

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

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In the matter of Application 5248 of Banta Carbona
Irrigation District to appropriate water from
San Joaquin River in San Joaquin County
for Irrigation and Domestic Purposes

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DECISION No. A 5248 - D-214

Decided: February 6, 1929

APPEARANCES AT HEARING HELD AT SACRAMENTO, December 11, 1929

For Applicant

Banta Carbona Irrigation District

Nutter, Hancock & Rutherford
by Newton Rutherford, Stockton

For Protestants

East Contra Cost Irrigation District

Alex Murdoch, Atty.
Brentwood, Calif.

Reclamation Districts 2058 and 2062

J. M. Smith, Secretary
Banta, Calif.

EXAMINER: Harold Conkling, Chief of Division of Water Rights, Department
of Public Works, State of California.

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O P I N I O N

Application 5248 proposes a supplemental appropriation of 40 cubic feet per second for Banta Carbona Irrigation District and adjacent lands. On June 18, 1924, Application 1933 of that district was approved allowing an appropriation of 179.69 cubic feet per second from San Joaquin River at a point east of Tracy for the irrigation of the 14,375 acres within the district boundaries. Application 5248 now pending is intended to provide an additional supply which would be applied in part to lands presently without the district

which it is proposed to bring within the district and in part to lands outside of the district which would be served under contract.

The application was completed sufficiently for advertising in accordance with the Water Commission Act and the Rules and Regulations of this office, was advertised, and protested by the East Contra Costa Irrigation District. Accordingly it was set for hearing in Room 401 Public Works Building, Sacramento, on Tuesday, December 11, 1928 at 10:00 o'clock a.m., of which hearing due notice was given. Appearances were entered both by applicant and by protestant and in addition an appearance was entered as protestant by Reclamation Districts 2058 and 2062, who made common cause with the East Contra Costa Irrigation District.

DISCUSSION OF PROTESTS

The objection of protestants to the proposed appropriation is based upon two grounds. It is urged as one ground of objection that diversions such as that proposed will result in a lowering of the water level at protestant's diversion point thereby necessitating a rebuilding of its intake works and increasing the pumping lift with resultant increased cost for power. It is urged as a second ground of objection that diversions such as that proposed decrease the inflow of freshwater to the Sacramento San Joaquin Delta thereby weakening the fresh water barrier in the upper bay and lower delta areas and stimulating the infiltration of salt water from the ocean and lower bay region which in turn produces at times a chlorine content of such proportions that the water in a portion of the delta channels is unfit for irrigation use. Protestant's engineer, Mr. Gerald Jones, submitted a tabulation of data for recent years showing an increasing chlorine content and a lowering of the water level at the intake

of East Contra Costa Irrigation District.

This situation in the Sacramento-San Joaquin Delta is so well known that we need hardly elaborate further on the position taken by protestants. It is a matter of common knowledge that the Sacramento and San Joaquin Rivers, discharging their fresh water burden into the upper San Francisco Bay region, build up a fresh water barrier which moves forward and backward through the lower delta and upper bay areas and prevents the incursion of salt water from the ocean into bodies of water in the delta area which lie for the most part below sea level. The position of this barrier at any time is dependent upon the quantity of water recently discharged by these two rivers into San Francisco Bay. In times of maximum flood the fresh water extends to Carquinez Straits and in the summer of 1924, which was an extremely dry year, the chlorine content ran as high as 600 parts per 100,000 at Rio Vista on the Sacramento River and at Jersey Island on the San Joaquin River.

It is unquestionably true that following winter and spring seasons of subnormal precipitation and runoff in the Sacramento and San Joaquin drainage areas this salt water barrier moves further up into the delta channels and exposes a greater agricultural acreage to the menace of salt impregnated water. And investigations which have been made by this office lead to the conclusion that a constant flow of some 4,000 cubic feet per second of fresh water into the delta area must be maintained in order to afford a satisfactory irrigation supply to the lower irrigable lands. It follows therefore naturally that any irrigation or other draft from the two rivers which reduces the inflow to the Delta below 4,000 cubic feet per second will increase the salt water menace to the lower lands such as those of protestants.

It is likewise unquestionably true that any draft for irrigation

or other purposes on either of the two rivers will contribute to a lowering of the water level in the delta channels from which these protestants divert their supply.

Protestants did not deny, however, that there were perhaps whole irrigation seasons, and certainly portions of every irrigation season, when the amount applied for by this applicant might be appropriated without injury to them, and protestants did not undertake to establish any measure of the damage to them which might result from this appropriation. Protestants in fact admitted that the injury due to this particular appropriation might be negligible and it was the cumulative effect of this with other appropriations which was feared.

DECISIONS OF SUPREME COURT NULLIFY PROTESTS

The possibility of injury to protestants by reason of increasing salinity and decreasing water level at their diversion works, which may result from this proposed appropriation is not, however, a governing consideration in this matter. In the case of *Town of Antioch v. Williams Irrigation District, et al* (205 Pac. Rep. 694-5) the Supreme Court of California in 1922 ruled in a case very similar to this one and affecting the same waters:

"It is evident, from all these considerations, that to allow an appropriator of fresh water near the outlet of these two rivers to stop diversions above so as to maintain sufficient volume in the stream to hold the tide water below his place of diversion and secure him fresh water from the stream at that point, under the circumstances existing in this state, would be extremely unreasonable and unjust to the inhabitants of the valleys above, and highly detrimental to the public interests besides.

"Our conclusion is that an appropriator of fresh water from one of these streams, at a point near its outlet to the sea, does not, by such appropriation, acquire the right to insist that subsequent appropriators above shall leave enough water flowing in the stream to hold the salt water of the incoming tides below his point of diversion. Further than this we need not go."

With respect to the other ground of objection offered by protestant (i.e. the lowering of water level at protestants intake) the same court has heretofore ruled in the case of Natoma Water, etc., Co. v. Hancock, 101 Cal. 42, 48, 50, 52; 31 Pac. 112; 35 Pac. 334.

"As to the necessary lowering of your head of water by the diversion of the surplus, that will no doubt cause you some inconvenience and trouble which you have heretofore escaped, but it is damnum absque injuria. There is but a limited supply of water in this state available for irrigation and other useful purposes, and a paramount public policy requires a careful economy of that supply. So long as there is but a single appropriator of water on a stream it matters not how imperfect or wasteful may be the means by which he diverts the quantity of water to which he is entitled. No one else is affected and there is no ground for complaint.

"But when subsequent appropriators divert the entire surplus at points above him he is required to use all reasonable diligence to husband what is left, and if by such diligence and the use of ordinary means of diversion he can obtain all that he is entitled to he cannot complain on account of the trouble and expense which it may involve.

"*****While the right of the prior appropriator is carefully protected, he is compelled to exercise it with due regard to the rights of others and the paramount interests of the public. The quantity of his lawful appropriation cannot be diminished, but he must return the surplus to the stream without unnecessary waste, and he must use reasonable diligence and reasonably efficient appliances in making his diversion in order that the surplus may not be rendered unavailable to those who are entitled to it. Upon the same principle it must be held that a prior appropriator whose means of diversion become insufficient for his purposes by reason of their inherent defects, when the surplus is diverted from above him, must take the usual and reasonable measures to perfect such means."

THERE IS UNAPPROPRIATED WATER AVAILABLE

The records of flow maintained by the Water Resources Branch of the U. S. Geological Survey indicate that the average flow at the Vernalis gaging station during the months of July, August and September, which are the months of critical flow so far as irrigation supply is concerned, is approximately

1450 cubic feet per second, and that the absolute minimum recorded flow is 391 cubic feet per second. There has been no showing that this flow together with that from other contributory sources is insufficient generally and under normal conditions if husbanded and beneficially used, to satisfy the needs of all rightful claimants of existing rights dependent upon this source and we are therefore obliged to rule that protestants have failed to establish their contention that this application should be denied upon the ground of lack of unappropriated water.

LEGAL RELATIONSHIP MUST BE ESTABLISHED BETWEEN APPLICANT
AND OWNERS OF LAND TO BE SERVED

There is however another phase of the matter which the Division has given considerable thought, and which demands attention before this application may be approved. We refer to the matter of legal relationship existing between applicant and the owners of land to be served. Regulation 16 of the Division prescribes as follows:

"Beneficial use is the fundamental requirement for the consummation of an appropriative right and therefore an application will be rejected if the applicant fails to establish to the satisfaction of the Division of Water Rights that he can proceed with reasonable promptness toward the completion of the construction of the physical features of his project and completion of beneficial use. Where irrigation of the land of others or the distribution of water or hydroelectric energy to others or to the public is proposed, the applicant shall give reasonable assurance of his ability to consummate the use proposed."

In this particular case it appears that applicant has failed so far to furnish evidence of a satisfactory legal relationship with owners of the lands outside of the district boundaries.

As has been stated, Application 1933 by this same applicant was heretofore approved allowing an appropriation of 179.69 cubic feet per second from this same source for the irrigation of 14,375 acres within the

district boundaries. This application as originally filed on July 23, 1920 contemplated an appropriation of 250 cubic feet per second for the irrigation of 20,000 acres. Completion of the application was delayed for a period of some three years or more awaiting final determination of the district boundaries, during which time presumably all those owners of adjacent lands who so desired had an opportunity to come into the district and share in the appropriation initiated by the filing of Application 1933. It was not until the district boundaries were definitely established and the district was in a position to proceed with an included area of 14,375 acres that the amount sought to be appropriated was scaled down in accordance with our usual rule to the customary maximum allowance of one second foot to each eighty acres to be irrigated or 179.69 cubic feet per second.

Since the approval of Application 1933 the area within the district has been increased to 14,647.02 acres. There is in addition some 2,521.62 acres outside of the district which it appears the district is obligated to serve under definite contracts evolving out of its purchase of the diversion works of the Kasson Irrigation District--Banta Carbona Irrigation District having taken over and reconstructed those diversion works and now operating them. And there are in addition some 8,501 acres outside of the boundaries of Banta Carbona Irrigation District and not covered by the contracts above referred to which it is proposed to bring within the district. It is for the purpose of insuring an adequate water supply for these additional lands that Application 5248 was filed.

It is not entirely clear from the record why a claim was not made by applicant in connection with Application 1933 for sufficient additional water with which to serve the 2,521.62 acres of Kasson Irrigation District

which the applicant was required to serve under the heretofore mentioned contracts but our understanding is that applicant chose at that time to stand, so far as this area was concerned, upon prior rights of appropriation claimed (i.e. the so-called McChesney rights). Apparently now however if this understanding is correct, applicant chooses to acquire a duly registered and recorded appropriative right based upon a filing with this office which new right would be identical with and not in addition to the so-called "McChesney" rights.

It appears that the present diversion works of applicant are constructed to a capacity of 220 cubic feet per second, which it was testified by applicant's engineer should be ample to take care of these additional lands, and the purpose of Application 5248 and of the inclusion of said lands "is not only for the purpose of irrigating those lands but also for the effect of lowering the cost of irrigation of lands now within the District by decreasing the overhead expense". (See Transcript p.9)

Until an additional appropriation is secured as proposed in Application 5248 it is urged that the district will not wish to admit any additional lands, and it is probable the lands outside the district would not wish to be formally included and become burdened with a part of the district's obligations, facing as they would the possibility of an insufficient water supply. It is but reasonable then that both the district and these lands without the district which it is proposed to include should at this time have assurance, if such assurance is otherwise in order, that a permit will be forthcoming on Application 5248 when and if a satisfactory legal relationship is established between applicant and the lands which it is proposed to serve thereunder.

It would however be in conflict with the practice of the Division

as set forth in Regulation 16 heretofore quoted if the Division would at this time, upon the showing so far made, issue a permit to Banta Carbona Irrigation District for the irrigation of 8,501 acres which have filed no petition for inclusion within the District and which have signified no interest in the appropriation. We take it that the propriety of this rule may well be exemplified by its application to the present case.

It is conceivable and we may say even probable that the period of development which will ensue in Banta Carbona Irrigation District before the two appropriations under Applications 1953 and 5248 can be fully consummated will occupy a space of some years. We have in mind the Modesto and Turlock Irrigation Districts nearby which are even yet proceeding with development under direct flow rights initiated forty years ago. Were the development period of Banta Carbona Irrigation District to occupy a similar number of years and were this application approved, lands outside the district boundaries which are now specified as intended for service could, without any expenditure whatsoever claim a priority after a lapse of many years good as against intervening appropriators who had proceeded in good faith, constructed their diversion works, and been using the water beneficially for many years. We take it that this is not a condition which should be facilitated or accomplished through any action of this office and shall therefore in accordance with our usual practice and Regulation 16 of the Division require prior to the approval of Application 5248 that applicant and the lands without the district arrive at some definite arrangement with respect to the conditions under which the latter may participate in this appropriation.

CONCLUSION

We may state therefore in conclusion that under the decisions of

the Supreme Court of this state we are estopped from ruling as requested by protestants that this application be denied upon the grounds that the proposed appropriation would result in lowering the water level at their intakes thereby compelling them to rebuild their diversion works and incur an additional expense for power in connection with pumping, or upon the further grounds that the proposed appropriation will tend to increase the danger from excessive salinity in the water at their said intakes. It is found that there is unappropriated water available, that the proposed use is beneficial and that permit is in order when and if satisfactory legal relationship is established between applicant and the owners of the land intended for service. Action on the application will therefore be withheld for a reasonable time to permit a showing on this phase of the matter.

O R D E R

Application 5248 for a permit 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 action on said application 5248 be deferred until further order is entered.

Dated at Sacramento, this 6 day of February, 1929.

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

JCF:
ENB:MP