

ORIGINAL

Decision 82 07 026 JUL 21 1982

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application)
of Berry Creek Water Company, a)
California corporation, to borrow)
funds under the Safe Drinking)
Water Bond Act, and to add a)
surcharge to water rates to repay)
the principal and interest on such)
loan.)

Application 60513
(Filed May 4, 1981;
reopened December 1, 1981)

Martin McDonough, Attorney at Law, for
Darwin R. Datwyler, petitioner.
Jeffrey A. Meith, Attorney at Law, for
Berry Creek Water Company, Inc.,
applicant and respondent.

FINAL OPINION

Procedural History

Berry Creek Water Company, Inc. (BCWC), a California corporation and a public utility, maintains its offices in Oroville, Butte County, and serves approximately 40 customers in the Ponderosa Pines subdivision 17 miles northeast of Oroville in the unincorporated community of Berry Creek. On May 4, 1981, it filed this application to obtain our approval under Public Utilities (PU) Code §§ 816-851 to enter into a contract with the State Department of Water Resources for Safe Drinking Water Bond Act (SDWBA) loans. (See Water Code §§ 13850 et seq.)

The loan amount requested is \$61,903 for a 35-year term, available under SDWBA at 7% interest. The application also included a request for a surcharge to rates to cover the cost of the loan.

There were no protests to the application and on September 15, 1981 we issued Decision (D.) 93534 granting the relief BCWC requested. We commented (pp. 203):

"Berry Creek has serious deficiencies within its system including inadequate water treatment and storage capacity facilities. The present chlorination treatment is inadequate for producing water meeting primary drinking water quality standards. Since the chlorinated water is stored in an open earthen reservoir before it enters the distribution system, it is subject to excessive bacteriological and turbidity levels because of contamination caused by animals, birds, windblown debris, and surface runoff.

"Berry Creek proposes to correct the deficiencies in its water system by constructing new water treatment facilities including filtration equipment, installing a 60,000-gallon covered storage tank, and installing approximately 1,000 feet of 8-inch mains to connect the water treatment and storage facilities with the existing distribution system.

"The SDWBA states, among other things, that water utilities failing to meet California Health and Safety Code standards and which cannot otherwise finance necessary plant improvements may apply to the California Department of Water Resources (DWR) for low interest loans. The California Department of Health Service (DHS) is required by SDWBA to analyze the public health issues and determine plant improvements needed to meet water quality standards. DWR assesses financial need and acts as the lending agency and fiscal administrator. Before a loan is granted, the applicant must demonstrate to DWR its ability to repay the loan and show that it has taken steps to maximize water conservation. Under the provisions of Public Utilities (PU) Code Sections 816 through 851, public utility water companies must obtain authorization from the Commission to enter into any long-term loan.

PU Code Section 454 requires a public utility water company to obtain Commission approval for rate increases.

"The DHS and Butte County Department of Health have reviewed the Berry Creek loan proposal and have set forth a summary of construction to be undertaken with the loan proceeds. By letter dated February 3, 1981, DWR informed Berry Creek of its eligibility for a loan under the SDWBA."

We then reviewed the items of construction, the financing, and the surcharge schedule. The decision then notes that a public meeting was held at Berry Creek (near Oroville), which was attended by approximately 17 BCWC customers. They supported the application, including the surcharge, but urged that future developers of new subdivisions be required to make a lump-sum contribution to reduce the principal balance of the SDWBA loan. We stated (pp. 8-9):

"Although the Commission long has been aware of such arguments, it has, in the past, for a variety of reasons, been reluctant to impose the type of charge for new connections urged by the Berry Creek customers. In this particular instance, however, because of the small size of the utility, the relatively large impact that this surcharge will have on water rates, and the enormous benefits that it will bring to new land developments, we shall require such developments to share the burden. Moreover, we are concerned that the actual cost of the plant facilities to be constructed is likely to substantially exceed the amount of the loan. We estimate that these cost overruns will be about 30% of the principal amount of the loan. Accordingly, in the future each new applicant for a main extension contract for water service shall make a lump sum contribution of \$600 per lot to the water utility. . . .

The \$600 contribution shall not be levied against unimproved lots at the Ponderosa Pines Subdivision of Berry Creek. Such lots are located in Berry Creek's existing system, and one of the primary purposes of SDWBA system improvements is to provide for better quality and quantity of water for current and future customers within an existing utility system.

"In the near future, Berry Creek plans to expand beyond its present service area, by adding approximately 34 connections located at the Old Mills Estate Subdivision. The \$600 per lot lump sum contribution was derived by dividing the approximate \$20,400 cost overruns of the proposed SDWBA loan by 34.

"The staff of the Commission's Revenue Requirements Division reviewed the application and concluded that the proposed plant improvements will substantially improve service. The proposed SDWBA loan clearly is the most feasible and economical method of financing these improvements. The Commission, therefore, will authorize Berry Creek to enter into the proposed loan contract with DWR and to institute a surcharge on customers' bills to repay the loan."

We found a formal hearing unnecessary and approved the application, with certain fiscal controls as conditions. D.93534 dated September 15, 1981 was effective five days later to place the surcharged rates in effect promptly.

On October 15, 1981, Darwin Datwyler petitioned for rehearing. The petition alleges (pp. 1-3):

- "1. Petitioner is a property owner on Berry Creek above the service area of Applicant Berry Creek Water Company; and the water supply of the Applicant is presently obtained from a ditch diverting from Berry Creek on Petitioner's land, herein called the Zink Ditch. There is an agreement between Erma and Donald Zink, predecessors in interest

of Petitioner, and Elizabeth and R. W. Lindmeier, predecessor in interest of Applicant, by which the water diverted by the Zink Ditch is to be divided equally between Petitioner and Applicant.

- "2. The flow of Berry Creek which can be diverted into Zink Ditch is inadequate in the summer time to supply the requirements of both Petitioner and Applicant; measurements by Petitioner show that the total flow into the ditch in August of 1981 was on some days less than 13 gallons per minute. Applicant proposes to serve a potential of approximately 170 service connections, and with planned expansion, 35 more. Chart 1 of General Order 103 specifies a minimum requirement for a metered system with 150 customers of about 180 gallons per minute.
- "3. Petitioner is concerned that if Applicant is permitted to borrow \$61,903 as provided in Decision 93534 persons will be induced to purchase lots in the Applicant's service area and to rely on Applicant for a water supply when Applicant will be unable to provide such a supply. The remaining water of Berry Creek is believed to be fully appropriated during the summer months, as are most other streams in the Central Valley.
- "4. It is against the public interest for this commission to permit Applicant to borrow public funds in order to supply water to which it does not have a right. It is against the financial interest of the Petitioner for public money to be used to deprive Petitioner of his water rights. It is against the financial interests of the customers of the Applicant to make investments in homes, and to pay rates and surcharges provided in the rate

schedules approved by Decision 93534 for water which cannot be supplied. Applicant may at any time be limited to its present number of service connections under Public Utilities Code section 2708.

- "5. Petitioner's representative attended the public meeting held by the Commission staff, and has made representation of the facts above to the Commission staff prior to the issuance of Decision 93534."

On the basis of those allegations, Datwyler requested rehearing of D.93534, and an order barring BCWC from borrowing funds until it "makes a reasonable demonstration...that it has adequate water rights and water supply to serve in its service area."

In D.93831, issued December 1, 1981, we ruled that Datwyler was not entitled to a rehearing under PU Code § 1731, but we accorded him a hearing under § 1708 to determine whether D.93534 should be rescinded, altered, or amended. D.93831 states:

"The hearing shall be limited to determining the adequacy of applicant's water supply to serve additional customers and to any matter related to such determination, as the presiding officer shall deem appropriate."

Hearing on this subject was held before Administrative Law Judge Meaney in Oroville on February 22 and 23, 1982, and, after certain stipulated extensions, briefs were received on April 20, 1982.

Description of the System
And Surrounding Area

BCWC's property and water sources are located in a rural area about 17 miles northeast of Oroville. Berry Creek runs in a generally southwesterly direction through the property of Darwin Datwyler. It then joins Berry Creek South Fork and runs westerly through Ponderosa Pines subdivision, then through the nearby community of Berry Creek, through Madrone Lake, and then to Lake Oroville.

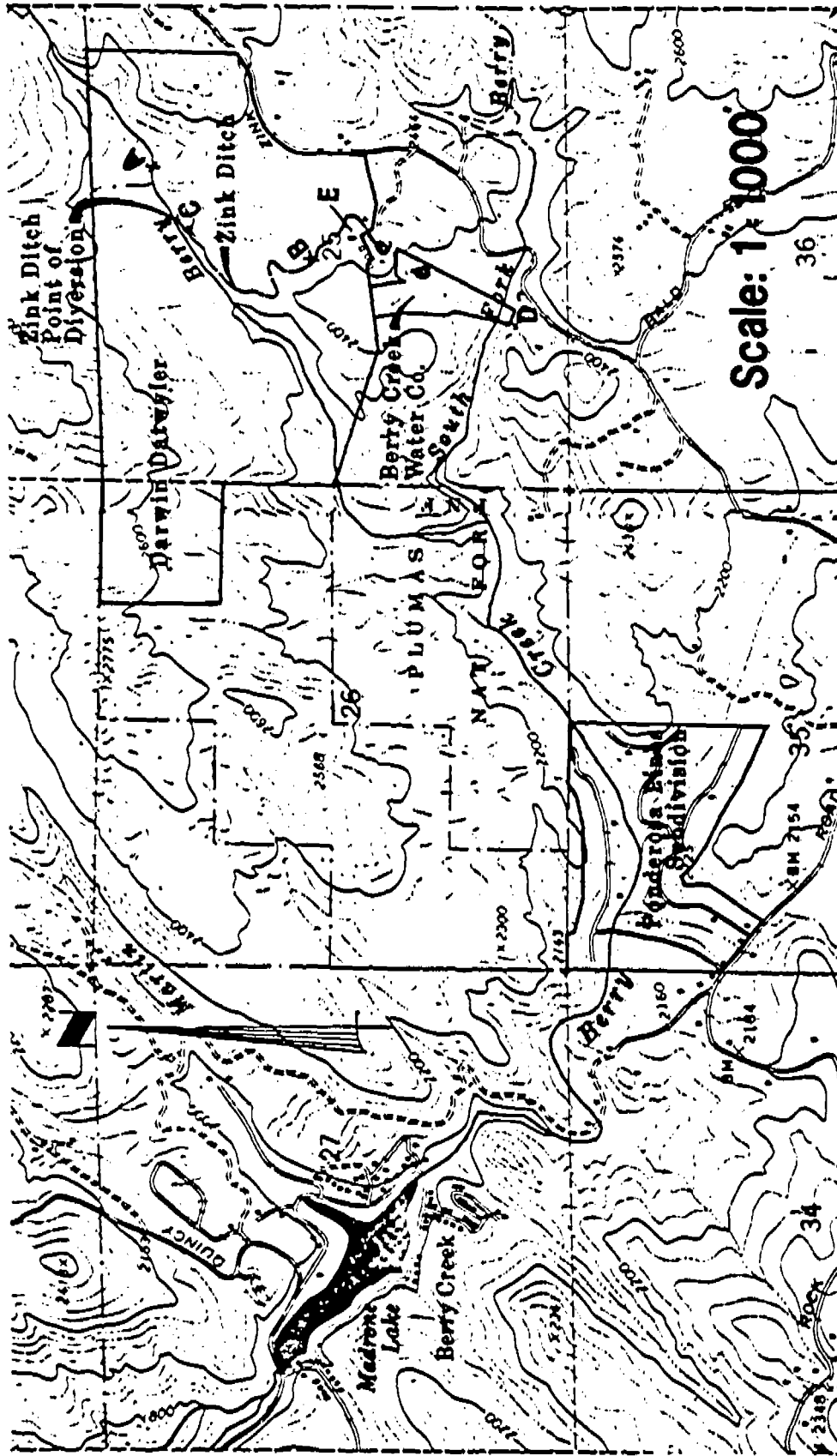
BCWC does not draw water from Berry Creek itself but from Zink Ditch, which diverts water from Berry Creek at a point on Datwyler's property. The first half mile of the ditch passes through relatively steep terrain; the next half mile through flatland which Datwyler irrigates. It then crosses onto property of the Morgenroth family, some of which is dedicated to BCWC's use. After crossing the property line, the ditch flows into a reservoir. BCWC has two reservoirs, the upper capable of holding 2.5 million gallons, and the lower having a capacity of 0.75 million gallons. The water is chlorinated when it enters the second reservoir and then flows by gravity to the distribution system.

The source of controversy is principally the amount of water available to BCWC via the Zink Ditch, which is roughly 4,000 feet long.

Datwyler and the Morgenroths^{1/} share equally in the water diverted into Zink Ditch as successors to the parties to a 1962 agreement, which is declaratory of a pre-1914 water right (Ex. 4).

The locations of the properties and the principal points of interest are shown on the map on the following page, adapted from Exhibit 1.

^{1/} Commission records show the owners of BCWC to be C. John Ryan of Santa Clara and Emma Morgenroth of Oroville. Michael Morgenroth, the manager and principal witness for BCWC, is her son.



Facts Presented at Hearing

Datwyler testified he irrigates about 80 acres from Zink Ditch and that for the last few years the water has been inadequate. He has applied to the Water Resources Control Board for an appropriation of additional water from Berry Creek during winter months (which is the subject of a formal protest by BCWC) and plans to construct a holding reservoir. Datwyler stated he is concerned about potential additional water use by BCWC if all the lots in the Ponderosa Pines subdivision are developed. He believes that additional water use downstream will lower the water levels in the ditch to the point that there will be an inadequate supply for irrigation of his property.

Michael Morgenroth, manager of BCWC, testified that the loan which is the subject of this proceeding is for a filtration system and a covered storage area and is not being done for expansion purposes. He stated that while Ponderosa Pines subdivision contains 171 lots, all residential except for one store, there are no present expansion plans.

Datwyler disputed BCWC's contention that its present system could serve existing customers in dry months without using more than its 50% of Zink Ditch water. James C. Hanson, a civil engineer who testified for Datwyler, instructed Datwyler to take certain water measurements above the Zink Ditch diversion point (point "A" on map) and below it (point "B"). Datwyler or his son measured flows at eight different dates in August and September of 1981. Flows at Berry Creek on four different dates varied from 75 to 160 gallons per minute (gpm); flows on the ditch above Datwyler's first point of diversion ranged from 13.69 to 67.68 gpm. Hanson calculated an average of 24.6 gpm available to BCWC which he stated is insufficient for BCWC's purposes.

Morgenroth testified that BCWC's two reservoirs below the ditch (see small shaded areas on map) hold 2½ million gallons (upper reservoir) and 3/4 million gallons (lower reservoir) so that if an interruption of the Zink Ditch flow occurs, BCWC can serve existing customers for quite a few weeks.

Morgenroth also described alternate sources of water. BCWC purchased pumps it used on its property at the South Fork of Berry Creek (point "D" on map). He also indicated an area downstream from Zink Ditch as a place of natural drainage from which water could be taken. Datwyler questioned BCWC's right to take water from these sources, although he introduced no evidence to show why the Morgenroths could not extract water on their own property. BCWC did not present specific evidence on the amounts of water potentially available from these sources.

Both parties agree that Zink Ditch is not well-maintained on Datwyler's property, although they contest the relative importance of the several reasons for its condition. A fair summary of the problems is contained in Exhibit 12, prepared for BCWC by Kenneth D. Lenhardt, a civil engineer who testified for BCWC. He inspected the ditch on August 13, 1981. The pertinent part of Exhibit 12 reads:

"I arrived at the home of Mr. Morganroth [sic] 11:20 A.M. We immediately began our inspection by walking to the headwaters of the ditch, i.e., the diversion point at Berry Creek, then slowly following the ditch back toward the reservoir. The ditch traverses the mountainous terrain with its location on the side slopes. The land is fenced, but animals do have access to it. The soil conditions vary from rock outcroppings to loam soil.

"The general condition of the ditch is poor. Vegetation is dominant throughout the entire ditch. In two critical areas, black-berry bushes are so dense the exact location and condition of the ditch could not be determined.

"Water loss from the ditch through seepage is very evident. A contributing factor may be the cattle and their continual disturbance of the natural bottom of the ditch. This disturbance does not allow the ditch to seal itself.

"Other reasons for seepage loss is the loam and decomposed granite soils the ditch is located on. Although the disturbance of cattle is a contributing factor, I feel the only way to completely eliminate seepage loss would be to line the open channel with concrete or some other impervious material.

"From our inspection of the open ditch, seven discharge points (most 2½" pipes) were found on Mr. Morganroth's neighbor's property. Not all of those points had flow at the time of our inspection (see enclosure). Of seven, five were flowing some water of which we could only measure four. These discharge points consisted of mainly a 2½" pipe through the sidewall of the open ditch at flow line level. Only at one point was there a dam constructed to block up flow thereby creating additional head or pressure for the discharge. Mr. Morganroth told me that the discharge points we observed were not new installations but had been in operation for years.

"The discharge points not measured nor not flowing at the time of our inspection do have the capacity of drawing an estimated additional 25 to 30 g.p.m. from the ditch. This would make a total of 128 to 133 g.p.m. or approximately seventy-six percent of the water being drawn from the ditch for irrigation.

"The total measured flow from the discharge points was 103 g.p.m. We did measure the flow at the flume entrance to Mr. Morganroth's upper reservoir. That measured flow was 40 g.p.m."

The enclosure to which reference is made reads as follows:

"Points of discharge were numbered from the Berry Creek Diversion to upper reservoir of Mr. Morganroth. Points 1 thru 7 are on Mr. Morganroth's neighbor's property. The eighth is at the reservoir. Flow measurements were taken by use of a timer and a five gallon bucket. Although the flows are not exact, they are an indication of the amounts of water being used.

"Discharge Point #1	2½" pipe through wall of open ditch. 13.7 GPM
"Discharge Point #2	2½" pipe through wall of open ditch. 4.4 GPM
"Discharge Point #3	2½" pipe through wall of open ditch. 64.8 GPM
"Discharge Point #4	1" siphon - no flow
"Discharge Point #5	2½" pipe - no flow
"Discharge Point #6	2" pipe - unable to measure flow
"Discharge Point #7	2½" pipe 20.1 GPM
"Discharge Point #8	Measured at flume of reservoir 40.5 GPM"

From the above it can be seen that when measured, Datwyler was diverting 103 gpm and the BCWC reservoir was receiving only 40.5 gpm. A straight arithmetical analysis is simplistic, however, because of water loss in the ditch for the various reasons enumerated.

Other witnesses introduced by the parties testified concerning conditions on the ditch at varying times, and on certain water flow measurements, and much hearing time was taken up with detail relating to water flow measurements and their efficacy. The evidence demonstrates that the measurements were crudely made and on an irregular, short-term basis. Exhibit 7, rainfall data at the nearest ranger station since 1941-1942, show considerable variation in rainfall from year to year and the record contains insufficient information for adjusting the 1981 flows for rainfall conditions with any degree of sophistication, although the period in which recent measurements were made was apparently one of low flow.

There is also controversy over whether a gunite lining would improve water flow. Apparently this would be beneficial for BCWC (provided that proper fencing keeps cattle out of the ditch) but the parties dispute the cost of the lining; and because maintaining the ditch is a joint responsibility, Datwyler and BCWC would have to agree on the project.

Discussion

Datwyler's petition should be denied because he has failed to establish how denying BCWC approval for its loan to improve water quality will properly solve problems relating to water supply. We impose the wrong remedy if we deny BCWC approval for the loan. Improvement of water quality is essential for the existing customers as well as any which might be added in the future, and such improvement must be undertaken to meet legal requirements.

The dispute between Datwyler and BCWC over proper or improper use of the Zink Ditch as it traverses Datwyler's property, or alleged overuse of it by BCWC which supposedly could reduce water levels on Datwyler's property below those which would allow him to irrigate property, is one for the State Department of Water Resources or the courts. A key example of an issue this Commission has no jurisdiction to resolve is how to interpret Exhibit 4, the 1962 agreement concerning the Zink Ditch water rights. Both parties agree that the water is shared equally, but Datwyler believes he can take more than 50% over short periods if he takes less over other periods; BCWC disagrees. Exhibit 4 contains no specific provision on the question.

We agree with BCWC that the record shows Datwyler, at times, takes more than 50% of the Zink Ditch flow. As witness Lenhardt stated in the conclusion to Exhibit 12:

"[Datwyler] is probably not taking any more water now than before. However, because of ditch conditions and low flow, he is taking more than half of what Mr. Morganroth is receiving. This could be corrected by capping some of the discharge points to the irrigation system thereby allowing more flow to pass through the ditch. More importantly, I believe if deficiencies of the ditch were corrected, there would be ample water for Mr. Morganroth's water company and for irrigation use to the neighboring property."

It also appears that Datwyler may not be contributing a reasonable amount of time and money to share in the costs of maintaining the ditch. Morgenroth testified that he personally spent between 200 and 300 hours on the ditch in 1981, estimating the labor cost of such work at \$1,500. If Datwyler is not contributing his fair share, this Commission has no jurisdiction to order him to do

it; BCWC must (and should) seek appropriate legal redress elsewhere, not simply for its own sake but to protect its customers.

In spite of the difficulties with the ditch, we believe the record demonstrates that BCWC has adequate water to serve existing customers, at least if the ditch as it passes through Datwyler's property is adequately maintained and excessive diversions do not occur. BCWC's expansion plans must be properly regulated, however, to assure adequate water supply for its existing customers. Alternate sources of water may possibly be available, but the quantities are uncertain. BCWC has undertaken no systematic measurements of water flows. (Indeed an inspection of its annual reports for the last three years shows that the section of the report on this subject has been left blank.)

We will require BCWC to measure flows systematically and to complete its annual reports properly. We will also require BCWC to make formal application to expand beyond its service area whether or not the expansion is contiguous to its present area.^{2/} For any new connections within the existing area (i.e. Ponderosa Pines) we will require advice letter filings which demonstrate to our satisfaction that water supply is adequate for such connections. In order not to delay the loan which is the subject of this application any further, these requirements will not be preconditions to the loan.

^{2/} PU Code § 1001 allows a public utility to extend its service area into contiguous territory without applying for a certificate, but under our powers to supervise and regulate utilities (§ 701) we may require such an application in specific instances.

If the parties cannot resolve their differences over use and maintenance of Zink Ditch, they are urged to seek some form of relatively inexpensive and expeditious solution, such as mediation or arbitration by one or more persons of appropriate experience. Such prompt action should benefit all users of the ditch and might eliminate eventual costly litigation.

The various requests to extend brief deadlines have prolonged the resolution of this matter. We will make the order in this decision effective immediately to avoid further delay.

Findings of Fact

1. Under a 1962 agreement declaratory of preexisting water rights, Datwyler and the Morgenroths share the water of the Zink Ditch equally.
2. At present, the ditch is the principal water supply of BCWC.
3. There are disputes between Datwyler, on the one hand, and the Morgenroths and BCWC, on the other hand, concerning use and maintenance of the ditch.
4. BCWC's water supply is adequate for its present customers, if Zink Ditch is adequately maintained and the water is shared equally as the 1962 agreement requires.
5. How much expansion BCWC can undertake and still serve its present customers adequately is uncertain.

Conclusions of Law

1. This Commission cannot solve the water rights disputes between Datwyler, on the one hand, and BCWC and the Morgenroths, on the other hand.
2. It is not in the public interest to delay approval for BCWC's proposed SDWBA loan to improve water quality because of unknown water supply to serve areas beyond BCWC's present dedicated service territory.

3. D.93534 should be reinstated, effective immediately.
4. BCWC should be ordered to measure its water supply from Zink Ditch properly, and should be restricted on expanding its service, as set forth in the order.

FINAL ORDER

IT IS ORDERED that:

1. D.93534 is reinstated.
2. Berry Creek Water Company, Inc. (BCWC) shall:
 - a. Measure the Zink Ditch flow into its reservoir at least weekly, with proper equipment, and compile a quarterly report covering the periods, January-March, April-June, July-September, and October-December. The first quarterly report for the period July, August, and September 1982 shall be submitted to the Commission's Hydraulic Branch no later than October 15, 1982. Subsequent quarterly reports shall be submitted no later than January 15, April 15, July 15, and October 15 covering the respective calendar quarters.
 - b. Take such other water measurements at other locations in the ditch, on a systematic basis, as prudence demands, and include them in the quarterly report.
 - c. Complete its annual reports properly to include the 12-month totals of the quantity of water produced from each source of supply as required by General Order 103 Section II, 4.b.
3. BCWC shall not expand beyond its present dedicated service territory, regardless of whether the expansion is contiguous to such territory, without first applying to this Commission for approval.

4. When BCWC intends to make any new connections within its dedicated service territory, it shall, at least 60 days prior to establishing any connection or connections, file an advice letter containing information by which we can determine adequacy of water supply to serve such connection or connections. This requirement does not apply to reconnections.

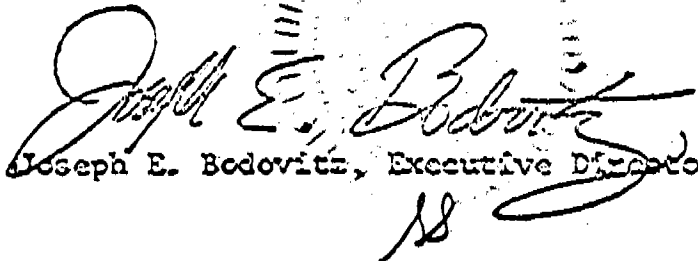
5. Proceedings in this application are terminated.
This order is effective today.

Dated JUL 21 1982 , at San Francisco,
California.

JOHN E. BRYSON
President
RICHARD D. GRAVELLE
VICTOR CALVO
PRISCILLA C. GREW
Commissioners

Commissioner Leonard M. Grimes, Jr.,
being necessarily absent, did not
participate.

I CERTIFY THAT THIS DECISION
WAS APPROVED BY THE ABOVE
COMMISSIONERS TODAY.


Joseph E. Bodovitz, Executive Director