Johnson to supply such consumers by means of a competing system.

Answering brief of Truckee-Carson Irrigation District (submitted December 4, 1953) contains among others the following passages:

"The evidence does not show that the Jacques Estate ever had any water rights in any creek at any time . . . The evidence does not show that the Jacques Estate ever made an appropriation Therefore the only rights the Jacques Estate might have had were riparian rights on riparian lands, which they may have had on Cold Creek or Trout Creek."

"If the Jacques Estate did have riparian rights . . . these rights could not have been conveyed for use on non-riparian lands. The use of water on a riparian right is limited to a reasonable amount but the water must be used upon the riparian land from ownership of which the right arises and cannot be used upon distant or non-riparian land nor can a riparian owner as such rightfully sell or divert to non-riparian lands water which he has a right to use on riparian lands, but which he does not so use."

" . . . the record does not show without dispute that the applicant, Frank Globin, is the owner of any rights in Cold Creek. A conveyance which purports to convey a vague and undetermined amount of water flowing in some stream which the record does not show was ever beneficially used or which might have been claimed under a riparian right which is not subject to conveyance, could not convey any water right to anyone."

" ... the Truckee-Carson Irrigation District affirms that Applicant Frank Globin has no right to the waters of Cold Creek or Trout Creek except possibly the present pipeline diversion which, according to the evidence, shows a possible maximum diversion of 1.5 second-feet."

Reply of Frank Globin to brief of Truckee-Carson Irrigation District

(submitted December 17, 1953) contains among others the following passages:

"All the alleged facts set forth by protestant in support of its claim to prior appropriative rights to all of the waters of the Truckee River and of Cold Creek are no more than mere gratuitous statements of the protestant The statements of the protestant contained in its brief are not evidence and cannot be considered by the Division"

"One of the fundamental principles of all judicial and administrative proceedings is that no witness can testify, nor can any evidence be offered, without giving to the adverse party full and complete right of cross-examination."

"It is not contended that the Jacques Estate ... had any rights other than riparian rights to Cold Creek but this was all the right that was needed, for as such riparian owner the Jacques Estate was entitled to have flow through its property the full normal flow of the stream."

" ... the Jacques Estate at the time of its conveyance to Frank Globin ... could ... convey away any portion of that flow it should desire. And this water may be used by Globin upon lands which are not riparian to Cold Creek."

Reply brief of Frank Globin to brief of Protestants Sierra Pacific Power Company, Truckee-Carson Irrigation District and Washoe County Water Conservation District (submitted March 23, 1954) argues that

the statements contained in the briefs of those several parties, because unsupported by evidence, cannot be considered as evidence. It declares those statements false. It contains among other passages the following:

"In a further effort to support its contention that there is no unappropriated water in Cold Creek the power company points to the license agreement executed by Applicant Globin. This agreement does not concede ... that the Nevada protestants owned any rights in Cold Creek prior to, or superior to, those rights claimed by Applicant Globin. The agreement was intended to be, and actually is, a quitclaim by the Nevada protestants to Globin of any rights they might have in Cold Creek which might have been adverse to the application of Globin to appropriate water from said water course."

Information from Other Sources

Extracts from the publication "Joint Report on the Use of Water in the Lake Tahoe Watershed - Prepared by the State Engineers of Nevada and California", June 1949, are as follows:

"During the past two years, several applications to appropriate private water from Lake Tahoe and the sources tributary thereto have been protested by the downstream Truckee River water users. The basis for these protests is the concern of the downstream users over possible impairment of their Truckee River water supply, because of increasing upstream use, occasioned by a growing population around Lake Tahoe.

"A full comprehension of the facts pertaining to the use of water around Tahoe, and the probable future effect on downstream users, is a necessary background for action on pending and future applications and the protests thereto. Since both the upstream source and the downstream use lie partly in California and partly in Nevada, an investigation to develop the facts in the matter was undertaken jointly by the two States."

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"The population of Lake Tahoe during 1948 was at its maximum during July and August, averaging 27,500 for two months. The average for the year was 9,000. The total person-months was 108,000.

"Various estimates of the future population around Lake Tahoe have been made. It appears that the population may double in 25 years. Assuming that if what now appear to be feasible building sites were occupied, the ultimate population could be in the order of 200,000 persons during July and August.

"The Lake Tahoe region is primarily a recreational area. Future development will progressively require additional housing units and perhaps additional golf courses. Such facilities may ultimately occupy all the livable area around Lake Tahoe to the exclusion of presently irrigated meadow lands and a considerable area of native vegetation. It, therefore, is believed that the increased demand for water due to the growth of population around Lake Tahoe will be for domestic and recreational purposes only.

"Should additional golf courses be constructed, as the population grows, the increase in use of water for their irrigation will be largely, if not entirely, offset by water salvaged from presently irrigated meadow lands and areas now covered by native vegetation. It, therefore, appears that there will be no increase in demand on the waters of the basin due to additional golf courses.

"The increased demand for water for domestic purposes will be confined to that required for household use. Any increase for the other domestic uses considered in this report, i. e., lawn and garden irrigation and sprinkling dust and native vegetation around dwellings, camps, and roads, will probably be compensated for by water salvaged from the native vegetation replaced by such facilities.

"The estimated daily requirement for household use around Lake Tahoe is 50 gallons per capita. Disposal of the unconsumed portion thereof is by means of cesspools and septic tanks, which procedure results in a high percentage of return as sewage underground. Allowing for some consumption by overlying vegetation, it is estimated that such return is 50 percent of the daily gross requirement of 50

gallons per capita or 25 gallons. The daily net consumptive use per capita, therefore, amounts to 25 gallons.

"The present household net consumptive use, on the basis of the average annual population of 9,000 for 1948, amounts to 28 acre-feet per year per 1,000 persons, or an annual total consumptive use of about 250 acre-feet.

"Assuming double the population, the net increase in use will be about 250 acre-feet per year. For a future population of 200,000 which might be the ultimate possible, such increase would amount to about 1,600 acre-feet per year.

"The 250 acre-feet increase in use estimated to be required for double the population is equivalent to a depth of approximately 1/40" over the surface of Lake Tahoe, and for a 24-year period, the longest period of record during which the lake failed to fill, is equivalent to a depth of 6/10" over the surface of Lake Tahoe.

"With double the population the amount of water discharged from Lake Tahoe into the Truckee River would be reduced on the average about .2 percent (2/10 of 1 percent). The most extreme condition was indicated in the year 1932-1933 when the reduction in discharge amounted to 3.1 percent of the 5,150 acre-feet discharged that year. Such percentages are, in general, below the percentage of accuracy that can be obtained in measuring the discharge.

"The increase in use would result in a decrease in power generation in the Truckee River plants to a value of approximately \$157 per year.

"The average decrease in the supply of irrigation water would amount to approximately .05 percent (5/100 of 1 percent) of the requirements of the Truckee-Carson Irrigation District.

"It is estimated that about 40 percent of the indicated increase in use will be appropriated under the code procedures of the two States and thereby be subject to protest by downstream users.

"The negligible effect, if any, of such appropriations in depleting the waters of Lake Tahoe is apparent.

"The water-rights owners around Lake Tahoe were not parties to the Truckee River Decree or Truckee River Agreement, hence are not bound thereby.

"Granting the applications now pending or those that may be filed within the foreseeable future for the appropriation of the waters of Lake Tahoe and its tributary streams for use within the Tahoe basin for domestic purposes and recreational uses allied therewith will have little effect, if any, toward depleting the waters of Lake Tahoe to the detriment of downstream users."

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"In view of the importance to the public welfare of both States of the development of Tahoe as a recreational area, it is recommended that as regards applications for the appropriation of water for domestic and recreational use in the Tahoe watershed, it be the general policy for the present to grant such applications, after due consideration of each application, pursuant to law."

The Truckee River Agreement, mentioned in the protests, hearing testimony and briefs, is a certain agreement dated June 13, 1935, between the United States of America, Truckee Carson Irrigation District, Washoe County Water Conservation District, Sierra Pacific Power Company, termed parties of the 1st, 2nd, 3rd, and 4th parts, respectively, and numerous individuals, parties of the 5th part. The agreement states that the parties thereto are diverters of water flowing from Lake Tahoe and/or in the Truckee River and its tributaries in the State of Nevada. The purposes of the agreement apparently were to coordinate efforts toward conservation of the waters of the lake and river, to expedite the entry of a final decree in adjudication proceedings then in progress and generally to facilitate development and distribution of available waters.

The Truckee River Final Decree, also referred to in documents relating to Applications 10914 and 11993, is the decree of September 8, 1944 in the action "The United States of America vs. Orr Water Ditch Company et al.", United States District Court, District of Nevada. It

was in effect an adjudication of rights of all parties named in that action, and of their successors in interest, to divert from the Truckee River and/or from its tributaries.

Neither Stella V. D. Johnson nor Frank Globin nor any predecessor in interest of either of those individuals appears to have been a party to the Truckee River Agreement or to have been named in the Truckee River Final Decree.

Discussion

If 1953 be considered a year of about 10% above normal runoff as the testimony by Witnesses Knox Johnson, Globin and Mellin suggests, then discharges in a normal year may be supposed to approximate 10/11 of those measured by Witness Nesbit in 1953. Normal discharges of Cold Creek above all diversions, estimated in that manner, may be of the order of 24.0 cubic feet per second on July 21, 21.3 cubic feet per second on July 28, 17.7 cubic feet per second on August 5, 15.5 cubic feet per second on August 15, 12.8 cubic feet per second on August 27, and 11.9 cubic feet per second on September 8. According to Witness Nesbit flow receded further to about 10.65 cubic feet per second on September 13, 1953 and, in his opinion, a seasonal low of about 10 cubic feet per second would probably have occurred in mid- or late September. While measurements at other seasons are not of record, spring flows and early summer flows of any year may be presumed to exceed flows ordinarily occurring in the same year on July 21.

Present demands upon Cold Creek also are indicated by the Nesbit measurements in 1953. The largest diversions observed in that series of measurements were 4.57 cubic feet per second by Stella V. D. Johnson, 0.59 cubic foot per second by Globin and 2.56 cubic feet per second by Elwood Johnson. These maximum observed rates of diversion total 7.82 cubic feet per second. That figure is assumed to represent, approximately, the aggregate of existing rights to divert from Cold Creek. On that assumption the flow of Cold Creek (deduced as in the preceding paragraph) probably exceeds diversions that might be made under existing rights by approximately 24.0 minus 7.82 or 16.18 cubic feet per second until July 21, 13.48 cubic feet per second until July 28, 9.88 cubic feet per second until August 5, 7.68 cubic feet per second until August 15, 4.98 cubic feet per second until August 27, 4.08 cubic feet per second until September 8 and, possibly, 1.41 cubic feet per second when the lowest stage is reached in mid-or late September. These excesses are probably more than the amounts sought under ^{Applications} 10914 and 11993 until some time in late August.

The applicants' claims as to the extent of their vested rights are discordant. Applicant Johnson in her application claims the natural flow of Cold Creek. Applicant Globin in his application claims an appropriative right to 1.8 cubic feet per second, established prior to 1904. Johnson concedes in her answer to Globin's protest that Globin has "a certain right" to waters of Cold Creek. Globin in his answer to Johnson's protest denies that Johnson is entitled to

divert more than enough to irrigate 200 acres. Johnson testifies that "according to her understanding" Globin is entitled to up to 1/3 of the flow of Cold Creek, that 500 acres of her land have been irrigated since 1918 or earlier, that she also holds riparian and prescriptive rights. Globin asserts ownership of 1/3 of the flow of Cold Creek, asserts that he and his predecessors have been using water since 1908. Aside from such rights as the applicants may hold, Elwood Johnson diverts substantial amounts from Cold Creek under a claimed right so to do. In the event of an adjudication it is probable that Stella Johnson, Frank Globin and Elwood Johnson would all be recognized as holding valid rights but it is also probable that the rights recognized in such procedure would be substantially less than the amounts that those parties claim. The competency of the deed to convey a quasi riparian right to deliver Cold Creek waters to presumably non-riparian lands is not apparent, nor is it apparent that appropriative rights established by use prior to 1908 cover increased requirements due to growth in recent years.

If applicant Johnson's claim to the full flow or even to a major fraction of the flow of Cold Creek is valid the approval of Application 10914 would avail her nothing. Likewise if Applicant Globin's claim of 1/3 of the flow of Cold Creek is valid the approval of Application 11993 would avail him nothing. Should it develop however that the claimed rights upon which the applicants rely are

invalid, in whole or in part, permits under the Water Code would avail those parties much.

The Lake Tahoe region is shown in the State Engineers' Joint Report to be predominantly a recreational area. Population within that area has increased rapidly and may be expected to increase further. The flow of Cold Creek appears little more than enough, at times, in summer and fall, to supply present diversions and to meet expanding domestic, related commercial, and recreational demands. Many thousands of people benefit from the utilization for such purposes of the limited water supply, as contrasted with the relatively few who would benefit directly from application of the same waters to any other use.

The Globin protest against Application 10914 is based upon the necessity of meeting the growing demand by customers served by the Globin utility, a demand that can only be met, Globin argues, by increased diversions, by him, from Cold Creek. In that connection the data indicate, as already mentioned, that said demand exists and that the supply obtainable from Cold Creek, upon which the Globin utility system depends, at certain times of year, is extremely limited.

The protest by Stella V. D. Johnson against Application 11993 appears insufficient, her point of diversion being located upstream from that of Applicant Globin.

The protests by Elwood Johnson against Applications 10914 and 11993 serve notice that that protestant claims a right superior

to any that can be acquired under those applications but they are insufficient to bar the approval thereof insofar as the flow of Cold Creek at times exceeds the amount necessary to satisfy vested rights.

The protest by California State Fish and Game Commission, originally directed against Application 11993 only was made applicable to Application 10914 also (by intimation) at hearing session of July 7, 1953 (page 34 of transcript). The protest originally provided that contingent upon the insertion of clauses providing for the by-passing of 2.5 cubic feet per second or the natural flow, whichever might be the lesser, in any permits issued, the protests might be disregarded and dismissed. By "Summary of Position" submitted on November 9, 1953 the Department of Fish and Game requested that the clauses in question require the by-passing of 5 rather than 2.5 cubic feet per second. Fish life is legally protected by the provisions of Section 525 of the Fish and Game Code. Since neither the protest nor the summary of position contains information that would support a permit term requiring the by-passing of any specific amount the inclusion of such a term in this instance appears unwarranted.

The protests by Truckee-Carson Irrigation District, Sierra Pacific Power Company and Washoe County Water Conservation District do not appear to bar the approval of either of the applications. Since much of the water that the applicants propose to divert would find its way as return flow or seepage into Lake Tahoe the net effect of the

proposed diversions upon the supply available to the Nevada protestants would be relatively small. Neither the applicants nor any of their predecessors in interest appear to have been parties to the Truckee River Agreement or to the adjudication of water rights along that stream. Not only are the applicants not bound by the Truckee River adjudication and agreement but no evidence was offered at the hearing of the extent of the rights of these protestants and there is therefore no basis for determining in this proceeding the possible effect of the proposed appropriations upon such rights as protestants may have. The Nevada protestants by their agreements of September 15, 1953 and February 5, 1954 have consented to year-round diversions from Cold Creek by Applicants Johnson and Globin in the amounts of 2.5 and 2.7 cubic feet per second, respectively, for domestic and commercial purposes.

The petition of July 24, 1953 to amend Application 10914, at best, is ambiguous and uncertain. In it Mrs. Johnson set forth her intention of using the water in question for domestic and related purposes at such time as subdivision and sale of her land for home sites would be feasible. She alleged numerous details concerning the suitability of the land for such purposes and her plans in relation thereto, and she petitioned that her application be amended to include said allegations. If the amendment were allowed, the result would appear to be an application to appropriate water for irrigation containing irrelevant allegations concerning potential domestic and recreational use. If considered as a petition to change purpose of use under Water

Code Section 1700 et seq., it violates 23 California Administrative Code Section 695, which requires a separate application for each major purpose of use, since applicant does not offer to delete the irrigation feature of her application. For these reasons the petition for leave to amend Application 10914, filed July 24, 1953, should be denied.

In view of established policy as set forth in Section 106 of the Water Code and in view of the probability that demand from Cold Creek for domestic purposes may tax the capacity of that stream, a special permit term and condition should be employed, if Application 10914 is approved, providing that diversions thereunder shall not interfere with diversions for domestic purposes from the same source.

Summary

Application 10914 by Stella V. D. Johnson initiates an appropriation of 2.5 cubic feet per second from April 1 to November 1 from Cold Creek, tributary to Lake Tahoe, for the irrigation of 200 acres of wild hay and pasture.

Application 11993 by Frank Globin initiates an appropriation of 2.7 cubic feet per second year-round, from Cold Creek, at a point about one hundred feet downstream from the proposed point of diversion under Application 10914, the water to be used for domestic, municipal and minor industrial purposes and for fire protection. The applicant states that he operates as a public utility, that he holds an appropriative

right of 1.8 cubic feet per second, that the area to be served includes Al Tahoe, Tahoe Sierra and nearby future subdivisions. He estimates that his water requirements will rise to 4.5 cubic feet per second by July, 1962.

Frank Globin protests Application 10914 in apprehension that the project thereunder would leave insufficient water in the stream at certain times in summer and fall to satisfy consumers dependent upon his utility. Stella V. D. Johnson protests that the project under Application 11993 would interfere with diversion of waters to which she is entitled under both prior appropriative and riparian rights. The California Department of Fish and Game protests both applications, asserting that diversion thereunder would result in destruction of trout, the water applied for exceeding at times the flow of the stream. Elwood Johnson protests both applications, asserting that he diverts at about the same point as Applicant Globin, about 1/4 mile below Applicant Johnson; he contends that the diversions the applicants propose would prevent him from exercising his prior right. Washoe County Water Conservation District, Sierra Pacific Power Company and Truckee-Carson Irrigation District, all diverters from Truckee River below Lake Tahoe, protest both applications, claiming that all of the natural flow of the Truckee River stream system is required for the satisfaction of their prior rights, including rights by virtue of the so-called 1915 Decree and the Truckee River Agreement.

The applications were the subject of a public hearing held at Sacramento on July 7, September 15 and September 16, 1953.

At the hearing session of July 7, 1953 there was preliminary discussion only; further proceedings were deferred to permit informal negotiation between the parties and to enable measurements to be made of the flow of Cold Creek.

A petition to amend Application 10914 was submitted on July 24, 1953 with a view to broadening the application to include domestic use as well as irrigation. It appears from the petition that the applicant desires to utilize most of the water sought under her application for irrigation initially but to utilize a portion of it for domestic purposes, that portion being small at first but larger as future conditions warrant. The petition was protested by Frank Globin on the same grounds as set forth in his protest against Application 10914. The petition is vague and uncertain. If the amendment were allowed the result apparently would be an application to appropriate water for irrigation purposes but containing irrelevant allegations as to potential domestic and recreational use. If considered as a petition to change the purpose of use it is inconsistent with the provision of the Administrative Code requiring a separate application for each major purpose of use. The approval of the petition appears unjustified.

At the hearing session of September 15, 1953 Engineer Raymond Nesbit testified as to recent measurements made by him of the flow of Cold Creek; Stella V. D. Johnson testified as to her land holdings, claimed water rights and past, present and intended future operations; Fred Dressler testified as to his experience in the cattle business

and as to his observation of the use of water on the Stella V. D. Johnson property; George Smith testified as to the use of water on that same property; Knox Johnson testified as to his supervision of irrigation on the Stella V. D. Johnson property since about 1940 and as to her long range plan of expansion.

At the hearing session of September 16, 1953 Attorney Orrick on behalf of the Nevada protestants made an unsworn statement as to the position of those protestants with respect to Applications 10914 and 11993; Frank Globin testified as to the public utility that he operates in conjunction with his other businesses, the history of that utility, the demands made upon it, the insufficiency of present supply, the present water rights that he claims, his obligation to water users within his territory; Engineer A. S. Wheeler testified as to the amount entering the Globin and Elwood Johnson intakes on August 15, 1947; G. H. Mellin testified as to his investigation of the Globin system in 1946 and 1953.

Subsequent to the hearing briefs were submitted on behalf of all of the parties.

Other information considered in connection with the matters at issue includes "Joint Report on the Use of Water in the Lake Tahoe Watershed", prepared by the State Engineers of Nevada and California, June, 1949; the so-called "Truckee River Agreement" and the so-called "Truckee River Final Decree", available in Office File No. 075.14.

Conclusions

From the information above set forth it is concluded that unappropriated water exists in the sources filed upon, that the amount thereof is insufficient at times, notably during August and September, to serve all of the purposes that interested parties desire it to serve, that the area within which the applicants' proposed developments are located is primarily a recreational area, that population within that area is increasing and will increase further, that the availability to that population of a water supply commensurate with its domestic and closely related needs is a matter of transcendent importance and that in view of the conditions that prevail the approval of an application to appropriate from Cold Creek for other than domestic or closely related purposes should be conditioned in favor of any appropriation for those higher uses. With respect to the petition to amend Application 10914 it is concluded that approval is unjustified in view of the ambiguity of that petition and its non-conformity with provisions of the Administrative Code.

Based upon the above conclusions it is the opinion of this office that the petition by Stella V. D. Johnson to amend Application 10914 should be denied and that Applications 10914 and 11993 should be approved and permits issued, subject to the usual terms and conditions and, in the case of Application 10914, subject to a special term and condition limiting diversions under that application to diversions that will not interfere with appropriations junior thereto for domestic or municipal purposes.

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ORDER

Applications 10914 and 11993 having been filed with the Division of Water Resources as above stated, protests having been filed, a public hearing having been held and the State Engineer now being fully informed in the premises:

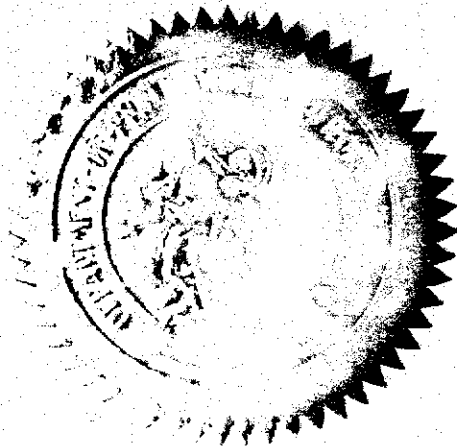
IT IS HEREBY ORDERED that Application 10914 be approved and permit issued subject to such of the usual terms and conditions as may be appropriate and subject also to the following special term and condition, to wit:

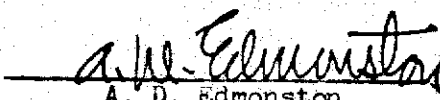
The right to divert water for irrigation purposes under this permit shall not interfere with any appropriation junior thereto from Cold Creek for domestic or municipal purposes as the same are defined in Title 23, California Administrative Code, Sections 661 and 664.

IT IS FURTHER ORDERED that the petition of July 24, 1953 by Stella V. D. Johnson to amend Application 10914 be denied.

IT IS FURTHER ORDERED that Application 11993 be approved and that a permit be issued to the applicant, 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 2nd day of March, 1955.




A. D. Edmonston
State Engineer