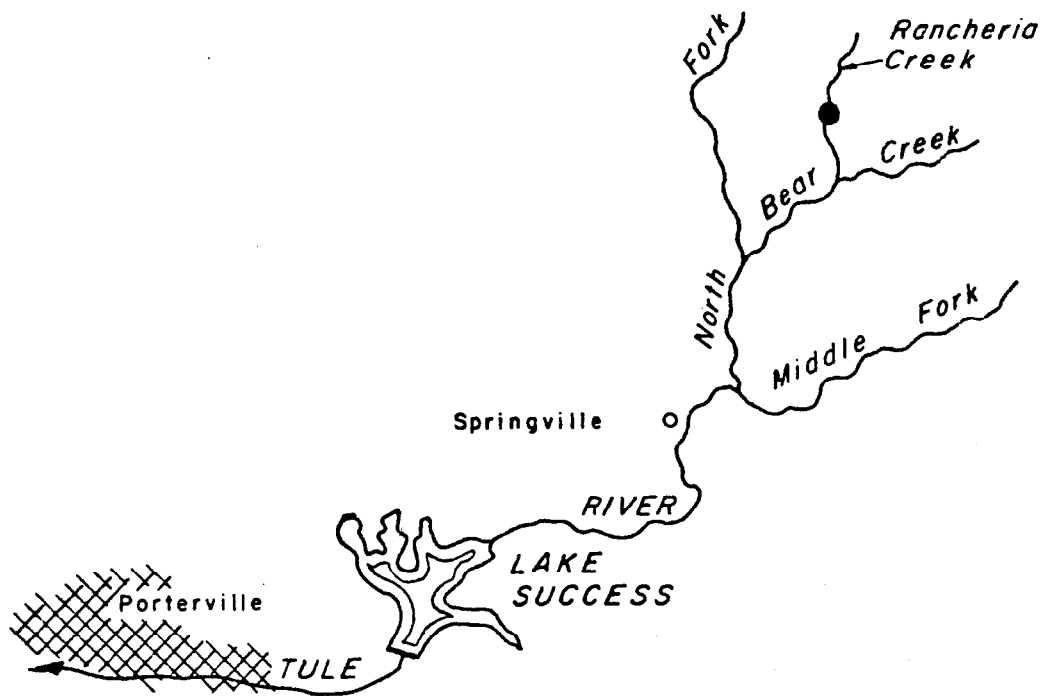


**RANCHERIA CREEK
IN TULARE COUNTY
APPLICATION 27253
DECISION 1607**



OCTOBER 1985

STATE WATER RESOURCES CONTROL BOARD



STATE OF CALIFORNIA

George Deukmejian, Governor

**STATE WATER RESOURCES
CONTROL BOARD**

Raymond V. Stone, Chairman

Darlene E. Ruiz, Vice Chairwoman

Edwin H. Finster, Member

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•
Raymond Walsh, Interim Executive Director

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STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Application 27253)	DECISION 1607
DALE C. WAGNER and DIANE ROSS,)	
Applicant,)	SOURCE: Rancheria Creek
LOWER TULE RIVER IRRIGATION)	tributary to Bear Creek
DISTRICT ET AL.,)	thence North Fork Tule
Protestants.)	River
)	COUNTY: Tulare

DECISION DENYING APPLICATION 27253

BY BOARD MEMBER RUIZ:

1.0 INTRODUCTION

Dale C. Wagner and Diane Ross (applicant) having filed Application 27253 for a permit to appropriate unappropriated water; the field investigation having been conducted on August 11, 1983 in accordance with Water Code, Section 1345, et seq.; the applicant having requested a hearing in response to the finding that no unappropriated water was available; a hearing having been held on March 19, 1985; the applicant and protestants having appeared and the evidence having been duly considered, the Board finds as follows:

2.0 SUBSTANCE OF APPLICATION

Application 27253 is for a permit to appropriate 5040 gallons per day by direct diversion from May 1 through October 31 from Rancheria Creek tributary to Bear Creek thence North Fork Tule River. The water is

sought for the beneficial uses of irrigation, stockwatering and fire protection. The maximum annual use will not exceed 2.8 acre-feet.

3.0 PROJECT DESCRIPTION

The project is located in Tulare County about 7 miles northeast of Springville, California, within the NE1/4 of NE1/4, Section 6, T20S, R30E, MDB&M. A pump would be installed at Rancheria Creek and the water pumped through 100 feet of 2-inch PVC pipe to a distribution system to irrigate 5 acres of pasture and orchard. The distribution system would consist of 600 feet of 1-1/2 inch PVC pipe.

4.0 PROTESTANTS

The application was protested by Lower Tule River Irrigation District, Vandalia Irrigation District, Campbell Moreland Ditch Company and Tulare County on the basis of injury to prior vested rights. The Department of Fish and Game (Department) sought assurance that flows would be bypassed to protect instream beneficial uses. The protests will be discussed in more detail later in our decision.

5.0 FIELD INVESTIGATION / ANALYSIS / HEARING REQUEST

Application 27253 is a minor application (Water Code Section 1348). The field investigation was conducted on August 11, 1983 in accordance with procedures for minor protested applications (Water Code Section 1345 et seq.). The staff analysis, forwarded to the parties, concluded that unappropriated water was not available and recommended denial of the application. A hearing was requested by the applicant pursuant to Water Code Section 1347.

6.0 UNRESOLVED ISSUES

The request for hearing specified that the availability of unappropriated water was an unresolved issue. Because the staff analysis recommended denial of the application, the Department's request for bypass flows to protect instream beneficial uses is also an unresolved issue. Evidence regarding these issues was received during the hearing held on March 19, 1985.

7.0 APPLICABLE LAW

In order to issue a permit, the Board must find that unappropriated water is available (Water Code Section 1375). Unappropriated water includes water that has not been previously appropriated and water not diverted by riparian use (Water Code Section 1202). The use of water for preservation of fish and wildlife resources is a beneficial use of water. When determining the amount of water available for appropriation, the Board must also take into account the water required for preservation of fish and wildlife (Water Code Section 1243).

8.0 PRIOR BOARD DECISION

Decision 1018 was adopted on June 30, 1961 by the State Water Rights Board, predecessor to the State Water Resources Control Board. Finding that unappropriated water was not available, the decision denied 21 applications to appropriate water from streams in the upper watershed of the Tule River. The decision includes an extensive analysis

of the availability of unappropriated water and concluded that "evidence shows that waters of Tule River have been completely used during all but infrequent flood years such as 1943 and 1952 under claim of prior rights in the Tule River Delta and Tulare Lake area" and "that the water which could be appropriated in flood years occurs too irregularly and infrequently to be of any value to the applicants."

9.0 APPLICANT'S CONTENTIONS

That unappropriated water is available is based on six contentions by the applicant. No evidence was presented for the contention that the protestants have forfeited by nonuse or abandoned their pre-1914 rights to divert water from the Tule River (Applicant 1, p. 3, item 2). Another contention, that water was available in Rancheria Creek on those occasions when it lacked continuity with the North Fork Tule River, was dropped by the applicant (Applicant 1, p. 4, item 5 and T,6:20-25).

Common to the remaining contentions are two propositions: (1) unappropriated water is present in the watershed at locations other than the applicant's proposed point of diversion, and (2) such water is available for appropriation by applicant's project. These contentions are briefly described in the following paragraphs.

9.1 Water at Success Reservoir

Located on the Tule River about 5 miles east of Porterville, Success Reservoir is a flood control project operated by the Army Corps of Engineers (Corps). No post-1914 appropriative rights have been obtained for (1) the water diverted to temporary storage at the

reservoir and (2) water held in dead storage. Contending that these waters have not been appropriated under post-1914 water rights, the applicant asserts they are available for appropriation by his project on a tributary some 15 miles above the reservoir.

9.2 Proposal to Enlarge Success Reservoir

The applicant contends that (1) the California Department of Water Resources (DWR) plans to enlarge the capacity of Success Reservoir and (2) that, by inference, such plans indicate the existence of unappropriated water (Applicant 1, p. 4, item 6). This argument is most fully stated in the applicant's letter of August 11, 1983 (Staff 1, letter of same date). Other than the applicant's bare assertion, no evidence was introduced to support this proposition or the preceding proposition.

9.3 Illegal Diverters

The applicant contends that there are at least 12 illegal diverters in the Tule River watershed and that the protestants' failure to enjoin such use makes the water available for appropriation (Applicant 1, p. 4, item 4). Water Code Section 1202(c), he argues, provides that water is available for appropriation if it is not being put to the beneficial use for which it was appropriated by protestants (T,25:20-26:23). No evidence of probative value was introduced to demonstrate the existence of illegal diverters. Further, none of the alleged illegal diverters are upstream from the applicant's proposed project such that more water would be physically available to the applicant if the diversions were halted (T,24:16-20). In any event, all that

terminating illegal diversions would do would be to restore to protestants their rights.

10.0 PROTESTS

10.1 Irrigation Districts

The protesting irrigation districts made four principal points. First, the districts have prior rights to the use of the water in Tule River. Second, after a lengthy hearing by this Board's predecessor, unappropriated water was found to be unavailable in the river (Decision 1018). Third, absent proof of changed circumstances the finding of unavailability should stand; and, finally, the applicant failed to demonstrate that unappropriated water is available (T,48:6-50:20).

10.2 Department of Fish and Game

Evidence was presented by the Department demonstrating that downstream from the proposed point of diversion Rancheria Creek supports a fishery resource (T,92:1-94:20). The Department requested that any approval of the application include conditions requiring the applicant to construct the diversion facilities in a manner that would assure a 0.5 cubic foot per second bypass of water for fishery resources (T,94:21-95:10). The applicant made no objection to the Department's recommendation (T,95:11-96:11).

11.0 AVAILABILITY OF UNAPPROPRIATED WATER

11.1 Unappropriated Water is Not Available

In general, unappropriated water is determined by (1) quantifying the water physically available in a watershed and (2) subtracting the

needs of riparian users and the claims of the holders of prior rights. The quantity of water surplus to the needs of riparians users and the claims of the holders of prior rights is available for appropriation. The protestants' claims are exercised by diversions below Success Reservoir. Other tributaries join the Tule River (1) below the applicant's proposed diversion point and (2) above Success Reservoir. Because the protestants' claims may be satisfied from any and all tributaries to the Tule River, quantification of available water should be in relation to the water available to the protestants.

The Board, in Decision 1018, concluded that the water of the Tule River was fully appropriated except during infrequent flood years (Decision 1018, p. 14). The protestants contend, absent changed circumstances, that the Board should be bound by the decision. The applicant was not a party to the decision and is not bound by the doctrine of res judicata; however, because the applicant made no criticism of the findings in Decision 1018 nor offered any evidence as to the quantity of water available in the watershed, encompassing sufficient years for meaningful analysis, we will use the findings in the decision to aid in our analysis.

Tables II and III in Decision 1018, when combined, show inflow to Success Reservoir and represent very nearly total flow of the Tule River available to the protestants (Decision 1018, pp. 5-18). The following table is extracted from Tables II and III and shows the flows available to the protestants during the months in which the applicant seeks to divert water at an upstream location.

AVERAGE MONTHLY
INFLOW TO SUCCESS RESERVOIR
May 1949 - October 1958

	MAY	JUNE	JULY	AUGUST	SEPTEMBER	OCTOBER
Acre-Feet	24030	9922	2450	710	452	716
Cubic-Feet per Second	404	167	41	12	8	12

Judicial decisions are cited by the protestants as recognition of their rights to divert water (Glover v. Mitchell (1910), Woods Central Irrigation District Company v. Power Slough Ditch Company (1911), Poplar Irrigation Company v. Howard (1916), LaMarsna v. Woods Central Irrigation District Company (1928) and Jones v. Pleasant Valley Canal Company (1931), Tulare County Superior Court Cases Nos. 5840, 5353, 7004, 16899 and 18018, respectively). Because the five decrees may include determinations of the same rights, only Decree No. 5840 for Glover v. Mitchell (1910) was used to compute the prior rights claimed by the protestants and others. Standing alone the decree sets forth rights to water totaling approximately 940 cfs in year-round diversions, a quantity which is more than double the quantity of water available in the river to the protestants on an average monthly basis during the months of May through October. While there is significant variance in monthly flows from one water year to another, flows

exceeding 940 cfs are very infrequent. For example, during the 10-year periods analyzed by Decision 1018, flows exceeding 940 cfs would have occurred only during May of 1952.

The weight that should be given to the rights recognized by Glover v. Mitchell may be questioned. First, the diversion rights recognized by the decree for summer months are so much higher than actual flows in the Tule River it is unlikely such rights could actually have been perfected. Second, the diversion rights recognized by the decree may be more a product of stipulated agreements than of a full contest of claims. Finally, the case was brought by owners of riparian lands along the Tule River west of Porterville against upstream diverters and the portion of the decree respecting their concerns, the heart of the controversy, is a prohibition of diversion under upstream allocations totalling about 790 cfs from March 19 to April 10 unless 400 cfs is flowing in the river at the Oettle Bridge about 12 miles downstream from Success Dam. Nevertheless, these allocations indicate that available water has been fully used under various claims of right for many years and that no unappropriated water is available for appropriation.

11.2 Success Reservoir Water Foreign in Source from Rancheria Creek

The applicant seeks a permit to directly divert water from Rancheria Creek, a tributary, some 15 miles above Success Reservoir. A flood control project, the reservoir temporarily impounds and then releases the peak spring runoff from snowmelt in the Sierras. An examination of topographical maps displaying the areal extent and elevation of

Rancheria Creek vis-a-vis other tributaries in the watershed indicates that Rancheria Creek can be expected to contribute only a small fraction of the water temporarily impounded at Success Reservoir. In other words, most of the water in the reservoir is from sources other than Rancheria Creek and is never physically available for appropriation at the applicant's proposed point of diversion.

11.3 Success Reservoir Water Foreign in Time from Proposed Season of Diversion

Most of the water impounded in Success Reservoir enters the reservoir before the critical dry months in the proposed May 1 through October 31 season of diversion for which water is sought. For instance, applicant's Exhibit 2 shows that in 1962-63 and 1983-84 inflow exceeded the outflow from the reservoir during most of the months from November through June. Most of the water impounded in the reservoir that might have originated in Rancheria Creek would have left the creek before the end of June, and June appears to be a marginal month. Accordingly, this water would not have been in Rancheria Creek at the applicant's point of diversion for appropriation after June.

11.4 DWR and Illegal Diverters

Whether or not DWR might have plans to enlarge Success Dam and Reservoir, it is clear from the paragraphs immediately preceding that such plans do not raise an inference that some quantity of unappropriated water is physically available for direct diversion at the applicant's proposed point of diversion. Similarly, that there may be illegal diverters on other tributaries to the Tule River does not

raise an inference that unappropriated water is physically available to the applicant.

12.0 SUCCESS RESERVOIR WATER RIGHTS

The applicant is correct, apparently, in asserting that Success Reservoir is being operated as a water supply project for consumptive use purposes without either a water right permit or license to appropriate the water. Flood control projects impounding water temporarily and immediately releasing the water, once the threat of flooding passes, to the downstream natural channel do not require an appropriative right. The Board and its predecessors have taken the view that one sine qua non of an appropriation is that water be put to some beneficial use (Section 1240). While projects for flood control have a beneficial purpose, the mere slowing of runoff is not a beneficial use of water.

Review of the protesting irrigation districts' contractual relations with the Corps, however, indicate the reservoir regulates streamflow for delivery of water for downstream redirection for purposes other than flood control (Districts, Exhibits 3, 4, 5, 6 and 7). Federal legislation authorizes the Corps to enter into contractual agreements to supply water from flood control projects for consumptive use purposes. (Flood Control Act of 1944, 58 Stat. 887). The Corps, however, is also required to comply with state law respecting the appropriation of water (Act of July 3, 1958; 72 Stat. 297).

The protesting irrigation districts' claim that storage permits are not needed at Success Reservoir because the waters of the Tule River

were fully used prior to 1914 is questionable (T,52:16-53:15). That the waters of the Tule River were fully used before 1914 does not answer whether storage permits are required. Prior to 1914 it appears the water was fully utilized by riparian diverters, pre-1914 appropriators and by overlying users of groundwater recharged by the river (Decision 1018, p. 7 and 12; T,52:14-53:15). Judicial decisions cited by the districts as recognition of the alleged rights to store water only identify the rights of riparian diverters and pre-1914 holders of diversion rights expressed in direct diversion amounts (Glover v. Mitchell (1910), Woods Central Irrigation District Company v. Power Slough Ditch Company (1911), Poplar Irrigation Company v. Howard (1916), LaMarsna v. Woods Central Irrigation District Company (1928) and Jones v. Pleasant Valley Canal Company (1931), Tulare County Superior Court Cases Nos. 5840, 5353, 7004, 16899 and 18018, respectively). None of these decisions expressly identify any pre-1914 appropriative right to divert Tule River water to storage above or below ground.

Other records of the Board, of which we take official notice, indicate that pre-1914 rights to store water at Tulare Lake have been claimed as the basis of the storage rights at Success Reservoir (see record for hearing on Application 10940). Some of the pre-1914 rights recognized by the decrees and quantified in terms of direct diversion amounts may be the basis for claimed storage rights; however, the existing record does not include sufficient information to evaluate this possibility. Because the protestants' apparent direct diversion

rights exceed flows found in the Tule River under all but infrequent occurrences, further inquiry into this subject is unnecessary to resolve the question of whether unappropriated water is available for the applicant.

13.0 CONCLUSIONS

We find the applicant has failed to show that unappropriated water is available. Accordingly, Application 27253 shall be denied. Because the application is denied, deciding what permit conditions should be adopted in response to the Department's protest is unnecessary.

14.0 ORDER

IT IS HEREBY ORDERED that Application 27253 is denied.

CERTIFICATION


The undersigned, Executive Director of the State Water Resources Control Board, does hereby certify that the foregoing is a full, true, and correct copy of a Decision duly and regularly adopted at a meeting of the State Water Resources Control Board held on October 17, 1985.

AYE: Raymond V. Stone
Darlene E. Ruiz
E. H. Finster
E. M. Samaniego

NO: None

ABSENT: None

ABSTAIN: None



Raymond Walsh
Interim Executive Director



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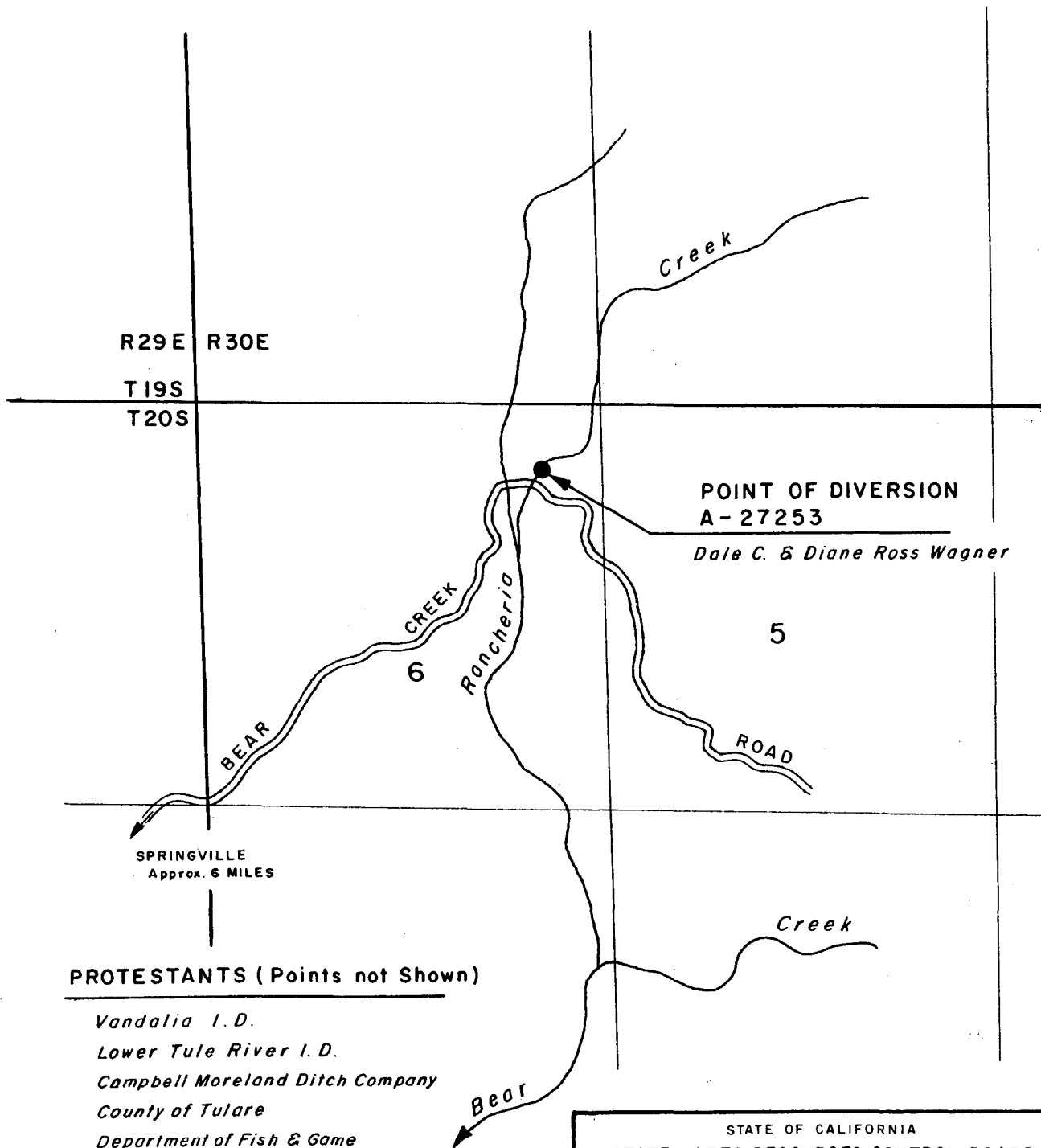
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**POINT OF DIVERSION
A-27253**
Dale C. & Diane Ross Wagner

PROTESTANTS (Points not Shown)
*Vandalia I.D.
Lower Tule River I.D.
Campbell Moreland Ditch Company
County of Tulare
Department of Fish & Game*



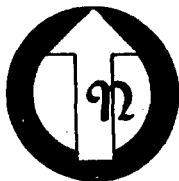
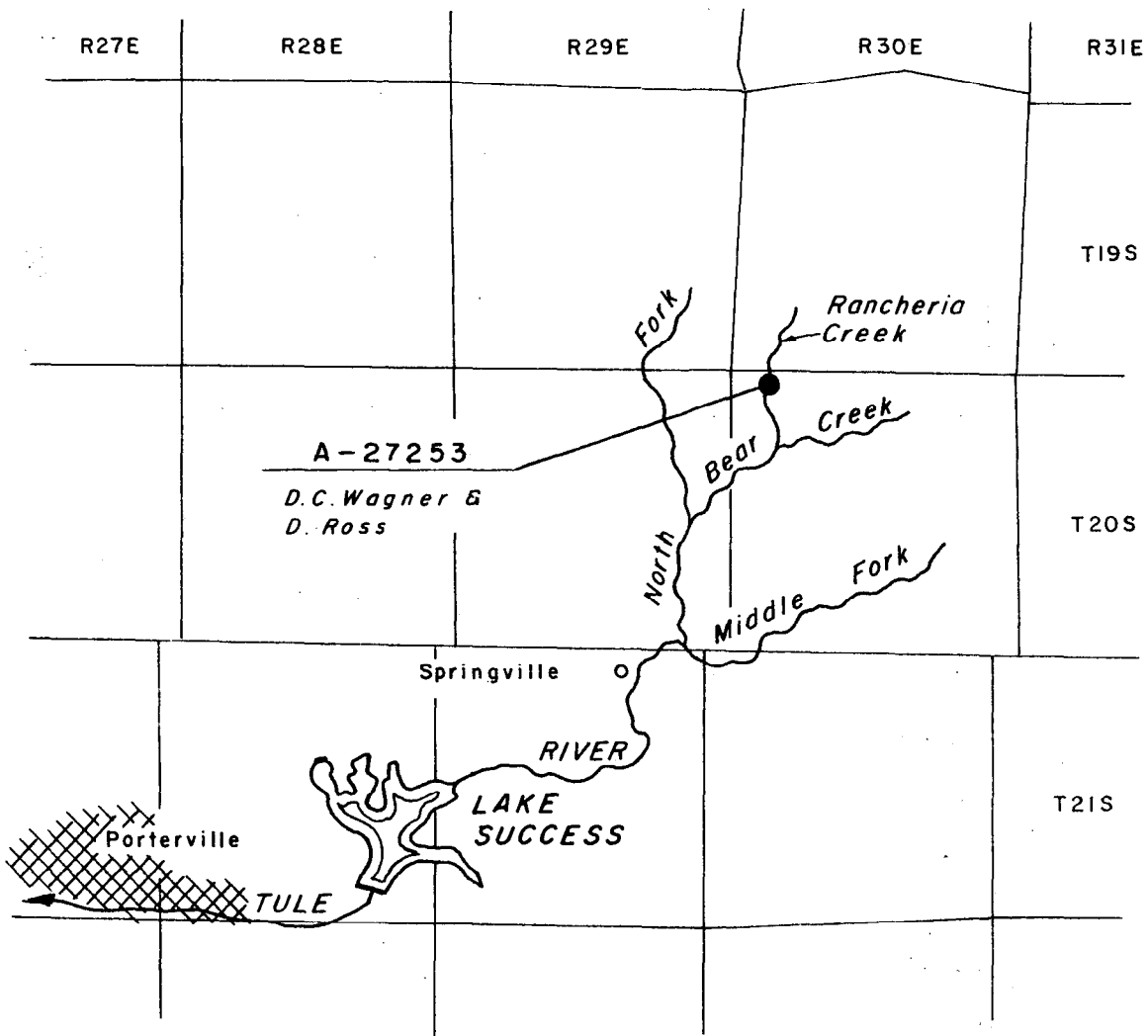
**M.D.B&M.
TULARE CO.**

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD
DIVISION OF WATER RIGHTS

**APPLICATION
27253**

SCALE
1000' 0 1000' 3000 FEET

DATE: 1/31/85	DRAWN: ECW	CHECKED: LKB	DWG: 3329
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TULARE CO.
M.D.B. & M

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD
DIVISION OF WATER RIGHTS

APPLICATION
27253

SCALE
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DATE: 8-19-85	DRAWN: -ECW	CHECKED: L.K.B.	DWG: 3343
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