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

In the Matter of Application 5134 of the Yosemite Power Company to Appropriate from the South and Middle Forks of the Tuolumne River in Tuolumne County for Power Purposes

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Decision No. A 5134 D 143

Decided March 10, 1927

APPEARANCES AT HEARING HELD December 16, 1926.

For Applicant:

Yosemite Power Company	A. E. Chandler

For Protestants:

Turlock and Modesto Irrigation Districts	P. H. Griffin L. J. Maddux W. H. Holmes R. V. Meikle
City and County of San Francisco	John J. O'Toole
Waterford Irrigation District	R. P. McIntosh
	L. L. Dennett
Groveland Water Users Association	W. Lehmkuhl
	No appearance

EXAMINER: Edward Hyatt, Jr., Chief of Division of Water Rights, Department of Public Works, State of California.

O P I N I O N

Application Number 5134 was filed by the Yosemite Power Company on July 30, 1925.

It proposes an appropriation of 75 cubic feet per second of direct diversion and 25,000 acre feet per annum of diversion to storage from the Middle Fork of the Tuolumne River, 75 cubic feet per second of direct diversion and 25,000 acre feet per annum of diversion to storage from the South

Fork of the Tuolumne River at Crocker and 25 cubic feet per second of direct diversion and 15,000 acre feet per annum of diversion to storage from the South Fork of the Tuolumne River at Heardin.

The direct diversion is to be made throughout the entire year. The diversion to storage is to be made during the season from January 1st to July 1st of each year.

The diversion to storage from the Middle Fork of the Tuolumne River is to be made at a rate not to exceed 200 cubic feet per second.

The water from all sources is to be stored in the Crocker Reservoir which has a capacity of 41,000 acre feet and in the Heardin Reservoir which has a capacity of 24,000 acre feet.

The water is to be used for the generation of electrical energy through three power houses, two to be located on South Fork of the Tuolumne River and one on the Tuolumne River just below its junction with the South Fork. The total amount of power to be developed is 66,800 theoretical horsepower.

The water is to be returned to the main Tuolumne River at the tail race of the lower power house at a point in the NW¼ SE¼ Section 24, T 1 S, R 17 E, M.D.B. & M.

The application was protested by the following parties:

Protestant	Date of Filing Protest
Modesto and Turlock Irrigation Districts	10-6-26
Waterford Irrigation District	10-14-26
Groveland Water Users Assn.	10-15-26
City and County of San Francisco	10-20-26

This application 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 Room 707 Forum Building, Sacramento, California, at 10:00 o'clock A. M. on December 16, A. D. 1926. Of this hearing applicant and protestants were duly notified.

Synopsis of Protests.

In their written protest the Modesto and Turlock Irrigation Districts claim all of the water of the Tuolumne River that they can, or may make, and are now making beneficial use of, by virtue of prior appropriative rights, for both irrigation and power purposes and allege in effect that the approval of the application as far as storage is concerned would deprive them as lower appropriators of the natural flow of the stream. At the hearing these protestants also claimed that if the Division of Water Rights permitted them to change the points of diversion under Application 5094 of the Turlock Irrigation District there would be no water available for storage by the applicant. They further claim that Application 5266 of the Turlock Irrigation District, although filed subsequently to Application 5184 by the Yosemite Power Company, has a priority of right by virtue of Section 15 of the Water Commission Act.

The Waterford Irrigation District claims a right to the use of 250 second feet of water from the source from which the applicant proposes to divert based upon a notice posted prior to the passage of the Water Commission Act and claims also a right to 66 second feet of water purchased from the Sierra and San Francisco Power Company which latter right is acknowledged to be the first on Tuolumne River. The period of diversion under the 250 second foot right has been from about February 15th to about July 10th and under the 66 second foot right has been from about April 1st to about October 1st. When protestant can rely upon the 250 second foot appropriation it re-sells the right to use the 66 second foot right thereby securing a revenue. The protestant claims that the proposed appropriation of the applicant would diminish the flow of the Tuolumne River at the point of diversion of the protestant, so as to seriously shorten the time when the 250 second foot appropriation will be available to the District

and will interfere with the storage of a portion of the 250 second feet for use during the low water period.

The Groveland Water Users Association claim a right to the use of water through the Gold Rock Ditch and allege in effect that the proposed appropriation would prevent it from securing water from the South Fork of the Tuolumne River for irrigation purposes through that ditch.

The City and County of San Francisco claim prior appropriative rights on the Tuolumne River and its tributaries and allege in effect that under the Raker Act it is obligated to release a portion of its waters to make up flow to the Turlock and Modesto Irrigation Districts when that flow fall below a certain minimum and that if the application were granted it would compel the protestant to release a greater portion of the water which it had therefore appropriated.

There is Unappropriated Water in the Tuolumne River.

The drainage area of the Tuolumne River above the La Grange dam is approximately 1,545 square miles. The mean seasonal runoff from this area is about 2,000,000 acre feet. Of this amount the Yosemite Power Company seeks to impound 65,000 acre feet or approximately 3.2%. The direct flow which the applicant proposes to divert together with the stored waters will be directly returned to the Tuolumne River above the points of diversion of the Modesto, Turlock and Waterford Irrigation Districts.

The Modesto and Turlock Irrigation Districts base their claim as to ultimate irrigation requirements on a net irrigable area of 240,000 acres with a gross diversion duty of 4.85 acre feet per acre per annum which would mean a total seasonal requirement of about 1,020,000 acre feet. There are approximately 10,000 acres of irrigable land within the boundaries of the Waterford Irrigation District for which its engineer estimates an ultimate gross duty of 5.5 acre feet per acre per annum or a total supply of 55,000 acre feet. The

total requirement for the three districts is therefore estimated by the district engineers at about 1,075,000 acre feet per annum for irrigation purposes. For domestic purposes the City of San Francisco proposes an ultimate draft of 400,000,000 gallons per day or approximately 450,000 acre feet per annum. Therefore after deducting from the average annual flow of Tuolumne River the full amount estimated by these protestants as their right there would still remain a surplus of 475,000 acre feet or approximately 25 per cent of the normal flow.

We are not inclined however to accept the estimates of the districts as to their ultimate requirements. It has been their history that with the progress of time concrete lining of ditches, rechecking of lands and other improvements in the irrigation systems and methods of irrigation have brought about a constant reduction in the amount of water used. This reduction is most strikingly illustrated in the memorandum submitted under date of December 29, 1926, by the engineers of these three districts wherein at p. 11 it is shown that with an increase of 50 per cent in the irrigated acreage of Waterford Irrigation District between 1921 and 1926 there was no increase in the amount of water used. It is likewise clearly illustrated in the experience of Modesto and Turlock Irrigation Districts.

The Division of Engineering and Irrigation of this department after a careful study of all available data including the experience of these districts, published Bulletin No. 6 in 1923 wherein (See Table I p. 89) it is estimated the net duty of water for agricultural lands on the San Joaquin Valley floor is 2.00 acre feet per acre per annum and the net duty of the foothill lands on the east (which would include part Waterford Irrigation District) is estimated at 1.75 acre feet per acre per annum. We cannot believe that gross diversions of

4.25 to 5.50 acre feet per acre per annum should be required to supply such a net duty, as this would involve transmission losses of from 50 to 68 per cent which would appear grossly excessive when these districts are fully developed.

The total amounts which may be claimed by other users on this stream is relatively unimportant and we cannot escape the conclusion that so far as irrigation use is concerned there is a vast surplus in the normal flow of Tuolumne River over and above all reasonable demands of the claimants of vested rights which surplus is now available for appropriation.

Particularly would it appear that the irrigation districts would have little to fear, in the matter of interference by this proposed appropriation with their irrigation use because of the fact that only 65,000 acre feet are to be stored which 65,000 acre feet will later be released to augment the flow during the following season when there is a shortage of water and this reservoir release together with the natural flow used by applicant will ultimately come down to the districts without loss, none of it having been consumed or dissipated aside perhaps from a slight evaporation loss in the storage reservoirs.

As to possible interference with the rights of Waterford Irrigation District to use water for irrigation purposes and with the rights of Modesto and Turlock Irrigation Districts to use water for power purposes at Don Pedro and La Grange Dams by reason of a change in the regimen of the stream through the operation of storage we shall discuss these matters later in connection with their individual protests.

The Protest of the Modesto and Turlock Irrigation Districts.

From the above discussion of the water supply in the Tuolumne River we have seen that there is unappropriated water during a season of normal run-

off and as no water is to be diverted from the Tuolumne River watershed by the applicant and the schedules of operation submitted by both the applicant and the protestants indicate that in general the water released from the proposed storage of the Yosemite Power Company would be of benefit in regulating the stream during the later irrigation months and that the content of Don Pedro Reservoir as well as the power head would be increased thereby, the contention of these protestants that the proposed appropriation would necessarily deprive them as lower appropriators of the natural flow of the stream does not appear to be well founded.

While it may be possible that under certain conditions there might be an interference with the prior rights of these protestants the burden of respecting these rights is upon the applicant and the fact that the applicant may possibly violate the terms and conditions imposed upon him under a permit would not necessarily justify the denial of the application.

Under Application 5094 filed by the Turlock Irrigation District on July 12, 1926, the District proposes to appropriate waters of Moccasin Creek and the Tuolumne River for power purposes. The point of diversion on the Tuolumne River named in the original application was located on the main river below its junction with the North Fork and about two miles above Wards Ferry. The District on November 12, 1926, proposed to change the points of diversion to include an appropriation from the South Fork near Hourdin Reservoir and from the Middle Fork just North of Hourdin Reservoir and to increase the amount to be diverted to storage from 20,000 acre feet to 80,000 acre feet per annum. Applicant was advised that no increases in amount could be allowed and that the changes in point of diversion were of such magnitude and involved such interference with Application No. 5154 that they could not be allowed. The objection of Turlock Irrigation District based upon these proposed changes cannot there-

fore be sustained.

Application 5266 was filed by the Turlock Irrigation District under date of November 15, 1926, about three and a half months subsequent to the filing of Application 5134 by the Yosemite Power Company. It proposes to appropriate in addition to the waters of Big Creek, the waters of the Middle and South Forks of the Tuolumne River.

The proposed points of diversion on the South and Middle Forks of the Tuolumne River are identical with those named in Application 5094 and it is evident that if Application 5134 by the Yosemite Power Company is approved it would interfere with the proposed diversion of the Irrigation District.

The protestants Turlock and Modesto Irrigation Districts, by virtue of Section 15 of the Water Commission Act claim that although the filing of Application 5266 was subsequent to that of 5134 it has nevertheless a priority of right over and above that of 5134 in that their appropriation is for agricultural purposes and that of the applicant is for power purposes.

We believe however that Section 15 of the Water Commission Act is not here in issue.

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

The contention is advanced by joint protestants Turlock Irrigation District and Modesto Irrigation District that the second and third sentences

of Section 15 of the Act are meaningless unless they be applied to the case at hand and held to confer a priority in right upon the districts in favor of their joint application 5266. In other words the declaration of policy that agricultural use is next highest to domestic use and that the commission shall be guided thereby in acting upon applications is urged as controlling though in conflict with the fundamental principle of appropriation which has obtained from the beginning of that doctrine and which was carried on into the Water Commission Act, to wit, "first in time, first in right". More specifically the argument is that a pending application for power purposes is to be relegated in priority in deference to a subsequent application for agricultural purposes.

The second and third sentences referred to, if they stood alone as a complete section would lend themselves more to such an interpretation but even then such a meaning would be debatable. However, it is a familiar rule of statutory interpretation that all of an act and all of its sections and each section must be considered as a whole and the context given due consideration.

In the light of the fundamental principle of appropriation that "first in time is first in right" we would expect departures from that doctrine to be expressly declared or so clearly indicated as to leave no room for doubt especially in view of the fact that date of filing an application is made the date to which the priority of a right initiated under the act relates. As has been heretofore held by the Division of Water Rights in the matter of an application filed by the East Bay Municipal Utility District to appropriate from the Mokelumne River for municipal purposes, such an application is prior in right as against applications prior in time and pending before the division for other purposes. Section 20 of the Water Commission Act is very explicit wherein it declares that such applications "shall be considered first in right,

irrespective of whether they are first in time". Here then is an instance wherein the Act does depart from the fundamental principle of priority which it otherwise observes. In so doing the Act as we would expect is very explicit and leaves no room for doubt or uncertainty. Such cannot be said of Section 15 if it be urged that it also constitutes such a departure in every case as between domestic and agricultural applications on the one hand and applications for other purposes on the other hand.

The true applicability of the declaration of policy contained in these sentences of this section, it seems to us, is clearly indicated by the legislature. The opening sentence of the section and also its closing sentence disclose its subject matter as that of the "public interest" and the weight to be accorded considerations of "public interest" in acting upon an application. Hence the two sentences under consideration seem to be merely a declaration that wherein the "public interest" is involved agricultural use shall rank next to domestic use. In other words the importance of agricultural use is emphasized and in the event that an application for direct flow for power purposes such as a low head development near the mouth of a stream were filed, such an application might result in a dedication of the stream exclusively to power development and such a dedication might well be detrimental to the "public interest" and especially to agricultural development. Herein the section would come into play with its guiding declaration that agricultural use is next highest to domestic use. This clause would in such an event serve its purpose as declarative of what is the public interest and in pursuance of Section 15 it would appear that the application should either be rejected as against public interest or so conditioned as to allow subsequent agricultural developments to proceed even to the detriment of such a power development and this in the absence of any other pending applications.

But in the matter of the pending application, the storage for power purposes proposed by applicant is to be made on the upper reaches of the stream system and the water is to be returned to the stream and will even be available to lower storage in reservoirs of these protestants or to use for direct application by them. There is nothing per se detrimental to the public interest in such a storage and in general the ideal regulation of stream flow seems to be by upper storages and uses for power with a return to the stream for lower storage or direct application for agricultural purposes. We think the second and third sentences of this section serve as a guide in such cases for instance as these wherein a proposed use for agricultural and non-domestic purposes will be so prohibitive of agricultural or domestic uses as to raise the issue as to whether a stream is to be dedicated to power use for instance to the exclusion of agricultural use, and in such a case agricultural use is declared by the legislature to be more in the public interest. In applying this section then the proposed use must be such as to operate against the "public interest" and if the controversy should hinge on whether the use of a given stream system shall be for power or for agriculture then agriculture must be given the preference.

It is therefore concluded that the instant situation is not one wherein the provisions of Section 15 of the Water Commission Act are intended to apply and furthermore the Division is not able to say that the proposed use by applicant will prove to be less in the public interest than would that of the protestants if this application were to be denied in favor of protestants usage under their subsequent application 5266.

The Protest of the Waterford Irrigation District.

It is the contention of the Waterford Irrigation District that the proposed storage of the applicant during the period from January 1st to July 1st of each year would have a tendency to diminish the natural flow of the river at the time the Waterford District is required to use the water and

that in order to avoid possible litigation a condition should be imposed to the effect that the water should be stored during the non-irrigating season.

In view of the fact that the applicant seeks to store only about 3.2% the total normal flow of the River and will no doubt release it more or less uniformly we cannot believe that injury would result to this protestant.

To limit the season of the applicant's proposed diversion to storage during the non-irrigating season would be to deprive it of collecting water during the period of maximum runoff and as between storage on the upper reaches of the stream and a lower prior right, on account of the variance in the seasons it would be impractical to impose such a condition. The burden is on the applicant to so respect the lower rights that they will not be required to bring the matter before the courts.

As to this protestants' claim of possible interference with its right to store a part of the 250 second foot appropriation there has been no showing that this right embraces the right to store or that protestant has any present plans for storing this water if it had the right.

Protest of the Groveland Water Users Association.

The Groveland Water Users Association was unable to make an appearance at the hearing on account of lack of finances. A representative of the association however called at this office on December 14, 1926, and expressed his opinion that the land nearest to the source should have first consideration, especially as against a power project.

As no appearance was made at the hearing in behalf of this protestant and no evidence submitted which would indicate that injury would result to them by the approval of Application 5154, there is apparently no reason for the consideration of the protest especially since it failed to submit evidence in

confirmation of its allegation and to support the burden of proof appropriate to a moving party.

Protest of the City and County of San Francisco

Coming now to a consideration of the objections advanced by the city and county of San Francisco, it may be conceded for the purposes of this opinion that the city is a prior appropriator from other branches of the Tuolumne River than those here involved. The facts are substantially that San Francisco diverts to storage on one fork of the river; that the applicant proposes to store on another fork of the river; that below the confluence of these forks Modesto and Turlock Irrigation Districts divert to use directly and also to storage; and that the city as a condition to rights of way granted by the Federal Government under act of Congress, commonly known as the Raker Act, must allow natural flow to pass thru its reservoirs when needed, in conjunction with the natural flow of the rest of the river, to supply quotas designated in said act for the districts. But the Federal Government explicitly denies in Section 11 of said act that it is attempting to interfere with state control over water and defers to the supremacy of the laws of the state concerning the control of water.

Granting to the districts, the city and other appropriators now using from the river their ultimate needs, it has been hereinabove found that ample water remains for the applicant and that the applicant may obtain its supply without injury to prior rights. Mere possibility that an applicant will violate a permit if granted is certainly no justification for a refusal thereof.

Furthermore, the city is only obligated to release "out of the natural daily flow of the streams which it has intercepted, so much water as may be necessary for the beneficial use of said irrigation districts not exceeding an amount which, with the waters of the Tuolumne and its tributaries, will cause" the requisite flow to the districts. Hence the act itself contemplates that the

branches from which the city appropriates shall not bear the entire quota which the districts are conceded. This together with its explicit recognition of state control over water, would seem to mean that the Federal Government has not imposed upon San Francisco the obligation of guarantor under any and all circumstances. Nor does it seem an unreasonable conclusion that the conditions imposed upon the city are satisifed in so far as the city is concerned even though a shortage in quota to the districts is occasioned by others on other branches who have intervened since the act. If others intervene and use from the river it is not provided that San Francisco shall act as a guardian angel for the districts.

At any rate the laws of the state are deferred to in the Raker Act and under those laws the Federal Government cannot dictate the rights in and to the waters of the Tuolumne River; under these laws unappropriated water is open to appropriation; the Division of Water Rights finds that there is unappropriated water available for this applicant and permit is therefore to be issued.

As to conditions designed to prevent possibility of interference with the city's use for domestic purposes and to prevent necessity for recourse to the courts, the Division is unable to understand how it can be of avail. The courts are the forums provided by law to prevent such interferences and the Division is only able to do so by means of water master control after all rights have been adjudicated by a court of competent jurisdiction. Herein there has been no adjudication of the rights of the respective parties, the Division is without authority to undertake such an adjudication in these proceedings, the Federal Government has not done so in the Raker Act and cannot do so by act of congress. Hence conditions based upon adjudicated rights cannot be imposed and the protection of vested and existing rights must be left to the courts, each

and every permit issued by the Division providing that it is subject to such rights. Finally the applicant will be directly liable to the districts in case it wrongfully withholds water from the districts and as against prior rights of the city it must first contribute to rights prior to both.

General.

The purpose to which the water is to be put under Application 5134 is a beneficial one and in our opinion the proposed storage will not interfere with future irrigation interests on the stream.

At the time the application was made the company had a preliminary permit from the Federal Power Commission which expired on August 20, 1926. The Company then filed an application for license with the Federal Power Commission but this commission found it deficient in regard to financial showing, water rights, and certain other minor requirements and the application was denied without prejudice to the right of the Company to file a complete application for license if and when it may be able to and wish to.

According to a statement made by the applicant's attorney at the hearing the financial showing has been rectified and application for license will be made to the Federal Power Commission just as soon as this office acts upon the application.

It is the opinion of this office that Application 5134 of the Yosemite Power Company should be approved.

ORDER

Application 5134 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 said Application 5184 be approved and that a permit be granted to the applicant subject to such of the usual terms and conditions as may be appropriate.

Dated at Sacramento, California, this tenth day of March ,1927.

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

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