

see also WR 80-13
WR 80-18
82-10

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Application 24758)	Decision: D1558
ARTHUR ANDREOTTI,)	Source: Unnamed Stream
Applicant)	and Indian Creek
UNITED STATES WATER AND POWER)	County: Colusa
RESOURCES SERVICE, ET AL.,)	
Protestants)	

DECISION APPROVING APPLICATION
24758 IN PART

BY THE BOARD:

Arthur Andreotti having filed Application 24758 for a permit to appropriate unappropriated water; protests having been received; a hearing having been held by Board Member Adams on April 26, 1978; applicants and protestants having presented evidence; the evidence received at the hearing having been duly considered; the Board finds as follows:

Substance of the Application

1. This application is for a permit to appropriate 3,200 acre-feet per annum (afa) by storage from Indian Creek and an unnamed stream tributary to Indian Creek in Colusa County to be collected from October 1 to July 1 for irrigation. The points of diversion are located within the SE $\frac{1}{4}$ of NE $\frac{1}{4}$ and the NW $\frac{1}{4}$ of SE $\frac{1}{4}$ of Section 35, T17N, R6W, MDB&M.

Applicants Project

2. The applicant plans to construct an earthfill dam which will be about 35 feet high by 1,150 feet long. The location of the dam is immediately upstream of the confluence of Indian Creek and of an unnamed stream tributary to Indian Creek. The dam spans both watersheds and therefore collects water to storage from Indian Creek and from the unnamed stream.

The reservoir impounded by the dam will have a surface area of 199 acres and a storage capacity of 3,200 acre-feet. The water will supplement a dry farming operation.

Background

3. On November 14, 1904, the Glenn-Colusa Irrigation District (GCID) initiated a pre-1914 appropriative right to divert by direct diversion up to 20,315 acre-feet per annum (afa) from Stony Creek for the period from March 15 to October 1 at a rate not to exceed 500 cubic feet per second (cfs).

4. On October 10, 1906, the United States Bureau of Reclamation (since renamed the United States Water and Power Resources Service - herein called the Service) initiated a pre-1914 appropriative right to divert by direct diversion 85,050 afa from Stony Creek for the period from March 15 to October 15 at a rate not to exceed 279 cfs.

5. On October 11, 1906, the Service initiated a pre-1914 appropriative right to store 51,000 afa of the waters of Little Stony Creek in the East Park reservoir of the Orland Project by means of the East Park Storage Dam. The present capacity of East Park Reservoir is 50,880 acre-feet. The season of diversion is year-round. East Park reservoir was completed in 1910 and the first use of water commenced in 1910.

6. On March 23, 1910, the Service initiated a pre-1914 appropriative right to divert by direct diversion up to 28,350 afa from Stony Creek from March 15 to October 15 at a rate not to exceed 93 cfs.

7. On March 25, 1913, the Service initiated a pre-1914 appropriative right to divert 250 cubic feet per second of the waters of Stony Creek at Rainbow Diversion Dam. The water diverted from Stony Creek is conveyed in the East Park Feeder Canal to East Park Reservoir for storage. The season

of diversion is year-round. The present capacity of the East Park Feeder Canal is 250 cubic feet per second.

8. On May 28, 1918, the United States commenced a quiet title action in the United States District Court, Northern District, Second Division, entitled United States of America v. H. C. Angle, et al., in Equity No. 30, referred to herein as the "Angle" case. The Court entered a final decree in the Angle case on January 13, 1930.

9. The Angle Decree confirmed the existence of the appropriative rights of the Service and of the Glenn-Colusa Irrigation District mentioned above and also concluded that one Mary Ann Newton did not have any right title or interest in or to any of the waters or use of the waters at Indian Creek for the following described parcel of land:

SE $\frac{1}{4}$ NE $\frac{1}{4}$, E $\frac{1}{2}$ SE $\frac{1}{4}$, Section 35, T17N, R6W, MDB&M, County of Colusa.

10. On February 17, 1921, the Service filed Application 2212 for the appropriation of 50,200 afa to storage of the waters of Stony Creek for the period from about November 1st to May 1st in Stony Gorge Reservoir.^{1/} In 1944 License 2652 was issued confirming the right to divert water as set forth above. Stony Gorge Reservoir is downstream of the confluence of Stony Creek and Little Stony Creek.

11. The above decreed rights and rights acquired under Application 2212 of the Service are the major water rights held for the benefit of the Orland Project. The Orland Project provides irrigation water to about 20,000 acres of irrigable land surrounding the Town of Orland in the County of Glenn. The users of water from the Orland Project have formed the Orland Unit Water User's Association (Orland)

^{1/}Application 2212 was originally filed for appropriation of 115,000 afa. An amended application reduced the amount to 50,200 afa.

12. On October 1, 1954, Orland assumed operation and maintenance of the Orland Project under terms of a contract with the Service.

13. On April 30, 1958, the California Department of Water Resources filed Application 18115 for the appropriation of 160,000 afa from Stony Creek at the Black Butte Reservoir site. On September 18, 1959, Application 18115 was assigned to the California Water Commission in accordance with Chapter 2101 of Statutes of 1959. On November 15, 1960, the California Water Commission assigned Application 18115 to the Service subject to the following condition, among others:

"The prior rights of any county in which the water covered by the application originates to the use of such water as may be necessary for the development of the county, as provided in Section 10505 of the Water Code;"

14. The State Water Rights Board adopted Decision 1100 on September 26, 1962. Decision 1100 authorized the issuance of a permit on Application 18115 with a season of diversion from November 1 to the succeeding April 30. Subsequently, Permit 13776 was issued to the Service on Application 18115. Condition 7 of Permit 13776 states.

"In conformity with Water Code Section 10505, this permit shall be subject to any and all rights of any county in which the water sought to be appropriated originates to the extent any such water may be necessary for the development of the county."

15. The Black Butte Project was added to the Federal Central Valley Project in 1970 by the Act of October 23, 1970, Public Law 91-502, (84 Stat. 1097). The Black Butte Project does not normally provide water to the Orland Project. However, exchanges of water between the Orland Project and the Central Valley Project have occurred.

16. Orland and Service have operated East Park Reservoir, the

Rainbow Diversion Dam, and Stony Gorge Reservoir in a manner to maximize the storage of water in both reservoirs. Since the watershed tributary to East Park Reservoir is much smaller than the watershed tributary to Stony Gorge Reservoir, they try to fill East Park Reservoir first by diverting water from Stony Creek at the Rainbow Diversion Dam to East Park Reservoir.

Protests

17. Orland, the Service and William H. Deane and Henry H. Deane (Deane) filed protests against the approval of Application 24578 on the basis of injury to vested rights. In addition, protestants Deane also alleged that approval of Application 24578 would be against the public interest and have an adverse environmental impact.

18. Protestant Service and Protestant Orland alleged interference with their prior rights for the Orland Project as set forth in the Angle Decree. Protestant Service's main concern was reduction of natural flow into East Park Reservoir. Protestant Service and Protestant Orland stated in their protests that there were no conditions under which their protests could be dismissed. At the hearing protestant Service further alleged that the approval of Application 24578 was against the public interest because of the problems of policing the proposed diversion to assure that the applicant was not diverting water to which the Orland Project is entitled. As an alternative position, protestant Service recommended that no diversion of water be allowed until the natural inflow of East Park Reservoir equaled or exceeded 51,000 acre-feet and that the season of diversion end on March 15 of each year. Since the protests of Protestant Service and of Protestant Orland concerned the availability of unappropriated water, they will be discussed in detail in that portion of the decision.

19. Protestants Deane own property immediately downstream of the proposed reservoir. They have filed Statement of Water Diversion and Use (S9091) which indicates a use of about 55 afa between February and September for irrigation of 25 acres of pasture and for watering 30 head of stock. Protestants Deane pump from Indian Creek in the exercise of an apparent riparian right whenever water is available and they also have a well for a supplemental supply. Protestants Deane also use the full flow of Indian Creek which annually replenishes or replaces sand and gravel excavated by the Deanes each year from the stream channel as it passes through their property.

20. Protestants Deane are successors in interest to the property owned by one Mary Ann Newton at the time the Angle Decree was entered. This property is described in paragraph 9 of the decision. The United States District Court determined that Mary Ann Newton did not have any right, title, or interest to any of the waters of Indian Creek for said property and that the assigns or successors in interest are debarred and estopped from claiming or asserting any right, title, or interest in the waters of Indian Creek. This determination is binding on the Board, and Protestants Deane protest insofar as it alleges injury to vested rights must be dismissed. Protestants Deane other bases of protest are considered, infra.

Protestant Deane also allege that the project would interfere with annual gravel restoration. The Supreme Court held in a unanimous decision on Joslin v. Marin Municipal Water District, 67 Cal. 2d, 132, 60 Cal. Repr. 377 (1967), that a downstream riparian owner was not entitled to water for such purposes when it would prevent appropriation of water upstream. This part of the Deane protest, therefore, is without merit.

Availability of Unappropriated Water

21. The watershed tributary to the applicant's proposed reservoir has an area of about 6,700 acres. The elevation in the applicant's watershed ranges from 1,200 feet above sea level to about 2,500 feet. In contrast, the watershed tributary to East Park Reservoir has an area of about 77,800 acres and the elevation within said watershed ranges from 1,200 feet above sea level to 6,000 feet above sea level. Consequently, the applicant's watershed is about nine percent of the watershed tributary to East Park Reservoir. Since the applicant's watershed is considerably lower in mean elevation than the watershed tributary to East Park Reservoir, it produces less water per acre of watershed than the watershed tributary to East Park Reservoir. The average runoff to the Andreotti dam site is in the order of 6,000 afa. The record clearly shows, however, that the runoff is very erratic in the Stony Creek watershed. Therefore, an average may not be the best method of estimating whether water is available a sufficient period of time to justify granting a water right entitlement. Other methods of estimating runoff confirm that 3,200 afa would be available at the applicant's point of diversion more than fifty percent of the years. Accordingly, water is physically present in the stream frequently enough to justify construction of a reservoir for carry-over storage. The real issue here is whether it is needed for prior rights downstream. This issue may be conveniently analyzed by considering the availability of unappropriated water to supply the applicant, for the Stony Creek watershed above Stony Gorge Reservoir (Upper Stony Creek watershed) and for the Stony Creek watershed above the point of diversion for GCID (Lower Stony Creek watershed).

22. Protestant Service submitted Exhibit 2 which showed these years when the natural inflow to East Park Reservoir was less than 51,000 acre-feet for the water years 1909-1977. Exhibit 2 indicates that in 42 years or 60 percent of the time the natural inflow was less than 51,000 acre-feet. Exhibit 2 further indicates that East Park Reservoir did not fill in 14 years or 20 percent of the time even with the addition of water by the East Park Feeder Canal and with carryover storage. The position of Protestant Service and Protestant Orland as we understand it is that all the unappropriated water in Little Stony Creek upstream of East Park Reservoir was appropriated with a priority of 1906 and that the addition of foreign water from the East Park Feeder Canal in subsequent years to fill East Park Reservoir did not change the fact that the natural flow of Little Stony Creek was appropriated with a priority of 1906. Although superficially this argument appears supported by the sequence of the appropriation of water by Protestant Service, the subsequent method of operation of East Park Reservoir and the East Park Feeder Canal negate their argument. As explained supra, Protestant Service and Protestant Orland try to fill East Park Reservoir first by diverting water from Stony Creek by means of the Rainbow Diversion Dam and East Park Feeder Canal to East Park Reservoir. Stony Gorge Reservoir fills in more years than does East Park. The legal consequences of this operation is that unappropriated water exists during the winter in the Little Stony Creek watershed above East Park Reservoir. Since Stony Gorge Reservoir fills in the majority of years, unappropriated water exists also in the Upper Stony Creek watershed. However, the Board must assure that these prior rights are protected. The inclusion of a permit term requiring release of water collected during the current storage season to the extent necessary to fill East Park and Stony Gorge Reservoirs, when those reservoirs do not fill by the end of the spring runoff season, assures that those prior rights are protected.

23. Permits for winter storage issued for reservoirs in the Stony Creek watershed prior to Decision D1100 approving the Black Butte project were generally limited to the season from December 1 to March 15. The rather limited storage season was to protect pre-1914 direct diversion rights of the Glenn Colusa Irrigation District and the Service set forth in the Angle Decree. In some permits storage during November was allowed during wet years.

24. Decision D1100 of the Board analyzed the availability of unappropriated water and granted a diversion season of November 1 to the succeeding April 30 for storage on Stony Creek under Application 18115, a State filing. Since this application was made subject to any and all rights of any county of origin and Applicant Andreotti is in a county of origin, applicant's season should be at least as long as that granted for Black Butte Reservoir. Hence, the season should be from November 1 to April 30. Special permit terms will require release of water from the Andreotti Reservoir during low runoff years, when storage is adverse to the rights at East Park and Stony Gorge. The rate of release should be of the maximum rate possible not to exceed the capacity of the stream channel.

Environmental Considerations

25. Protestant Deane alleged that the applicant's proposed diversion would cause the following two adverse effects: (1) a reduction in groundwater recharge and (2) a loss of live stream aesthetics. We believe that these concerns are insignificant for several reasons. The watershed of Indian Creek and of the unnamed stream is such that the flows of these streams fluctuate greatly in response to the erratic precipitation. During high flow periods it is well understood by the Board that most of the water flowing in a stream channel will not have the opportunity to move from surface flow into the underflow

or into adjacent groundwater basin, if any exists, because of the slower rate of movement of water into and through alluvial gravels. If, on the other hand, these large flows are captured in an upstream reservoir and then released at a slower rate, the quantity of water that will move into the underflow or adjacent groundwater basins will be proportionately much greater than without such regulation. During wet years the environmental concerns expressed by Protestants Deane will not be a problem because of the high flows. During dry years the applicant would have to release any water stored in conformance with the condition specified in paragraph 22 of the decision. In those years the applicant's reservoir will provide a benefit to Protestants Deane because it will regulate the flows.

26. The Board has prepared a Negative Declaration in accordance with the California Environmental Quality Act (Public Resources Code Section 21000, et seq.) and the State Guidelines. The Board determines that there will be no significant effect on the environment as a result of the project.

Public Interest

27. The Service alleges that the approval of Application 24758 is against the public interest because of the problems of policing the proposed diversion to assure that the applicant does not divert water to which the Orland Project is entitled. In part, this problem is inherent in any approval of an application upstream of a prior right. This allegation has never been a sufficient basis for denial of the pending application. However, the Board will include standard permit term 11 in any permit issued on Application 24758. The term allows the Service reasonable access to the applicant's project to determine compliance with the conditions of the permit.

28. Protestants Deane also allege that the approval of Application 24758 would be against the public interest. However, no evidence was offered in support of this contention, and we find no public interest basis for the denial of Application 24758.

Conclusions

29. From the foregoing findings, the Board concludes that Application 24758 should be approved in part and that a permit should be issued to the applicant subject to the limitations and conditions set forth in the following order.

ORDER

IT IS HEREBY ORDERED that Application 24758 be approved and that a permit be issued to the applicant subject to vested rights. The permit shall contain all applicable standard permit terms (5i, 6, 7, 10, 11, 12 and 13)* in addition to the following limitations and conditions.

1. The water appropriated shall be limited to the quantity which can be beneficially used and shall not exceed 3,200 acre-feet per annum to be collected from November 1 of each year to April 30 the succeeding year.

2. Construction work shall be completed by December 1, 1983.

3. Complete application of the water to the proposed use shall be made by December 1, 1985.

4. Permittee shall install and maintain an outlet pipe of adequate capacity in his dam as near as practicable to the bottom of the natural stream channel, or provide other means satisfactory to the State Water Resources Control Board, in order that water entering the reservoir which is not authorized under this permit may be released.

*The Board maintains a list of standard permit terms. Copies of these are available upon request.

8. The State Water Resources Control Board reserves jurisdiction over this permit to change the season of diversion to conform to the results of a comprehensive analysis of the availability of unappropriated water in the Sacramento River Basin. Action to change the season of diversion will be taken only after notice to interested parties and opportunity for hearing.

9. This permit (license) is subject to prior rights. Permittee (licensee) is put on notice that during some years water will not be available for diversion during portions or all of the season authorized herein. The annual variations in demands and hydrologic conditions in the Sacramento River Basin are such that in any year of water scarcity the season of diversion authorized herein may be reduced or completely eliminated on order of this Board made after notice to interested parties and opportunity for hearing.

10. No diversion is authorized by this permit when satisfaction of inbasin entitlements requires release of supplemental Project water. The Board shall advise permittee of the probability of imminent curtailment of diversions as far in advance as practicable based on anticipated requirements for supplemental Project water provided by the Central Valley Project or the State Water Project operators. The Board shall notify the permittee of curtailment of diversions when it finds that no water is available for diversion under this permit.

For the purpose of initially determining supplemental Project water required for inbasin entitlements, the following definitions shall apply:

- a. Inbasin entitlements are defined as all rights to divert water from streams tributary to the Sacramento-San Joaquin Delta or the Delta for use within the respective basins of origin or the Legal Delta, unavoidable natural requirements for riparian habitat and conveyance losses, and flows required by the Board

for maintenance of water quality and fish and wildlife.

Export diversions and Project carriage water are specifically excluded from the definition of inbasin entitlements.

- b. Supplemental Project water is defined as water imported to the basin by the Projects, and water released from Project storage, which is in excess of water required for Project export and Project inbasin deliveries.

Notice of curtailment of diversion under this term shall not be issued by the Board until:

1. Project operators jointly develop and demonstrate to the Board a reasonably accurate method of calculating supplemental Project water.
2. The Board has approved the method of calculating supplemental Project water and has confirmed the definitions of inbasin entitlements and supplemental Project water after public hearing.
3. The Project operators have notified the Board that the release of supplemental Project water is imminent or has occurred. Such notice should include the times and amounts of releases or potential releases.
4. The Board finds that supplemental Project water has been released or will be released.

Dated: June 19, 1980

/S/ CARLA M. BARD
Carla M. Bard, Chairwoman

/S/ JILL B. DUNLAP
Jill B. Dunlap, Member

/S/ WILLIAM J. MILLER
William J. Miller, Vice-Chairman

/S/ F. K. ALJIBURY
F. K. Aljibury, Member

/S/ L. L. MITCHELL
L. L. Mitchell, Member