

STATE OF CALIFORNIA
STATE WATER RIGHTS BOARD

In the Matter of Application 20460
of Gabriel and Bertha Perez to
Appropriate from McClure Creek in
Tehama County

Decision D 1155

ADOPTED DEC 19 1963

DECISION APPROVING APPLICATION

Application 20460 to appropriate unappropriated water having been filed; a protest having been received; a public hearing having been held before the State Water Rights Board in Red Bluff, California, on October 31, 1962, before W. A. Alexander, Member; applicants and protestant having appeared and presented evidence; the evidence received at said hearing having been duly considered; the Board finds as follows:

1. Application 20460 is for a permit to appropriate 0.79 cubic foot per second (cfs) by direct diversion, year-round, for irrigation and stockwatering purposes from McClure Creek in Tehama County. The point of diversion is to be within the SW $\frac{1}{4}$ of the NE $\frac{1}{4}$ of Section 21, T25N, R3W, MDB&M.

2. The applicants propose to excavate a small sump in the creek and pump the water therefrom to furnish a supplemental supply for a 63-acre dairy farm which lies within the boundaries of the protestant El Camino Irrigation District.

3. Water in McClure Creek, except during periods of winter rainfall, is a combination of waste water from the well irrigation of lands owned by Paul Arnberg, located approximately two miles above the applicants, and waste water from the irrigation of lands within the Elder Creek Water District. This District receives its water from the U. S. Bureau of Reclamation through the Corning Canal.

4. On July 24, 1962, the flow of McClure Creek at the applicants' point of diversion was 1.25 cfs, of which 0.75 cfs was waste water from the irrigation of the Arnberg lands.

5. Protest of the El Camino Water District is based on the following three principal contentions which will be discussed in the same order as set forth.

(a) The District has a prior right to the water of McClure Creek by virtue of an agreement entered into between the District and the Teisseire Brothers.

(b) Approval of the application would result in interference with the supply of water which is pumped from an underlying basin by the District to serve its members.

(c) Applicants' proposed appropriation would violate the terms of a reservation in the deed conveying the land to applicants' predecessors, which reserved all water rights to the protestant District.

6. The Teisseire Brothers own land west of the applicants within the Elder Creek Water District. They offered the runoff from the irrigation of their land to the protestant District

free of charge until such time as they might use it. This offer was accepted by the District. Even assuming that this arrangement gave the District a water right enforcible against other parties, it does not purport to, nor could it, give any interest to the District in water wasting from the irrigation of Arnberg's land. The major source of the water in McClure Creek during the summer season is water from Arnberg's land. Furthermore, the protestant has not diverted any water from the channel of McClure Creek under authority of this alleged agreement. Hence the water is presently going to waste unless it is in some manner reaching the supply in the underground basin being pumped by the District.

7. From the evidence before the Board, it cannot be determined what contribution, if any, McClure Creek makes to the underground water basin supplying protestant's wells. Further, in order to show any harm, protestant must establish that there is an overdraft in the ground water basin from which the District pumps or in some manner show how the diversion proposed by the applicant will interfere with its present supply. No such showing has been made. It is concluded from the available information that approval of the application would have no significant effect on the supply of water available for pumping by the protestant.

8. The Board is without jurisdiction to make a final determination of the effect of the reservation in the deed of applicants' predecessors. However, it is necessary to consider this issue, as the protestant claims it has created a bar to the approval of the application. The principal portion of the

reservation in the deed from the protestant to the applicants' predecessors dated December 13, 1944, is as follows:

"The El Camino Irrigation District, a body politic, excepts and reserves in Perpetuity for its use and benefit all needed and convenient rights of ways on, over and across said lands for surface drainage, canals, ditches, pipe lines, power and telephone lines, and other irrigation structures or property; also the right to maintain and repair and operate such structures or property, provided, however, that the same shall be done with due regard to crops, trees or other improvements, actual or contemplated of the Grantees herein, and all water rights of every kind or nature in any way pertaining to said lands, including rights to underground streams and percolating waters are hereby specifically reserved for the use of said El Camino Irrigation District." (Emphasis added.)

At the time of this conveyance in the year 1944 there was no summer flow in McClure Creek which the parties could have contemplated reserving. In the interpretation of a deed the court places itself in the position of the parties at the time the conveyance was executed (Victory Oil Co. v. Hancock Oil Co., 125 Cal.App.2d 222, 270 P.2d 604). Further, at the time of conveyance the District had no appropriative rights to the foreign water involved here, which it could reserve.

"A 'reservation' and an 'exception' have in common the fact that each detracts from what the grantee would otherwise take under the deed in which it appears (15 Cal.Jur.2d, Sec. 182, p. 588, citing Am.Jur. Deeds)." (Emphasis added.)

"A reservation does not extend beyond water rights presently in being, unless specifically made to do so by the conveying instrument...(52 Cal.Jur.2d, Sec. 578, p. 194)."

". . . A grantee's acceptance of a deed containing a reservation to the grantor of a priority or

appropriation of water for a certain reservoir, when no priority or appropriation had been secured, did not estop the grantee to claim an appropriation of its own for such reservoir (Wiel, 3d ed., Water Rights in the Western States, Vol. 1, Sec. 545, p. 583)."

9. During such time as McClure Creek may contribute to the flow of Sacramento River there is sufficient unappropriated water available in this latter stream to meet prior existing rights. Therefore, unappropriated water is available to supply the applicants, and subject to suitable conditions, such water may be diverted and used in the manner proposed without causing substantial injury to any lawful user of water.

10. The intended use is beneficial.

From the foregoing findings, the Board concludes that Application 20460 should be approved and that a permit should be issued to the applicants subject to the limitations and conditions set forth in the following Order.

ORDER

IT IS HEREBY ORDERED that Application 20460 be, and the same is, approved, and that a permit be issued to the applicants subject to vested rights and to the following limitations and conditions:

1. The amount of water appropriated shall be limited to the amount which can be beneficially used and shall not exceed 0.79 cubic foot per second by direct diversion to be diverted year-round. The equivalent of such continuous flow allowance for any thirty-day period may be diverted in a shorter time if there be no interference with vested rights.

2. The maximum amount herein stated may be reduced in the license if investigation warrants.

3. Actual construction work shall begin on or before June 1, 1964, and shall thereafter be prosecuted with reasonable diligence, and if not so commenced and prosecuted, this permit may be revoked.

4. Construction work shall be completed on or before December 1, 1966.

5. Complete application of the water to the proposed use shall be made on or before December 1, 1967.

6. Progress reports shall be filed promptly by permittee on forms which will be provided annually by the State Water Rights Board until license is issued.

7. All rights and privileges under this permit, including method of diversion, method of use, and quantity of water diverted are subject to the continuing authority of the State Water Rights Board in accordance with law and in the interest of the public welfare to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of said water.

8. Permittee shall allow representatives of the State Water Rights Board and other parties, as may be authorized from time to time by said Board, reasonable access to project works to determine compliance with the terms of this permit.

Adopted as the decision and order of the State
Water Rights Board at a meeting duly called and held at
Sacramento, California, on the day of
1963.

Kent Silverthorne, Chairman

Ralph J. McGill, Member

W. A. Alexander, Member