

STATE OF CALIFORNIA
DEPARTMENT OF PUBLIC WORKS
BEFORE THE STATE ENGINEER AND
CHIEF OF THE DIVISION OF WATER RESOURCES

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In the Matter of Application 14100 by Catherine Gray Best to Appropriate Water from R. D. 1002 Drainage Canal, Tributary via Dredger Cut and Snodgrass Slough to North Fork of Tuolumne River, in Sacramento County, for Irrigation Purposes.

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Decision A. 14100 D. 725

Decided November 2, 1951

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Appearances at Hearing Held at Sacramento, June 12, 1951:

For the Applicant

Catherine Gray Best (S. E. Best
(Archibald D. McDougall

For the Protestant

Norman E. Dierssen (Norman E. Dierssen
(Joseph W. Gross

EXAMINER - HARRISON SMITHERUM, Supervising Hydraulic Engineer, Division of Water Resources.

Also present - Kenneth L. Woodward, Associate Hydraulic Engineer, Division of Water Resources.

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OPINION

General Description of the Proposed Development

The application contemplates an appropriation of 0.305 cubic foot per second from a source designated as "R. D. 1002 Drainage Canal", in Sacramento County, for irrigation purposes. Diversion is to be effected by pumping, at a point within the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 8, T5N R5E, MDB&M.

The pump, 1200 gallons per minute in capacity, is said to have been already installed. The area to be irrigated is a 24.41 acre pasture, located partly within the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 8 and partly within the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 17, both of the same township 5N R5E. Irrigation is to extend year-round.

Protest

Norman E. Dierssen protested the application, representing that the diversion therein proposed will interfere with the passage of water from his upper to his lower diversion, that it will decrease an already deficient supply, and that it will give rise to continued litigation. He assertedly diverts from R. D. 1002 Drainage Canal at 2 points, these being located respectively within the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 7 and within the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 18, T5N R5E, MDB&M. From the uppermost of those diversions he claims to irrigate 40 to 45 acres and from the lowermost, 250 to 400 acres. He asserts both riparian and prescriptive rights. He states that his protest may be disregarded and dismissed if the applicant will enter into a binding agreement not to interfere with his prior rights, the extent of which to be set forth therein.

Answer

The applicant answers that according to her information and observation the appropriation which she proposes has not interfered and will not interfere with the passage of water from the protestant's upper to the protestant's lower intake, and will not lessen the supply to which the protestant is entitled. The applicant asserts in effect that the protestant's use from the source filed upon commenced in 1950, that his use has been very small and that the only user from that source prior to 1950 was Mr. Alfred Kuhn. The applicant asserts that the protestant's claims as to riparian and prescriptive rights are without foundation.

Hearing Held in Accordance with the Water Code

Application 14100 was completed in accordance with the Water Code and the Rules and Regulations of the Division of Water Resources and being protested was set for formal hearing under the provisions of Article 733(a) of the California Administrative Code on Tuesday, June 12, 1951, at 10:00 o'clock A. M. in the conference room, Public Works Building, Sacramento, California. Of the hearing the applicant and the protestant were duly notified.

Discussion

At the hearing of June 12, 1951 Witness Alfred Kuhn testified to the effect that the applicant's proposed place of use has in fact been irrigated, from the source filed upon, since 1938 or 1939 (pages 20 and 21 of transcript); that in 1948 the point of diversion was moved some 200 yards upstream (page 23 of transcript); that the source filed upon (R. D. 1002 Drainage Canal) is fed mainly by return flow from some 700 acres of nearby land owned by Witness Kuhn and irrigated by pumping from a borrow pit leading from Snodgrass Slough (page 15 of transcript); that the source filed upon, an artificial channel, was built during 1938 and 1939, that its purpose is to drain adjoining lands and that it flows southward (page 20 of transcript); that the source carries irrigation return flow, as a rule, from April until October, carries natural drainage in winter, and at times carries no water at all (page 25 of transcript); that drainage from lands other than the witness' 700 acres also contributes, although to a relatively small extent, to the flow which the source carries (page 27 of transcript); that water carried in the source eventually goes

into Mokelumne River (page 27 of transcript); that Protestant Dierssen has also pumped from the same source since 1947 or 1948, sprinkling a strip of some 30 acres occasionally, with a rain machine (page 28 of transcript); that Protestant Dierssen also irrigates by pumping from wells, and since about 1950 by pumping from the source filed upon by the applicant, though downstream from the applicant's intake (pages 30 and 31 of transcript); that 20 to 25 per cent of the flow of the source is pumped and the remainder flows on to a point where it is disposed of by being pumped into Mokelumne River (pages 33 and 34 of transcript); that in summer the District operates its pump at the lower end of the drain (the source filed upon) every day, to dispose of the surplus water (page 72 of transcript); that the drain is practically level for a half mile below the protestant's lower intake and that the protestant could obtain "plenty of water" by lowering his canal some 2 feet, in order to draw the water back.

At the hearing of June 12, 1951 Protestant Dierssen testified to the effect that he has irrigated alfalfa and other crops, partly from the reclamation drainage canal (the source in controversy) and partly from wells (page 40 of transcript); that from the drainage canal he has irrigated for a number of years by means of a portable pump, whenever required, and, by means of a 5000 gallon pump located downstream from the applicant's proposed point of diversion (page 44 of transcript); that he has irrigated during the current season, but that on May 14, 1951 there was insufficient water in the source to enable the 5000 gallon pump to run (page 47 of transcript); that he has irrigated for many years, diverting water whenever he wanted it from various points along the drainage canal except that

sometimes the water supply has been insufficient to enable his pump to run (page 49 of transcript); that he first irrigated in 1945, in which year he irrigated 15 acres of corn by means of a pump and tractor and next irrigated in about 1948, utilizing a rain machine (pages 58 and 59 of transcript); that he first used his new installation (5000 gallon pump) in 1949 (page 62 of transcript); that there is never any natural flow in the drainage canal in June (page 66 of transcript); that never prior to the time when Mr. Kuhn (the applicant's predecessor) planted clover and commenced to irrigate was there any substantial flow, in summer time, in the drainage canal (page 67 of transcript); that the basis of his protest is his asserted right as a riparian owner and his right by prescription through usage (page 67 of transcript); and that when the flow at his lower intake is insufficient it is possible that water occasionally may be available to the applicant, water at times entering the drainage canal at points between the applicant's intake and his own (page 68 of transcript).

According to a report of the field investigation conducted on June 22, 1951 by Engineers Smitherum and Woodward of the Division and participated in by Messrs. McDougall, Dierssen and Gross, some 1.5 cubic feet per second were passing the protestant's upper and the applicant's points of diversion at the time of that investigation and no water was being diverted at either of those points. According to the same report Protestant Dierssen stated that during the irrigation season no water would be flowing southward in the drain should Mr. Kuhn discontinue pumping from the drain paralleling Lambert Road; and Engineer Gross stated that the District pumps at the lower end of the drain are sometimes shut down when the downstream landowners desire that the water table be raised, and that at such times

water collects to such extent that the direction of flow in the drain is from south to north, making water available to the protestant at his lower point of diversion, although seldom if ever to the applicant.

The protestant's objection, expressed in his protest, that the applicant's proposed diversion will prevent the exercise of his alleged prescriptive and riparian rights to divert from the same source, is not sufficient, in the light of the information adduced, to bar approval of the application. It is physically impossible for the applicant's proposed diversion to interfere with the protestant's upper diversion, because that diversion heads upstream from the applicant's. Since the waters passing in summer time from the applicant's proposed point of diversion to the protestant's lower intake are derived from return flow from irrigation and would not in a state of nature pass his land no riparian right to such water is seen to attach. According to the testimony, the protestant has not diverted at his lower intake long enough for a prescriptive right to mature, nor is it apparent from the information at hand that a prescriptive right has matured to divert at any point or points whether downstream or upstream from the applicant. However that may be, the daily operation, in summer time, of the District pump to dispose of unwanted water at the lower end of the drainage canal, together with the testimony that the major portion of the summer flow of that canal is unused, indicates that supply ordinarily exceeds demand.

For the reasons outlined in the preceding paragraph it is the opinion of this office that the protest against Application 14100 is an insufficient basis for the denial of the application, that unappropriated water exists in the source filed upon, that such water may be taken and used beneficially in the manner proposed by the applicant without injury

to the protestant and that the application should be approved, subject to the usual terms and conditions.

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ORDER

Application 14100 for a permit to appropriate water having been filed with the Division of Water Resources as above stated, a protest having been filed, a public hearing having been held and the State Engineer now being fully informed in the premises:

IT IS HEREBY ORDERED that Application 14100 be approved and that a permit be issued to the applicant subject to such of the usual terms and conditions as may be appropriate.

WITNESS my hand and the seal of the Department of Public Works of the State of California this

A. D. Edmonston
State Engineer

Ed. W. Stein