

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

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In the matter of Application 8238 by El Nido Irrigation District
to appropriate from Duck Slough, a tributary of Bear
Creek and San Joaquin River for irrigation
and domestic purposes

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Decision A 8238 - D - 398

Decided Feb. 5, 1937

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APPEARANCES AT HEARING HELD SEPTEMBER 28, 1936, AT MENDOCINO, CALIFORNIA

For Applicant

El Nido Irrigation District

A. L. Cowell

For Protestants

Crocker Ruffness Land & Water Co.
George S. Bloss and C. A. Cross
Charles S. Howard

James F. Peck
Edward F. Freadwell
Milton T. Farmer

Leslie Reininghaus entered no formal appearance but was present as
observer for himself and Mina Reininghaus

W. P. Redmer entered no formal appearance but was present as
observer for himself and Fowler and Tyrand, protestants.

EXAMINER: Everett E. Bryan, Supervising Hydraulic Engineer for
Harold Conkling, Deputy in Charge of Water Rights,
Division of Water Resources, Department of Public Works,
State of California.

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OPINION

GENERAL DESCRIPTION OF PROJECT

Application 8238

Under Application 8238 El Nido Irrigation District seeks to appropriate 100 cubic feet per second by direct diversion from about November

let to about June 1st of each season and 10,000 acre feet per annum by storage underground to be made from about November 1st to about April 15th of each season for irrigation and domestic use within the district boundaries which embrace an area of some 2,400 acres in Merced County. Diversion is to be made from Duck Slough, a tributary of Bear Creek and San Joaquin River, at a point within the SW $\frac{1}{4}$ NE $\frac{1}{4}$ Section 11, Township 9 South, Range 14 East, N.D.B. & M. and the water is to be taken thence by canal a distance of some 11 miles to the District.

With respect to the underground storage feature of the project the following is quoted from the supplement to the application:

"The underground reservoir of the District consists of the gravel and sand beds beneath the surface of the entire District and beneath the area lying between the Eastern line of the District and its main canal. Continued pumping for many years by means of individual pumping plants from this underground reservoir greatly depleted the water supply.

"The spreading works consist primarily of an old channel of the Chowchilla River, as shown on the map accompanying the amended application. Two branches of this channel cross the main canal in Section 22, Township 9 South, Range 14 East, and come together in Section 21, whence a single channel extends Westward to a point near the quarter-section corner of the West line of Section 19, said Township and Range. This channel is in sandy soil and water percolates rapidly from it. It is crossed by bridges on two roads, where check dams can be placed and it is believed that from 15 to 20 cubic feet per second can be sunk into the ground water by keeping this channel full. For the greater part of its length it is about 100 feet wide and averages about 6 feet in depth. The main channel West of the main canal is about 4 miles in length and the Northerly branch is about $\frac{1}{4}$ miles long from where it crosses the main canal with its junction with the other channel. It is not so well defined as the main channel, but has an average width of about 60 feet and an average depth of about 4 feet.

"The distributing canals within the District run through sandy soil and considerable water may be sunk by keeping these canals in operation and spreading water upon vacant fields within the District wherever they may be available. In the winter of 1932, Duck Slough overflowed its banks and broke into the SE $\frac{1}{4}$ NE $\frac{1}{4}$ canal and for a considerable time about 100 cubic feet

per second flowed into the District and was disposed of in the old channel and by percolation from the canals and spreading upon vacant fields. The experience of the District in diverting water purchased from Merced Irrigation District shows that about 80 per cent of the amount delivered into the canal is lost in seepage and evaporation, most of the loss being after the water reaches the District. The amount of water which can be sunk from the canals and on vacant fields will vary with the available area for spreading, but is estimated to be from 60 to 80 cubic feet per second for such periods as the maximum quantity of water applied for may be available for diversion. The canal system within the District has a total mileage length of about 17 miles. It consists of three main laterals designated No. 2, No. 4, and No. 5, with their various branches, and two laterals, designated No. 3 and No. 6. The combined capacity of these laterals is about 80 cubic feet per second."

PROTESTS

This application was protested by Crocker-Huffman Land and Water Company, George S. Hesse, G. A. Crane, Chas. S. Howard Company, Kiss and Leavis Reininghaus, W. P. Redman, Favier and Tyrand and Merced Range Company.

The protest of Crocker-Huffman Land and Water Company recites that it is the owner of a large tract of land riparian to Duck Slough below the proposed diversion point of applicant and that "The flow of water in said Duck Slough is such that during the irrigation season no surplus of water flows in said Duck Slough, except such water as is necessary to irrigate the riparian lands of the protestant herein and other riparian lands of other owners along said Duck Slough."

The protest of George S. Hesse Jr. recites that said protestant is a user both as a riparian owner and prior appropriator by diversion at a point in Duck Slough below applicant and that if water were taken as proposed by applicant the lands of protestant "will become arid."

The protest of G. A. Crane recites that said protestant is a riparian owner on Duck Slough, diverting for more than fifty years at a point downstream

from applicant, and that if water were taken as proposed by applicant the lands of protestant "will become arid."

The protest of Charissa S. Howard Company, a Corporation, recites that said protestant is a user of water by diversion below applicant both under claim of riparian ownership and use begun before December 19, 1914, and that "The proposed diversion would cause the waters of said Duck Creek to cease to enter protestant's said land and would render the same arid and unsuitable for the growth of grass or other crops thereon and thus destroy the profitable use of same."

The protest of Nina and Leslie Reinisch recites that said protestants are riparian to Duck Slough at a point downstream from applicant and that the proposed diversion of applicant will so reduce the flow to their lands as to prevent the natural floods from spreading out over the said lands to fertilize, irrigate and clear the same of alkali and to replenish the underlying groundwater supply which has receded since the applicant has begun to pump.

The protest of H. P. Redmer and Xavier and Ervand is based upon both prior appropriation and riparian ownership at points downstream but recites that "This protest may be disregarded and dismissed if El Nido only claims surplus flood water."

The Marsal Ranza Co. protest is based upon claim of riparian ownership and use by prior appropriation "for more than forty years," and recites that if the applicant proceeds as proposed the lands of protestant will become arid.

EVIDENCE PRESENTED AT HEARING

The watershed area of Duck Slough above the intake of applicant's canal is some 115 square miles and rises to an elevation of approximately 4300 feet. There are no continuous records of discharge available except those offered as Exhibit 1 by applicant covering the period January 13 to April 13, 1922, which refer to "Mariposa Creek" rather than "Duck Slough" and for which the

point of measurement is not shown. However the oral evidence submitted indicates that during and following storms of any intensity and duration a considerable flow exists in Dumb Slough which on occasion reaches flood proportions, as in 1932 when the channel was of insufficient capacity to carry the discharge and it spread out over the adjoining lands and broke into the diversion canal of El Hido Irrigation District. How frequently such floods occur and the average duration is not shown by the evidence. Protestants called no witnesses on this point and attorneys for protestants did not deny that on occasion there was surplus water which could be taken by applicant without injury to protestants.

Protestants called no witnesses to establish a present use of the winter and spring floods which one would naturally anticipate in a water course having a watershed area and exposure such as this one. They made some effort to impeach the testimony of witnesses called by applicant to the effect that there was a large waste into San Joaquin River below the lowest of these protestants on the stream. Testimony of witnesses for the applicant however remained substantially unrefuted that very little of the flood flow was diverted.

Mr. G. E. Winton, Chief Engineer of El Hido Irrigation District, for example, testified that in his judgment anything in excess of 100 second feet flowing at the El Hido intake would be wasted. He testified that in April 1935 on one occasion when there was 200 to 300 second feet flowing at this point the same amount was passing the East Side Canal below protestants Crocker-Huffman Land and Water Co., Rodman, Xavier and Myrand, and Reininghaus and most of protestant Klose' land. On March 10, 1932, Mr. Winton measured the flow at a point east of the El Hido intake, at the East Side or Stevenson Canal, and at several intervening points and found the

flow approximately 30 second feet throughout, indicating that there were no diversions at that time. Some flow was then entering Duck Slough from the south through Stevenson Canal so that the flow was increased below that point. Measurements made by Mr. Winton on March 19 and 21, 1932, indicated that there might be some diversion between the El Nido intake and the west line of the Crocker-Huffman property some 20 miles downstream as the flow was 23 second feet on March 19th at the upper point and only approximately 8 second feet at the lower point two days later.

The evidence presented is fragmentary and inconclusive but from common knowledge and the admissions of counsel for protestants we believe it can be assumed that at irregular intervals there are flood flows in Duck Slough in excess of what prior appropriators and riparian owners have been accustomed to use on which occasions there is waste. It is this waste which applicant seeks to appropriate and the evidence presented indicates that the diversion of such surplus can be used advantageously by El Nido Irrigation District for winter irrigation and the recharge of the underlying ground water basin from which the land owners draw the main portion of their irrigation supply by pumping.

PROPOSED LIMITATION OF PERMIT

The principal effort of protestants has been to so limit and circumscribe the right of El Nido Irrigation District, provided this application were approved, that no diversion could be made unless water were wasting in Duck Slough below the lowest protestant on the stream, and to insure the full and unimpaired right of each riparian owner downstream to proceed with further development and an increased use of water whenever in the future he might desire to do so without any opportunity for the appropriative

right of El Hido Irrigation District under Application 5388 to ripen into a right by prescription however long it may have been exercised.

The district was agreeable to the inclusion of a clause to accomplish these purposes and, at the suggestion of counsel for protectants, undertook to draft the proposed clause. Under date of October 3, 1936, Mr. Cowell, attorney for the district, proposed the following:

"By agreement of the applicant this permit is granted on the express condition that, if the gate in the westerly bank of the East Side canal for the passage of water of Duck Slough is closed, El Hido Irrigation District, hereinafter called "Permittee", shall not divert from Duck Slough any of the natural flow thereof unless there shall then be flowing into the East Side canal from said Slough at least 5 cubic feet of water per second, or, if said gate shall be open, permittee shall not divert from Duck Slough any of the natural flow thereof unless there shall be at least 5 cubic feet per second of water flowing from said Slough into Bear Creek and unless there shall also be flowing from Bear Creek into the San Joaquin River at least 10 cubic feet of water per second, and on the further condition that permittee shall at no time divert from Duck Slough any of the natural flow thereof if thereby the flow in said Slough shall be reduced below the full quantity of water which all appropriators of water from said Slough under rights prior to the right of permittee hereunder shall then have the right and be prepared and desire to take from said Slough, and the full quantity of water which all the owners of land riparian to Duck Slough shall then desire and be prepared to divert from said Slough for use on their respective riparian lands; provided, however, that if at any time water is being diverted from Duck Slough below the diversion point of permittee by an appropriator or appropriators without right or under a right subsequent to the right of permittee hereunder, nothing herein contained shall be construed to prevent permittee from diverting hereunder as much of the natural flow of Duck Slough as is then being diverted by such appropriator or appropriators, and if any water that shall have been diverted from said Slough to or upon any land riparian to said Slough shall be flowing from said riparian land to or upon land not riparian to said slough, unless such water is flowing back into said slough or to other riparian land, then nothing herein contained shall be construed to prevent permittee from diverting from Duck Slough hereunder a quantity of water equal to the quantity of water that shall have been diverted from said slough to or upon land riparian thereto and that is then flowing to or upon land not riparian to said slough, unless such water is flowing back into said slough or to other land riparian thereto."

Copies of this clause were given by Mr. Cowell to attorneys for the protestants and on October 7th Mr. E. F. Treadwell, attorney for protestants George S. Bloss and O. A. Crane offered the following alternative clause:

"By agreement of the applicant this permit is granted on the express condition that no water at any time shall be diverted from Duck Creek hereunder unless there is flowing in the creek water through the lands of each of the protestants including the lands of Howard Gattle Company on Bear Creek, of which said creek said Duck Creek is a tributary, nor shall any water be diverted hereunder so as to prevent water of said creek flowing through and to the lands of each of said applicants. Nothing herein shall prevent the diversion of water hereunder if the lack of water at the lands of protestants is caused by appropriations subsequent to the right of permittee hereunder."

Mr. Milton S. Farmer, attorney for protestant Charles E. Howard, under date of October 23rd expressed his preference for the clause proposed by Mr. Treadwell and indicated his belief that the clause previously proposed by Mr. Cowell was "quite uncertain and might lead to misunderstanding."

Under date of November 4th Mr. Cowell advised that he himself preferred the clause proposed by Mr. Treadwell except that it omitted some points that were covered in his original draft and he therefore suggested the following substitute:

"By agreement of the applicant this permit is granted on the express condition that no water at any time shall be diverted from Duck Creek hereunder unless there is flowing in the creek water through the lands of each of the protestants herein, including the lands of Howard Gattle Company on Bear Creek, of which said creek said Duck Creek is a tributary, nor shall any water be diverted hereunder so as to prevent water of said creek from flowing through and to the lands of each of said protestants, but nothing herein shall prevent the diversion of water hereunder if the lack of water at the lands of protestants is caused by appropriations subsequent to the right of permittee hereunder, or by the diversion by any riparian owner to land not riparian to said slough or by the closing of that certain gate in the westerly bank of the East Side Canal whereby any water of Duck Slough would be prevented from flowing West of said Canal."

Mr. Treadwell advised under date of November 17th that the suggestion made by Mr. Cowell is probably as near as the matter can be arrived at."

Though he was served with copies of these clauses and was the one who originally suggested the desirability of some such limitation in any permit to be issued Mr. James F. Peck, Attorney for Crocker-Huffman Land & Water Company has filed no comment and offered no substitute, and no further comment has been received from Mr. Farmer since his communication of October 23rd referred to above.

When the use of such a clause was proposed at the hearing on September 25th the examiner indicated to the parties that there was some doubt in his mind that a clause acceptable to the Division could be adopted to accomplish the purpose of the protestants. Mr. Treadwell thereupon cited as a precedent clauses of somewhat similar import included in permits issued to Mrs. A. F. Cochran on Coyote River in Santa Clara County. It is true also that similar clauses have previously been used in permits issued on Santa Ana River and San Gabriel River in Southern California and on Dos Pinos and Arroyo de Los Viveras Creeks in San Benito County. The situation in these cases, however, is not similar to that in this case. The object in those cases was to assure percolation to underground basins where it had been established to the satisfaction of the Division that a lowering ground water level made it necessary from the standpoint of public interest to insure the full percolation which would occur in a state of nature.

In the instant case protestants are attempting to insure a flow through their properties at all times when it would occur in a state of nature whether or not they would divert the water to any beneficial use. This would doubtless be a matter of private convenience to protestants but it is

not clear what public interest would be served. In fact in view of the provisions of Section 3, Article XIV of the State Constitution it appears that this might be distinctly contrary to the public interest because "the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable and the waste or unreasonable use or unreasonable method of use of water be prevented." Protestants in this case have neither established, nor did they call any witnesses in an effort to establish, that they were accustomed to use water at the lower end of Duck Slough and Bear Creek at all times whenever it would in a state of nature be flowing therein.

Furthermore, acceptance of the clause proposed would establish a precedent in another matter which we believe should be avoided by the Division. We refer now to the reservation which would be effected on behalf of future riparian development. The Division has consistently refused by its actions to subordinate proposed immediate development under applications to appropriate to prospective future development at some uncertain time in the future under claim of riparian right. Such protection for future riparian development can be secured either by agreement between the parties or by declaratory injunction.

We see no objection to applicant and protestants signing an agreement between themselves which will accomplish all the purposes of the clause or limitation which they have sought to insert in the permit which would be issued in this case and the Division may well suspend action a reasonable time for them to effect such an arrangement. Such an agreement would be equally, if not more binding upon the applicant and would avoid a precedent for which the Division should not be responsible.

CONCLUSION

Though there is uncertainty as to the frequency with which surplus or unappropriated water will be available under Application 2285, and the amount of such surplus, there appears little doubt that whenever precipitation of any considerable intensity and duration occurs on the watershed of Bank though there are storm or flood waters which escape below protestants and are wasted. This surplus is subject to appropriation and responsibility rests upon the applicant to so govern its diversions during these periods of surplus that it will not interfere with beneficial use under valid claims of prior and existing rights at points downstream. The fact that El Paso Irrigation District may, if a permit is issued, divert more than the surplus and interfere with the rightful use of other users below is not a sufficient reason for denying a permit, and it is not a sufficient reason for placing a limitation in the permit which will make it mandatory upon the District to take water only when it is wasting below the lowest protestant on the stream below. In order to assure the greatest possible beneficial use of water we believe it necessary for the various users to so coordinate their diversions that there will be no waste of water which could be beneficially used, and the responsibility rests not only upon the new appropriator at a point upstream but also upon the lower users, whether they be prior appropriators or riparian owners, to cooperate in the development of whatever reasonable method or plan of diversion and retention will best serve to prevent waste.

As for the protection which has been requested for future riparian development by the insertion of a limitation in the permit which will prevent the appropriative right of this permittee ripening also into a right by prescription we believe this is a matter which can properly be left to the courts, unless the parties themselves wish to adjust it by agreement between themselves. It does not appear in the public interest that the Division should undertake

to accomplish this purpose by the means proposed.

D E C I S I O N

Application 8238 having been completed and duly noticed, it having been protested and the matter having been heard after due notice to all parties, and the Division being now fully advised in the premises,

IT IS HEREBY ORDERED that said Application 8238 be approved and that a permit be issued thereon subject to the usual terms and conditions and subject to such special terms and conditions as may be appropriate.

WITNESS my hand and the seal of the Department of Public Works, State of California, this *Fifth* day of *February*, 1957.

EDWARD MILATT, State Engineer

(Seal)
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By Harold Gaudling
Deputy