

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

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In the Matter of Application 4788 of the Snow Mountain Water
and Power Company to appropriate from the South Bel River
in Lake and Mendocino Counties for Power Purposes and
in the Matter of Application 5661 of the Snow Mountain
Water and Power Company to appropriate from
the South Bel River in Lake and Mendocino
Counties for Irrigation Purposes

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DECISION A 4788, 5661 D 179

Decided January 9, 1928

APPEARANCES AT HEARING HELD AT UKIAH, July 29, 1926

For Applicant

Snow Mountain Water & Power Company

Paul S. Marrin
E. S. Pillsbury

For Protestants

Loleta Board of Trade
Percy J. Brown
Metropolitan Redwood Lumber Company
Eureka Chamber of Commerce
Arcata Chamber of Commerce
Federated Trade Bodies of Humboldt County
Town of Ferndale
Pacific Lumber Company
Hammond Lumber Company
Fortuna Business Men's Club
Town of Fortuna
City of Eureka
Humboldt County Farm Bureau
Redwood Chapter American Association of Engineers
I. N. Rasmussen, et al
Mrs. R. A. Callihan, et al
Wm. F. Swadlow, et al
Robert Malloy, et al
Golden State Milk Products Company
T. Pedrotti, et al
Humboldt Fish and Game Association
Mrs. V. Holmes, et al - Lake Glenn in Del Norte
Valley
E. D. Walden
Virginia Walden
John F. Gleason

H. C. Tolson
John F. ...

Ferndale Board of Trade
 F. W. Rasmussen and 60 others
 James Dawkins and 53 others
 Joseph A. Genzoli and 28 others
 M. L. Clausen
 Peterson Brothers
 L. S. East
 N. Hauck
 Joseph P. Casacca
 Theodore Kenner, Jr.
 Clara E. Cooper
 H. A. Dinsmore
 L. B. Bunderson
 M. J. Reidy
 Wm. C. Ross
 V. Gamboni
 Anton Tedson
 C. E. Bryant
 Mrs. V. Holmes and 22 others
 Mrs. Josephine Pedrotti and 19 others
 John T. Oleson
 Mrs. Catherine Stockel
 J. T. Paul
 W. J. Schilling
 V. Pedrotti, Sr.
 J. A. Regli
 Paul E. Mudgett and 62 others
 Mrs. R. A. Callihan and 20 others
 Board of Trade of Alton
 Percy J. Brown

Pater and Quinn by
 J. F. Quinn
 and
 Nelson and Ricks

Pacific Lumber Company

H. C. Nelson

County of Humboldt

John F. Quinn

Potter Valley Irrigation District, an interested party Charles Kasch
 Joseph Gross
 EXAMINER; Edward Hyatt, Jr., Chief of Division of Water Rights, Department
 of Public Works, State of California

O P I N I O N

GENERAL DESCRIPTION OF APPLICATIONS

Application 4768.

Application 4768 was filed September 22, 1925. It proposes an ap-
 propriation of 400 cubic feet per second of direct diversion of the waters
 of the South Bel River at the Van Arsdale dam and 214,813 acre feet of di-
 version to storage from the same source at the Scott or Lake Pillsbury dam
 for power purposes. The water is to be stored in Lake Pillsbury.

The proposed appropriations under this application are to be used in connection with a single comprehensive electric power development on the South Eel River and Russian River heretofore partially completed by the applicant and to be described hereafter. The water to be stored in Lake Pillsbury is to be used under this application through a power house to be located at the Scott dam and returned at the tail race of this power house to the South Eel River. It will then pass down the natural channel of the South Eel River to the Van Arsdale dam. At the Van Arsdale dam water will be diverted at the rate of 400 cubic feet per second. This water so diverted will consist of either the direct flow at that point or the water released from Lake Pillsbury or both. It will then be passed through the Potter Valley Power House where it will be utilized for the development of electrical energy under Application 1719, Permit 781 and, with the exception of a certain amount of water which will be diverted for agricultural purposes in Potter Valley under Application 5661 hereinafter described, will be conducted by a system of conduits and tunnels to the Coyote Valley Power House which it is proposed to construct on Lot 96 of the Yokayo Grant where it will be again used for the development of power. The water will then be returned to the East Fork of the Russian River at the tailrace of the Coyote Valley Power House and is thereafter "to be used for such purposes, municipal, agricultural or otherwise, for which applicant now has or hereafter may secure a permit or permits from the Division of Water Rights***".

As originally filed the season of diversion to storage named in the application was throughout the entire year but at the hearing held July 29, 1928 the applicant requested that the season of diversion be amended to the period from about November 1st to about June 1st of each

season and the application has been amended accordingly.

Under date of May 13, 1926 this office was informed by the applicant that the Snow Mountain Water and Power Company was not asking permission to take out of the South Eel River watershed any water whatsoever, either normal or flood waters, which it was not already authorized to take therefrom.

The application was protested by the following parties:

<u>PROTESTANTS</u>	<u>DATE OF FILING PROTEST</u>
Otto R. and Herman E. Grock	3-15-26
Wm. W. McCreary	3-15-26
S. O. Holmes	3-15-26
Fish and Game Commission (State of California)	4-29-26
Loleta Board of Trade	4-30-26
Metropolitan Redwood Lumber Company	4-30-26
Eureka Chamber of Commerce	4-30-26
Humboldt County Federated Commercial Bodies	4-30-26
Arcata Chamber of Commerce	4-30-26
Town of Ferndale	4-30-26
Pacific Lumber Company	4-30-26
Hammond Lumber Company	4-30-26
Fortuna Business Men's Club	4-30-26
Fortuna Board of Trustees	4-30-26
Robert A. Malloy and 19 other citizens and taxpayers of Humboldt County	4-30-26
L. N. Rasmussen and 123 other residents and taxpayers of Humboldt County	4-30-26
Redwood Chapter American Association of Engineers	4-30-26
Humboldt County Farm Bureau	4-30-26
City of Eureka	4-30-26
Humboldt County	4-30-26
Percy J. Brown	4-30-26
Golden State Milk Products Company	5- 1-26
Humboldt Fish & Game Association	5- 3-26
Paul E. Mudgett and 61 other residents and taxpayers of Humboldt County	5- 3-26
Mrs. R. A. Callihan and 20 other citizens and taxpayers of Humboldt County	5- 3-26
V. Pedrotti Sr. and Mrs. Josephine Pedrotti	5- 3-26
J. A. Egli	5- 3-26
Mrs. V. Holmes and 42 other owners of land adjacent to Eel River	5- 3-26
E. D. Walden and Virginia Walden	5- 3-26
Wm. P. Greenlaw and 75 other residents and taxpayers of Humboldt County	5- 3-26
John P. Oleson	5- 3-26
Mrs. Catherine Stockel	5- 3-26
J. L. Paul	5- 3-26

W. J. Schilling	5- 3-26
Rasmus Mortensen	5- 3-26
Potter Valley Irrigation District and various land owners (Protest withdrawn)	7-29-26
Ventura Fish and Game Association	9-24-27
North Sonoma County Fish and Game Commission	9-26-27

Application 5661

Under this application, filed August 15, 1927 by the Snow Mountain Water and Power Company, it is proposed to use water already appropriated for power purposes and used under permits previously issued for the additional purpose of irrigation.

It is proposed to store 4500 acre feet per annum of the waters of the South Eel River in Lake Pillsbury from about November 1st to about June 1st of each season from which reservoir, when needed, it will be passed down the channel of the South Eel River to Lake Van Arsdale at the Cape Horn or Van Arsdale dam which is the first point of rediversion. The water is then to be diverted through tunnels and penstocks and used for power purposes in the Potter Valley Power House, from which it is to be conducted in a concrete tailrace structure to the point of second re-diversion where the water will be diverted from each side of the tailrace into the ditches of the Potter Valley Irrigation District. The storage dam, rediversion dam and the second point of rediversion, including the tailrace and irrigation outlet have all been constructed and used in the past. The application is really for a portion of the water heretofore used for power purposes. This application was not protested.

HEARINGS HELD IN CONNECTION WITH APPLICATIONS 4788 and 5661

Application 4788 was completed in accordance with the Water Commission Act and the requirements of the Rules and Regulations of the Division of Water Rights and being protested was set for a public hearing at the

Court Room of the Courthouse, Ukiah on July 29, 1926 at 9:30 o'clock A.M.

Of this hearing the applicant and those of the protestants who filed protests prior to this hearing were duly notified.

The attempt of the Snow Mountain Water and Power Company to limit the application by the letter dated May 13, 1926 above referred to was somewhat in accord with a permit issued by the Division on Application 1934 filed July 23, 1920 by that company.

The hearing held on July 29, 1926 therefore was considered as limited by the statement of the applicant that it did not intend to take out of the South Eel River watershed any water which the applicant was not already authorized to take under prior rights. At the hearing the protestants objected to its consideration on the ground of the ambiguity of such a statement and contended that a hearing should be held on the issue of the amount to which the applicant was entitled under its existing rights for power purposes. The earlier precedent of the Division having heretofore issued a permit with the ambiguous language was considered at that time to constitute a precedent for holding the hearing on that basis but after the hearing was held the position of the protestants was given very thorough consideration and finally it was concluded upon the advice of the attorney for the Division that the proper course of the Division of Water Rights was to consider this application as one for unappropriated water in the amounts stated therein and that such an ambiguous statement as had been used heretofore was not in accord with the intent of the law.

Since the former hearing had not considered the application on that basis and since there were bona fide protests of record, it became necessary to rehear the application simply on the basis as stated without regard to any

former rights claimed. The public hearing was set at the Council Chamber of the City Hall on August 30, 1927 at 9:30 o'clock A.M. Of this hearing applicant and protestants were duly notified.

With the consent of the interested parties Application 5661 was included for hearing at this time.

PROTESTS

The protests filed in the matter of Application 4788 were numerous and without going into detail as to the grounds of each individual one it may be said that in general the protestants allege--

1. Interference with riparian rights.
2. The proposed appropriation which seeks to divert water from the watershed of the Eel River to the watershed of the Russian River to the detriment of the Eel River watershed is illegal and against established principles of law and public policy as the communities in the Eel River basin are entitled to the use of their own natural resources to assist in their future development.
3. That the plant, vegetable and timber life along the stream will be seriously injured.
4. That the rainfall in Northern California will be reduced.
5. That the proposed diversion would interfere with the favorable conditions of health and sanitation that have heretofore existed in Humboldt County.
6. That the summer flow of the South Eel River would have to be utilized by the applicant to the injury of the protestants as the proposed reservoirs and systems as a whole are not of adequate size to impound sufficient flood waters to meet the demands of the applicant.

7. That the method of confining and impounding the water would endanger the bridges and property of Humboldt County and its citizens in the bed and along the banks of Eel River.
8. That the fish life and navigation on the Eel River would be injured.
9. That the project of the applicant is speculative.

RIGHTS INITIATED BY APPLICANT

Rights initiated prior to enactment of Water Commission Act.

Applicant bases a claim of right to divert 400 cubic feet per second of the waters of the South Fork of the Eel River upon an appropriation initiated July 25, 1905 by one W. W. Van Arsdale for 20,000 miners inches to be diverted from the South Fork of the Eel River at a point in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ Section 29, T 18 N, R 11 W, M.D.B. & M. for the purpose of generating electrical power and for irrigation purposes in Potter Valley. The notice of appropriation was recorded July 31, 1905 in Book 1, page 150, Mendocino County Records. A relocation dated August 19, 1905 and recorded in Book 1 at page 150 Mendocino County records is virtually the same.

The Cape Horn or Van Arsdale dam was completed in 1906 or 1907 and from that time the applicant claims to have appropriated all of the normal flow of the South Fork of the Eel River for the purpose of developing power in Potter Valley with the exception of 2 cubic feet per second, this amount having been decreed by court order to one S. O. Holmes. (See 36 Cal. Appl. 394.)

Rights initiated subsequent to enactment of the Water Commission Act.

Application 1719.

This application was filed March 12, 1920 and on November 3, 1920 was approved by the issuance of Permit 781. Under the terms of this permit

the Snow Mountain Water and Power Company was granted the privilege of appropriating 215,000 acre feet per annum of the waters of the South Fork of the Eel River to be diverted from about November 1st to about June 1st of each season for power purposes. The water was to be stored in Lake Pillsbury which was to be created by Scotts Dam constructed on the South Fork of the Eel River about eight miles above the Van Arsdale dam. Under the terms of the permit the water was to be released from storage at a rate not to exceed 400 cubic feet per second. After leaving Lake Pillsbury the water was to pass down the natural channel of the South Fork of the Eel River to the Van Arsdale dam where it was to be re-diverted through a tunnel and pipe line and passed through the Potter Valley Power House which is located in the NW $\frac{1}{4}$ of Section 6, T 17 N, R 11 W, M.D.B. & M. and returned to a tributary of the Russian River within the same quarter section.

Application 1720.

This application was also filed March 12, 1920 and is the counterpart of Application 1719, it being for the same quantity of water from the same source and to be diverted by the same means as the water to be diverted under Application 1719. It differs however from Application 1719 in that the proposed use was for municipal and industrial use in the vicinity of Oakland, the waters to be diverted thence by a canal leading from the Potter Valley Power House. The application was approved on April 9, 1921 by the issuance of Permit 858.

Application 1934.

This application was filed on July 28, 1920. It proposed an appropriation of 400 cubic feet per second of direct diversion from the South Fork of the Eel River at the Van Arsdale dam of which amount 215,000 acre

feet per annum was the same water which it was proposed to divert to storage under Application 1720, Permit 858 and according to the application it was not intended to divert more water than the amount to which the Company was entitled under its existing rights for power purposes. It was proposed to release a sufficient amount of the water stored in Lake Pillsbury to make up the deficiency in the supply at the Van Arsdale dam. Water was to be diverted at the Van Arsdale dam and conducted to the Potter Valley Power House where it would be utilized for the generation of electrical energy under Application 1719, Permit 781. From the tailrace of this power plant it was proposed to conduct the water through a pipe line 120 miles in length to a number of reservoir sites in the vicinity of the East Bay cities where it was proposed to utilize the waters for municipal purposes. The application was approved on April 9, 1921 by the issuance of Permit 857 for an amount not to exceed "the amount to which the applicant is entitled under its existing rights for power purposes exclusive of storage".

WATER SUPPLY

The drainage area of the South Fork of the Eel River above the Van Arsdale dam is about 330 square miles, or less than one-tenth of the area of the Eel River watershed lying above the main agricultural lands in Humboldt County. It is estimated from the records of the Water Resources Branch of the United States Geological Survey that this 330 square miles of watershed contributes approximately one-tenth of the mean seasonal flow of the Eel River which, according to Bulletin 6 of the Division of Engineering and Irrigation, Department of Public Works, State of California, is approximately 6,040,000 acre feet. The amount of water which it is proposed to store under Application 4788 is approximately 215,000 acre feet or about 3.6% of the total seasonal runoff, or about 35% of the seasonal runoff of the South

~~Fork of the~~ Eel River above the Van Arsdale dam.

Assuming that the direct flow and diversion to storage is such that the applicant will be able to divert 400 cubic feet per second continuously through the Van Arsdale tunnel, the total annual diversion will be approximately 292,000 acre feet which amount is less than 5% of the mean seasonal flow of the Eel River just below its junction with the Van Duzen Fork or less than 50% of the estimated mean seasonal flow of the South Fork of the Eel River at the Van Arsdale dam.

PRIOR RIGHTS ON THE EEL RIVER

According to the records of this office, appropriative rights to the waters of the Eel River have been initiated subsequent to the passage of the Water Commission Act as follows:

<u>Appl.</u>	<u>Permit</u>	<u>Name</u>	<u>Use</u>	<u>Amount</u>	<u>Point of Diversion</u>
4078	1938	V. E. Paine	Irrigation	0.50	Sec. 34, T1N, R2E, H.M.
4079	1963	V. Pedrotti, Jr.	Irrigation	0.25	Sec. 3, T1S, R2E, H.M.
5054	----	Pacific Lumber Company	Industrial	18.60	Sec. 18, T1N, R1E, H.M.

Application 5054 was filed subsequently to Application 4788 of the Snow Mountain Water and Power Company and therefore is subject to any rights which may be acquired under that application. The points of diversion named in these applications are more than 84 miles below the Van Arsdale dam and lie below a vast drainage area.

Although there are approximately 44,000 acres of land in the Eel River Valley proper, and of this area perhaps 30,000 acres could be irrigated, the testimony presented at the hearing indicated that less than 2,000 acres have actually been irrigated.

It also appears that of the 2,800 acres of land lying above Scotia, which are possibly susceptible to irrigation, not more than 150 acres have actually been irrigated.

Most of the irrigation that has been practiced has been from wells and these users are more dependent upon the ground waters in the basin which are replenished during the storms of winter than upon the flow of water in the Eel River during the irrigation season.

Assuming that 2,000 acres have been irrigated it would appear that it would take a continuous flow of about 25 second feet for the irrigation of this land or a total of about 9,000 acre feet for six months' irrigation season which is less than 15 one-thousandths of one percent of the mean seasonal flow of the Eel River. The protestants appear to be more concerned about the possible interference with the future development in the Eel River basin than with interference with the present development but even assuming that 30,000 acres of land were to be irrigated it would require a continuous flow of about 375 second feet or 135,000 acre feet for a six months irrigation season or slightly over 2% of the mean seasonal flow of the Eel River.

PAST USE OF WATER BY THE APPLICANT

The Scott dam has already been constructed to such a height as to enable the applicant to store 93,724 acre feet of water in Lake Pillsbury and from information presented at the hearing it would appear that this amount of water has actually been stored therein. The Company intends to increase the storage capacity by raising the dam as soon as Application 4788 is approved.

This stored water together with the direct flow of the river at Van Aredale dam has been used continuously for power purposes through the Potter Valley Power House, the maximum amount of water so diverted being approximately 310 cubic feet per second which was diverted during the month of December 1924.

UNAPPROPRIATED WATER IS AVAILABLE FOR APPROPRIATION

UNDER APPLICATION 4733

Applicant compiled from records of the United States Geological Survey and introduced at the hearing at Ukiah on September 27, 1927, Exhibits 2 and 5 which show the relation of its past diversions and the proposed total diversion of 400 second feet to the flow of South Eel River at Van Arsdale Dam and to the flow of Eel River itself both at Scotia and below the confluence with Van Duzen River.

A study of these hydrographs and of the transcript of the hearing held September 27, 1927 reveals the fact that--except for some two second feet decreed by court order to one S. O. Holmes (56 Cal. Appl. 394)--applicant has for some seventeen years diverted the entire natural flow of South Eel River at Van Arsdale Dam during the months of July, August, September and October, also that the entire natural flow has been diverted in June during 14 out of a possible 17 years and in November during 13 out of a possible 17 years. Diversions proposed by applicant during those months therefore cannot affect downstream protestants on Eel River because no additional burden can be placed upon the river as the water during time of critical flow is already fully in use under prior rights claimed by applicant. Application 4733 will merely enable the applicant to use the same water through two additional power houses without depriving downstream claimants of anything of which they have not already for many years been deprived during the months of June to November inclusive.

The only remaining month during which there might be a demand upon the river for irrigation use is May and these same records and data reveal that the average flow of Eel River at Scotia during May is 4,800 second feet--

an amount which is vastly in excess of what would be required to satisfy any present or even prospective need for that purpose downstream.

The remainder of the year (December to April inclusive) is the winter and early spring season when there is normally no irrigation demand in this portion of the state and during this period some 84 per cent or 5,100,000 acre feet of the annual discharge of Hel River occurs. The total annual diversion proposed by applicant amounts to only approximately 292,000 acre feet--most of which either by direct diversion or storage will be taken from the stream flow during this period. There has been no evidence presented that this subtraction from the stream flow would injuriously affect downstream claimants.

TIMBER

The protestants allege that the proposed diversion of the applicant will result in injuring seriously the plant, vegetable and timber life along the stream inasmuch as it would result in a loss of water which is supplied from the stream by seepage and capillary attraction through the soil. They also allege that the supply from which the water is evaporated to produce the moisture with which the trees are watered through their leaves will be reduced.

In this connection it may be said that only a comparatively small

proportion of the vast area of timber land in Humboldt County lies along the stream bank, the greater portion of the area being watered directly from the precipitation rather than from percolation from the stream channel along Eel River. The tendency of the water is to drain from the watershed into the channel of the river and not away from it.

It may also be stated that the tendency of the vegetation is to transpire from their leaves the water which is taken up through their roots rather than to absorb moisture through their leaves.

Even if some of the plant growth should be supplied with water through seepage and capillary attraction or even through their leaves the amount so absorbed would be small and would not be influenced appreciably by the proposed appropriation of the applicant.

PRESERVATION OF FISH LIFE IN THE EEL RIVER

It has not been made to appear that the granting of Application 4788 will endanger fish life in the Eel River.

During the period of low flow but 2 second feet is now allowed to flow downstream past the Van Arsdale dam and the granting of this permit will not operate to reduce that amount and at other seasons of the year there will be waters far in excess of 2 second feet remaining after this appropriation is being satisfied and which waters will be available and as far as the record shows ample to sustain fish life.

The authority of the Fish and Game Commission under Section 637 of the Penal Code to protect fish life can in no way be prejudiced or restricted by any action that this office may take on the pending applications. The matter of fish protection is vested in the Fish and Game Commission as declared by the legislature.

DIVERSION OF WATER FROM ONE WATERSHED INTO ANOTHER

Humboldt County states as one ground of its protest that "the Division of Water Rights has no jurisdiction, power or authority to permit, authorize or grant a permit to appropriate water which will be diverted from one watershed to another watershed" and that such a permit would be without legal authority, in excess of the powers of the Division and void and unconstitutional.

Protestant does not cite a single case or authority in support of this declaration neither does protestant argue this point in its brief or cite cases or authorities in support.

That there is no merit in this contention is obvious from the fact that from the days of the early miners the practice of diverting from one watershed into another has been of frequent and common occurrence and there are many instances of such diversions being made at the present time which trace their priority to early times in the history of this state. Also from early times down to the present such diversion rights have been from time to time initiated and since the passage of the Water Commission Act many permits have been granted for such diversions.

In 2 Kinney on Irrigation and Water Rights, 2nd Ed. p. 1521 it is said:

"§866 Change of Water from one Watershed to another. There is no question now as to the right of an appropriator to divert the water from a stream flowing in one watershed and by any means conduct it for the irrigation of lands in another watershed. Yet in an early case in Colorado the validity of the appropriation and use of the water by this method was questioned, but the Court upheld the right. (Coffin v. Left Hand D. Co., 6 Colo. 445). Under a similar state of facts to those in the Colorado case, the Supreme Court of Washington, in a very recent case also upheld the right. (Hiller v. Wheeler, 103 Pac. 641)***** The general rule is that under the law of appropriation, as contrary to the law of irrigation as a riparian right, the water may be used in any locality, however remote from the stream from which it is taken. Therefore, it may be used on the lands of the valley of the stream from which it is taken, or it may be carried over or through the intervening ridge to land lying in another watershed, and there used provided that the vested rights of others are not injured thereby."

The Colorado case of Hammond v. Rose, 19 Pac. 466 affirms the prior Colorado decision in the Coffin case, supra as does the Wyoming case of Wiley v. Decker, 73 Pac. 210, 220.

Some of the California cases wherein uses beyond the watershed have been in issue are:

Armstrong v. Payne, 128 Cal. 730
San Bernardino v. Riverside, 126 Cal. 730
Holmes v. Ray, 126 Cal. 231
E. C. Horet Co. v. New B. Pt. H. Co., 177 Cal. 631
Gallatin v. Corning Irr. Co., 123 Cal. 405, 413
San Joaquin etc. Co. v. Fresno Flaca Co., 153 Cal. 626
Burr v. Haskin etc. Water Co., 124 Cal. 428
Montecito etc. Co. v. Santa Barbara, 151 Cal. 377
Watscama L. Co. v. Rogge, 151 Cal., 108, 111
Palge v. Rocky Ford C. Co., 83 Cal. 85
Orelinton v. Karsan C. & I. Co., 57 Cal. 221
Burnett v. Whitesides, 15 Cal. 35
Burr John & D. Co. v. Tustin, 11 Cal. 143
Holman v. Stone, 7 Cal. 22

In Gallatin v. Corning Irr. Co., supra the defendant under notices of appropriation posted by it was proceeding to construct its works to divert water out of the watershed of South Elder Creek. As a lower riparian owner the plaintiff sought to enjoin this diversion. The court held that the waters

involved were flood waters to which the plaintiff's riparian right did not attach and affirmed judgment for the defendant appropriator. The court said:

"These decisions in effect establish the just rule that floodwaters which are of no substantial benefit to the riparian owner or to his land, and are not used by him, may be taken at will by any person who can lawfully gain access to the stream, and conducted to lands not riparian, and even beyond the watershed without the consent of the riparian owner and without compensation to him. They are not a part of the flow of the stream which constitutes 'parcel' of his land, within the meaning of the law of riparian rights."

The case of Burr v. Macley, supra is in point by analogy in that in that case it was first held in California that one might appropriate from an underground basin and export water to distant lands not overlying the basin.

Also that place of use whether within or without the watershed is not of fundamental concern in the matter of rights by appropriation is emphasized by the numerous cases allowing changes in place of use subject to no injury to others. Where the water is to be used is immaterial except insofar as it may be determinative of whether others are injured. It is injury to others and not whether the place is within or without the watershed that is the material consideration.

We have found no cases nor have we been cited to any decisions which restrict the appropriative right to use within the watershed or make that a criterion or test of whether the use is allowable.

PUBLIC WELFARE

In the brief filed by the protestors on November 16, 1947 much stress is laid on the fact that in view of Section 1b of the Water Conservation Act as it now stands and with Section 1a, it is the duty of the Division to take into consideration the interest and welfare of the public in passing upon permits or granting water rights.

Section 1a of the Water Commission Act is as follows:

"The state water commission shall have authority to grant, or to refuse to grant a permit and to reject any application, after hearing; provided, however, that no hearing shall be necessary in order to issue a permit upon an unopposed application or in order to reject a defective application after notice as provided in section seventeen of this act, unless the state water commission elects to hold a hearing; and provided, further, that upon failure of any party in interest to appear at a hearing or show good cause within five days thereafter for said failure, final action may be taken by said commission without further hearing. In the conduct of hearings technical rules of evidence need not be applied. Notice of hearing shall be given by mailing notice not less than twenty days before the date of hearing". (Amended 1923)

Section 15 of the Water Commission Act is 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." (Amended 1917 and 1921.)

Section 15 directs the Division, when issuing a permit for the appropriation of water, to insert such terms and conditions as in its judgment will best develop, conserve and utilize in the public interest such water and to reject an application which is clearly against the public interest. It announces as a State policy that domestic use of water is the highest use and that the next highest use is for irrigation and directs the Division to be guided by such policy.

Considering Section 15 in connection with the other sections of the Water Commission Act and also in the light of the many Superior Court

decisions which have in past years construed the fundamental principles of the doctrine of appropriation of water, it is our interpretation of Section 15 that the Division is authorized to insert terms and conditions relative to use of water by an applicant which are directly pertinent to the manner of his use and the time of his use in order to insure the most beneficial use by him which can reasonably be expected under all the circumstances involved and which may be designed to carry out and safeguard positive provisions of the Act but that the Act does not empower the Division to impose any conditions which as a legislature it might consider applicable or even to speculate upon what might or might not prove to be of general public welfare and then act according to its best estimate as to what the future development of this state may prove to be in the public interest. Outside of a manifest and indisputable certainty as to what is against the public welfare we would hesitate to deny an application as not best conserving the public interest.

The Division does not hesitate when issuing a permit to insert such conditions as in its judgment are advisable to afford protection to prior rights, to restrict the permittee to unappropriated water, and to safeguard public welfare generally insofar as compatible with its conceptions of the underlying principles of the doctrine of appropriation, the water Commission Act and Section 15 thereof and the constitution and codes of the State.

In this case however it occurs to us that protestants are objecting to a continuance of what applicant has for many years done rather than against anything new which is proposed by applicant. No injury is apparent to protestants as a result of the appropriation proposed under Application 4788 because it would appear that during the season of critical or low flow

applicant has already for many years been diverting all of the natural flow of South Eel River at Van Arsdale Dam and during the greater portion of the remainder of the year there is a vast surplus over and above what is needed to satisfy downstream claimants. In fact the situation as regards downstream claimants cannot be affected by the action taken in approving or denying Application 4788.

We therefore fail to find any element of public welfare involved but if such existed there would be a counter element of public welfare in that another territory would claim that its welfare should be considered also. As to balancing the welfare of one community against another, we do not believe that Section 15 contemplates that.

OTHER GROUNDS OF PROTEST

(1) Protestants claim that the proposed diversion of applicant will result in reducing the rainfall in Northern California.

To substantiate this claim, weather bureau records of rainfall in Humboldt County for the period from 1887 to 1926 inclusive were submitted by the protestants at the hearing held on September 27, 1927 indicating that the rainfall has decreased somewhat during recent years in the Eel River watershed. No showing however was made which would relate this fact to the storage of Snow Mountain Water & Power Company. Not only has the rainfall decreased during recent years in Humboldt County but this condition appears to be general over the entire State. We are of the opinion that precipitation cannot be affected, at least in any appreciable degree, by the project of applicant.

(2) Protestants allege that the proposed diversion of the applicant would interfere with the favorable conditions of health and sanitation that have heretofore been enjoyed in Humboldt County.

In this connection, it may be said that during the period when the water is most needed for the purposes of health and sanitation the applicant has already acquired a right to and has used the water and that during the remainder of the year there is water flowing to waste into the Pacific Ocean.

(3) Protestants allege that the methods of confining and impounding the water would endanger the bridges and property of Humboldt County and its citizens, in the bed and along the banks of the Hel River.

In reply to this allegation, it may be stated that there is a body created by act of the legislature whose duty it is to safeguard the public interests by supervising the construction of dams and that this duty properly belongs to that body and not to this office.

(4) Protestants allege that the proposed project of the applicant is speculative.

There is in nearly every project which comes before this office a speculative aspect and in order to safeguard the public in this respect dates are named in every permit issued by this office on or before which construction work must be commenced and completed and the water put to complete beneficial use and if these terms are not complied with and no good cause can be shown why the dates should not be extended the permit may be revoked.

PERMIT CONDITIONS DEMANDS BY PROTESTANTS

The protestants urge a denial of this application or in lieu thereof a mandate from this office that applicant dedicate an amount of storage water to the protestants by utilizing its reservoir to make available a summer flow which but for storage during another season would be non-existent. In other words protestants would have this office compel applicant to improve upon natural conditions by supplying waters for their benefit at a time when, but for applicant's artificial works there could be no waters for them.

From a legal standpoint it should be noted by the protestants that the Division of Water Rights cannot constitutionally substitute for the legislature and that a delegation of uncontrolled and unguided legislative discretion would be void. We find it unnecessary to interpret Section 15 as constituting such a delegation, but if it does it is certainly and clearly unconstitutional upon a principal of law so thoroughly established as to require no citation of authority.

In this connection it may be said that at the last session of the legislature an attempt was made to accomplish a restriction upon appropriative rights by reserving certain quantities of water to the watersheds of occurrence--Assembly Bill 247 which failed of passage.

This bill is mentioned to show that the legislature generally recognized the fact that the law does not impose any such restriction as to watersheds and that in order to impose such a restriction, an act of the legislature would be necessary. If a reservation to the watershed is not provided for, much less is it provided that water shall be reserved and also made available to protestants at the expense of and by the works of the applicant.

The Division of Water Rights therefore does not find it possible to place a clause in any permit which may be issued in approval of application 4788 which would force the applicant to release a portion of its stored waters to the protestant.

However, as applicant proposes to divert water under this application to which he has the right under prior appropriations, a clause should be inserted in any permit issued in approval of the said application to the effect that the total amount of water diverted under this

permit together with the amount of water diverted under present existing rights of permittee should not exceed 400 cubic feet per second of direct diversion and 215,000 acre feet per annum of diversion to storage.

APPLICATION 5661 FILED BY SNOW MOUNTAIN WATER AND POWER COMPANY
FOR THE BENEFIT OF THE POTTER VALLEY IRRIGATION DISTRICT

There is a contract in escrow between the Potter Valley Irrigation District and the Snow Mountain Water and Power Company, a copy of which was introduced as an exhibit at the hearing held September 27, 1927. Whatever rights the Company may acquire under this application to liberate water in Coyote Valley will be subject to the contract with the Irrigation District to furnish it with an amount of water not to exceed 4500 acre feet of stored water.

The amount of water which it is proposed to supply to the irrigation district is so very small in comparison to the total amount introduced into the Russian River watershed by the Company that we do not believe that the effect on the summer flow of the Russian River will be of any material consequence. Also some of the waters used by the District will probably find their way into the Russian River as return flow.

As to the legality of this proposed use by the Company it appears that as an importer of foreign supply the Company would have the right to discontinue bringing this water into the Russian River watershed or might divert it all away to other and further uses at its pleasure.

In this connection attention is called to the case of E. C. Herst vs. Bow Blue Pt. Min. Co., 177 Cal., 301 p. 636 and 637 wherein it is said

"*****It is unnecessary, however, to prolong the discussion of this phase of the case, because applicant admits that, under the authorities, the people who put the water brought area sources outside of the watershed

into Wolf Creek might at their pleasure discontinue such increment, leaving appellant without remedy.

"If, then, the appellant can obtain no easement or right by adverse possession or user against the people at Grass Valley who add to the corpus of the stream, how, ask respondents, can plaintiff maintain the present action without first establishing a right to the use of this water? We can find no satisfactory answer to the question that will fit with appellants contentions.*****"

The proposed use of water under Application 5661 is a useful and beneficial one and there appears to be no reason why the application should not be approved. There should however be a special clause inserted in any permit issued in approval of this application to the effect that nothing contained therein should be construed to authorize the permittee to divert from South Mel River any water in excess of that to which it is now entitled under permits heretofore issued by Division of Water Rights.

O R D E R

Applications 4788 and 5661 for permits to appropriate water having been filed with the Division of Water Rights as above stated, protests having been filed against Application 4788, public hearings having been held and the Division of Water Rights now being fully informed in the premises:

IT IS HEREBY ORDERED that Application 4788 be approved and that a permit be granted to the applicant subject to such of the usual terms and conditions as may be appropriate and a special term or condition to the effect that the total amount of water diverted under this permit together with the amount of water diverted under prior rights of permittees shall not exceed 400 cubic feet per second of direct diversion and 215,000 acre feet per annum of diversion to storage; and

IT IS FURTHER ORDERED that Application 5661 be approved and that a permit be granted to the applicant subject to such of the usual terms and conditions as may be appropriate and a special term or condition to the effect that nothing contained therein shall be construed to authorize the permittee to divert any water from South Esl River in excess of that to which it is already entitled under permits heretofore issued by Division of Water Rights.

Dated at Sacramento, California, this 9th day of January 1928.

Harold Conkling
(HAROLD CONKLING)
CHIEF OF DIVISION OF WATER RIGHTS

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