

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

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In the Matter of Applications 3151, 3153, 3155 and 3157
of Sutter Basin Improvement Company and Sutter Basin
Company to Appropriate from Drainage Water, East
Dredge Cut, Gelshausen Slough and Sutter By-Pass
in Sutter County, for Flooding for Duck Ponds.

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DECISION NO. A 3151-3153-3155-3157 D 160

Decided June 27, 1927

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APPEARANCES AT HEARING HELD April 7, 1927.

For Applicants: Rex A. Lundberg
For Protestants: W. P. Dwyer for Sacramento Navigation Company
Other Appearances: R. J. Morrissey for Manley S. Harris, President
Gray Lodge Gun Club

EXAMINER: Edward Hyatt, Jr., Chief of Division of Water Rights.

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O P I N I O N

Application 3151 was filed on November 24, 1922 by Sutter Basin Im-
provement Company. It proposes an appropriation of 9.97 cubic feet per second
for flooding 398.9 acres from drainage which flows into East Dredge Cut of
Sutter By-Pass. Application 3153 was filed on November 24, 1922 by Sutter
Basin Improvement Company. It proposes an appropriation of 14.62 cubic feet
per second for flooding of 584.87 acres from East Dredge Cut--Sutter By-Pass.
Application 3155 was filed on November 24, 1922 by Sutter Basin Company. It
proposes an appropriation of 4.65 cubic feet per second for flooding of 185.95
acres from East Dredge Cut and Gelshausen Slough. Application 3157 was filed

November 24, 1922, by Sutter Basin Company. It proposes an appropriation of 24.38 cubic feet per second for flooding of 975 acres from East Dredge Cut--Sutter By-Pass.

The diversion season sought under each of the applications is from August 1st of each year to January 15th of the following year. All of the flooded areas are to be used for duck ponds. The applications were protested by Knightsen Irrigation District on February 17, 1923, but the protest was withdrawn on November 23, 1924.

Although these applications had no protests on record standing against them, there has been incident to the water shortage during the past few years, considerable controversy relative to use of water for duck pond purposes and the relation which same should bear to agricultural, navigation and other uses. For this reason it was desired by the Division of Water Rights that before final action on this class of applications was taken, opportunity be presented through a hearing for the discussion of the points involved by the various interests concerned in the perfection of water rights of this character.

These several applications were completed in accordance with the Water Commission Act and the requirements of the Rules and Regulations of the Division of Water Rights, and for reasons above stated were set for a public hearing at 707 Forum Building, Sacramento, at 10:00 o'clock A.M. on April 7, 1927. Of this hearing applicants and various other parties interested in the perfection of water rights of this character were duly notified. Appearances were made at the hearing as noted above.

Under date of April 16, 1927, a protest was made by Major C. S. Ridley for the War Department in which it was set forth that it would be entirely too much to expect that the War Department will sit idly by and allow water which is needed for navigation of the river to be diverted to flood duck ponds. It was suggested by Major Ridley that if permits were issued for this purpose, they should be very restrictive, and the matter of diversions for such purposes kept entirely and positively under the control of the Division of Water Rights, so that such diversions would be

allowed only when the water is not needed for navigation or other more beneficial purposes.

The protest entered by Mr. W. P. Dwyer at the hearing for the Sacramento Navigation Company was quite similar in character to that made by Major Ridley as expressed above.

The appearance of R. J. Morrissey was not made for the purpose of protesting these applications but was to encourage the development of flooded areas for duck breeding and protection.

These applications are for an appropriation at the rate of one second foot to each forty acres to be irrigated, which is sufficient to cover the irrigated area to a depth of 18 inches every thirty days. It is probable that in order to accomplish a quick flooding of the land at the beginning of the season such a rate of diversion is desirable and necessary. However it would appear that these projects come within the scope of the provisions of Section 42 of the Water Commission Act which limits to $2\frac{1}{2}$ acre feet per acre per annum the amount of water which may be applied to uncultivated areas not devoted to cultivated crops. Therefore if these applications are approved the customary permit clause used in such cases should be included in the permit.

In acting upon these applications two considerations appear to merit especial attention, to-wit as to the character of use and its standing as opposed to other uses. The use to which the water is to be applied is stated as "flooding for duck ponds". These are the first applications to be acted upon by this office for such purpose and although this kind of use has been made heretofore we have found no cases in the books wherein the courts of this state have rendered adjudications for such a use of water, nor have we found any decisions relative to an appropriation for such a purpose under conditions wherein there were prospects of conflict between users needing water for agricultural and other purposes and duck pond claimants. Conditions are such upon the Sacramento River as to warrant apprehension that during seasons of low flow diversions for duck ponds may further reduce the flow to such an extent as to be injurious to the needs of existing claimants. Especially hostile to such diversions, during

such periods of shortage, would be users in the deltas of the Sacramento and San Joaquin Rivers who depend upon the flow of the Sacramento to protect them from the incursion of salt waters from Suisun Bay. Not only this, but future claimants for water for agricultural and other long established and recognized beneficial uses might be precluded by prior rights obtained by duck pond appropriators. Finally the right inherent in the Federal Government to protect and maintain the navigability of the Sacramento River might be exercised with the result of curtailing further uses during a shortage of water and if it were held that duck pond users held a priority as of the date of filing application they might be entitled to use while subsequent claimants for agricultural and other uses would be prohibited.

During 1920 the shortage of water in the Sacramento River became so alarming that a conference of users and state officials resulted in the formation of an Emergency Water Conservation Committee which served a very useful function during that year in conserving water and counteracting the effects of the shortage. In January 1924 prospective conditions again brought forth a meeting of water users and state officials known as the Sacramento-San Joaquin River Problems Conference which appointed a permanent committee and under the joint direction of this committee and the State Division of Water Rights a Water Supervisor has been functioning since March, 1924 with gratifying results and has been able to accomplish much in the matter of conserving water during acute periods.

This brief sketch of conditions obtaining relative to the source in question evidences the public interest and welfare involved in the matter of the use of water from the Sacramento River. It is by reason of recent acute shortages in supply during the latter irrigation season that the character of use proposed is objected to by many as of a lower degree of benefit from the standpoint of the public welfare. In this we feel that there is merit and that

it will be a serious matter if usage for duck ponds is to have a preference over or to enjoy equality with or to prevent later agricultural or other more beneficial usage.

We cannot say that a use for "flooding for duck ponds" is not a beneficial use, on the contrary we think that such a use is for a beneficial purpose and evidently the Utah Supreme Court thought so in the case of Lake Shore Duck Club v. Lake View Duck Club et al, 166 Pac. 309. In that case the plaintiff club was diverting water onto an area of the public domain which was unsurveyed, uninclosed, unoccupied and untilled. The purpose was to propagate and grow grasses, tules, rushes and other vegetation suitable for feeding wild water fowl. The defendant club was diverting water away from plaintiff club for a like purpose but upon lands owned by defendant club. The judgment for defendant club was affirmed upon the ground that plaintiff club had not the exclusiveness of control and benefit which is essential to constitute an appropriation.

Both clubs were diverting for the propagation of wild ducks and the formation of ponds suitable therefor and throughout, the entire tenor of the opinion is that the use made by each party was beneficial. The plaintiff had filed an application with the state engineer and had been granted a permit. In closing the court said:

"The beneficial use stated in the application is not in question. We are not disposed to hold that any use of water tending to supply man or domestic animals with food is not beneficial. But for the purpose of effecting a valid appropriation of water under the statutes of this state we are decidedly of opinion that the beneficial use contemplated in making the appropriation must be one that inures to the exclusive benefit of the appropriator and subject to his complete dominion and control. As the use in this case is not of that character, we are forced to the conclusion that plaintiff's attempted appropriation is invalid and that defendants committed no legal wrong in the acts complained of in plaintiff's complaint".

In Ex Parte Elan, 6 Cal. App. 233, an act of the legislature to prevent waste from artesian wells was upheld. The act provided that it was waste to cause, suffer or permit the flow from an artesian well to run into any bay,

pond, or channel, unless used thereafter for the beneficial purposes of irrigation of land or domestic use, or into any street, road, or highway, or upon public land, unless it be used for the irrigation thereof or for domestic use or for the propagation of fish.

It was contended among other things that the act was unconstitutional in that it violated Section 21, Article I, of the state constitution, which provides that "no special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature, nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens". In order to demonstrate this proposition it was assumed that surface owners were not prohibited by this act from extracting from this common source of supply any quantity thereof by means of pumps, that no attempt was made to restrict the use after the same was so pumped, and that the waste of such water so pumped was not violative of the act. In illustration of the discrimination claimed it was stated that certain gun clubs within the arid region were pumping large quantities of this subterranean water, by means of which duck ponds were filled and maintained, while other gun clubs whose ponds were fed by artesian wells were restricted in the use of the flow therefrom. Said the court:

"It may be conceded that the courts have recognized the right of gun clubs to practically create a monopoly in wild game over large areas of land and have protected them in a so-called private proprietorship and limited dominion over such portions of the common property of the people of the state as they may induce to stay upon such preserves by feeding them and maintaining ponds therein. It may also be conceded that an exclusive right to hunt upon such preserves has also been held to be a species of property, and injunctions have been issued to prevent interference with the full exercise of such rights. (Kellogg v. Kings, 114 Cal. 378, [55 Am. St. Rep. 74, 46 Pac. 166].) But, while the maintenance of such duck ponds no doubt contributes greatly to the enjoyment of the owner of the hunting privilege, it will scarcely be contended that this is a use of the water which is beneficial to the land. Neither does it follow that because the courts have recognized such exclusive hunting privileges they must support the owners thereof in an encroachment upon another more necessary common right of the public, that of the conservation of the subterranean waters of the state for domestic uses and purposes of irrigation.

"No special immunities or privileges are granted to any club, clubs, person or persons. That some clubs may maintain their ponds by pumping, while others, more fortunate, have theirs maintained by artesian wells or running streams, or tide water from the ocean, in no way affects the question. As well might it be said that legislative action affecting tide lands created special privileges or immunities because the duck ponds of the clubs relying upon tide waters might be affected thereby.

"It is further contended that a discrimination exists because of the provision which permits the maintenance of ponds for the propagation of fish, as distinguished from the maintenance of ponds for other purposes. The propagation of fish has always been recognized as a legitimate pursuit and as an effort to increase the food supply of the world, and the use of water therefor a beneficial use, which, like the use for irrigation or domestic purposes, is declared by the act to be the highest use to which this natural element may be applied. The legislature has the right to determine what uses are superior in kind, and to protect the same, and it is within its province to determine that certain uses of this public property are of a higher character and superior in right to other uses. This right is subject only to the constitutional limitations against discriminations. Having so determined, and no just criticism being applicable thereto, the value of such uses must be held to be established. We are not called upon in this case to determine the legislative right to regulate or protect the extraction of this subterranean water for transportation or sale by those owners of the surface whereon the use of water is not required for those higher uses, nor of prescriptive rights asserted or claimed in such instances, but simply to hold that for the uses which have been determined subordinate the great subterranean water supply may not be applied to the detriment of the higher uses, and that legislation directed to the conservatism of such water, as in this act, is not prohibited by any constitutional provision."

A good discussion of what is a beneficial use for which water may be appropriated is contained in 2 Kinney on Irrigation and Water Rights, Second Edition, pages 1193 and following. Also reference is made to 1 Water Rights in the Western States by Wiel, Third Edition, pages 406 and following. The following quotation from Kinney is of interest:

"And, in general, we will say that any purpose which is useful or beneficial may be the object of such appropriations. In some States, however, certain uses are given preference right by statute, but where this is not the case as a general thing any use which is beneficial may claim its right in the order of its priority with the other rights claimed from the same stream. As we stated in the first edition of this work: 'The purpose

contemplated for the use of the water may be irrigation for agricultural or horticultural purposes, mining, milling, manufacturing, domestic, or any purpose for which water is needed to supply the natural and artificial wants of man, provided it be for a beneficial use.' And, as was said in a recent Federal case (Cascade Town Co. v. Empire W. & P. Co., 181 Fed. Rep. 1011): 'The courts have not defined, because as yet they are unable to define, the exact boundaries of the territory known as beneficial use'. Therefore, as to what is a beneficial use must depend upon the facts and circumstances surrounding any particular use, until that use has been defined by the courts as beneficial."

That the courts have been liberal in upholding uses as beneficial is evidenced in the Federal case above quoted from wherein an appropriation of a stream and waterfall for its contribution to the scenery of a summer resort was upheld. (See Section 697 page 1201 of 2 Kinney).

Although of opinion that the use proposed is beneficial it remains to consider the limitations which should be placed thereupon in view of Section 15 of the Water Commission Act. Section 15 of said act provides as follows:

"The state water commission shall allow, under the provisions of this act, the appropriation for beneficial purposes of unappropriated water under such terms and conditions as in the judgment of the commission will best develop, conserve and utilize in the public interest the water sought to be appropriated. It is hereby declared to be the established policy of this state that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation. In acting upon applications to appropriate water the commission shall be guided by the above declaration of policy. The commission shall reject an application when in its judgment the proposed appropriation would not best conserve the public interest."

In this section the Division of Water Rights is charged with the duty of imposing terms and conditions which will best develop, conserve and utilize water in the public interest, and utilizations for domestic and irrigation purposes are given a preferential standing wherein the issue of public interest is involved. That it is a matter of great public concern and interest relative to the usage of Sacramento River waters during the latter irrigation season in years of low runoff is manifest. Hence, if this section is to be

respected, certainly the pending matter calls for its application and an exercise of judgment and discretion by the Division in providing for development, conservation and utilization in the public interest and an adherence to the specific mandate as to the preferential position to be accorded domestic and irrigation usage when action is taken upon applications to appropriate. In the statute under consideration in Ex parte Elam, supra, a preferential status accorded domestic and irrigation usage was approved by the court.

It is therefore considered a duty imposed by statute and a proper and reasonable function of the Division to impose terms and conditions in the public interest which will restrict and limit usage under permits to be issued upon these applications so as to eliminate interference with domestic, irrigation, and other more essential and important uses of water during periods of shortage in flow.

O R D E R

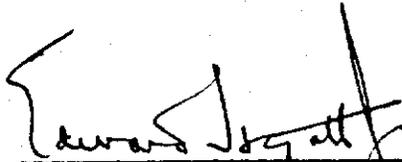
Applications 3151, 3153, 3155 and 3157 for permits to appropriate water having been filed with the Division of Water Rights as above stated, protests having been filed, a public hearing having been held, and the Division of Water Rights now being fully informed in the premises:

IT IS HEREBY ORDERED that said Applications 3151, 3153, 3155 and 3157 be approved and that permits be granted to applicants subject to such of the usual terms and conditions as may be appropriate and the following special terms and conditions, to-wit:

1. No right to water shall be acquired for the purpose authorized under this permit which shall authorize use to the disadvantage of any right which may subsequently be acquired for use for domestic, irrigation, agricultural, municipal, power, industrial, mining, or any other more beneficial purpose.

2. This permit is issued subject to the express condition that diversions to use for the purpose hereunder authorized may be regulated or stopped by the Division of Water Rights as by it deemed necessary to prevent interference with rights heretofore or hereafter acquired under applications for more beneficial purposes.

Dated at Sacramento, California, this 27th day of June, 1927.



(Edward Hyatt, Jr.)
CHIEF OF DIVISION OF WATER RIGHTS

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