

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

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In the Matter of Application 8631 of Maxwell Irrigation District
to appropriate from Sacramento River in
Glenn County for Irrigation Purposes

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DECISION A. 8631 D - 414

Decided *March 28, 1938*

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APPEARANCES AT HEARING HELD AT SACRAMENTO, SEPTEMBER 28, 1937

For Applicant

Maxwell Irrigation District

Thomas J. Hataley

For Protestant

Glenn-Colusa Irrigation District

Hankins and Hankins
by F.J. Minasian

For Objectors

Parrott Investment Company

Garret McEnerney
by William L. McGinness

M. & T. Incorporated

Hugh Fullerton

EXAMINER: Harold Conkling, Deputy in Charge of Water Rights, Division of
Water Resources, Department of Public Works, State of California.

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O P I N I O N

GENERAL DESCRIPTION OF PROJECT

Under Application 8631, filed with the Division of Water Resources
on April 8, 1936, the Maxwell Irrigation District proposes to appropriate an
amount of water not to exceed 70 cubic feet per second throughout the year from
the Sacramento River at the present intake of the main canal of the Glenn-

Colusa Irrigation District which is located within the NE $\frac{1}{4}$ of SE $\frac{1}{4}$ of projected Section 8, T 22 N, R 2 W, M.D.B. & M. in Glenn County. It is proposed to use the water for irrigation purposes on 8,323.5 acres of land within the boundaries of Maxwell Irrigation District of which not more than 2,000 acres will be irrigated in any one year.

Application 8631 was protested by Glenn-Colusa Irrigation District, Parrott Investment Company and M. & T., Incorporated. The latter two protestants were advised prior to the hearing, however, that their protests were dismissed because of failure to state a cause of action.

PROTEST

The Glenn-Colusa Irrigation District alleges in effect that applicant has no right in and to the proposed point of diversion and the proposed works for the transportation of the water to be appropriated; that the taking of the water at its point of diversion would interfere with protestant's diversion and therefore the application should be denied.

The Parrott Investment Company and the M. & T. Incorporated allege in effect that the proposed appropriation of the applicant if approved would result in such a diminution of the water in the Sacramento River during the critical period of July, August and September that it would not only result in increasing the cost of pumping but would make necessary the remodeling and possible removal of its pumping plant to a new location in order to obtain the water to which they are entitled.

The Parrott Investment Company also seeks to protect its riparian right to such water as it may hereafter require for future irrigation of lands which are not now irrigated claiming that although permits are issued "subject to existing rights" this reservation is of no efficacy or value to the owners of existing rights until, in some general proceeding, such existing rights

are adjudicated and provision made for the protection thereof through some appropriate procedure. This Company further directs attention to the fact that the applicant is now seeking to divert 70 cubic feet ^{per second} /at the intake of the Glenn-Colusa Irrigation District whereas it formerly applied for a petition to change the place of use and point of diversion under Application 186, Permit 72, alleging in effect that applicant has not acted in good faith by withdrawing its petition and filing Application 8631.

HEARING SET IN ACCORDANCE WITH SECTION 1A
OF THE WATER COMMISSION ACT

Application 8631 was completed in accordance with the Water Commission Act and the Rules and Regulations of the Division of Water Resources and being protested was set for public hearing in accordance with Section 1a of the Water Commission Act on September 28, 1937 at 10:00 o'clock A.M. in Room 401, Public Works Building, Sacramento, California. Of this hearing applicant, protestant and objectors were duly notified.

GENERAL DISCUSSION

It appears from the record that for the last four or five years the Maxwell Irrigation District has been diverting water from the Sacramento River at the intake of the Glenn-Colusa Irrigation District in amounts varying from 15 to 40 c.f.s. during the months of maximum use, under apparently no claim of right.

In order to remedy the situation the Maxwell Irrigation District filed petitions to include the intake of the Glenn-Colusa Irrigation District as an additional point of diversion under Application 186, Permit 72 and to increase the place of use to include the lands of the Maxwell Irrigation District. The petition was protested by Parrott Investment Company on the grounds that by diverting water some 52 miles upstream from the point of diversion

named in Application 186, Permit 72, it would affect the pumping operations at its point of diversion which is located about 39 miles above the point of diversion named in Application 186, Permit 72.

Subsequently, however, the Maxwell Irrigation District and Clara C. Packer to whom the District had assigned an interest in Application 186, Permit 72 decided to accept a license for 17.5 c.f.s., the amount of water which had actually been applied to beneficial use under Application 186, Permit 72 and the Maxwell Irrigation District withdrew its petitions for changes in point of diversion and place of use and filed Application 8631 for the appropriation of 70 c.f.s. which is approximately 30 c.f.s. in excess of the amount which the District has actually been diverting at the intake of the Glenn-Colusa Irrigation District.

It appears from the record that the Glenn-Colusa Irrigation District enters into a yearly agreement with the Maxwell Irrigation District by which the latter District may utilize the excess capacity of the pumping plant and canals of the Glenn-Colusa Irrigation District for the diversion and conveyance of water to the lands of the Maxwell Irrigation District, this privilege being revocable at any time upon a ten days advance notice, it being understood that the agreement should not be construed as granting the Maxwell Irrigation District any right, title or interest in the water rights of the Glenn-Colusa Irrigation District.

The Glenn-Colusa Irrigation District does not refuse to allow the Maxwell Irrigation District the privilege of using its intake and canal in the future. If this were the case the Division would necessarily be obliged to refuse to approve Application 8631 in its present form. But the Glenn-Colusa Irrigation District is apparently willing to allow the applicant the privilege of continuing to use the excess capacity of its diversion works so long as

the capacity is available and under such conditions that it can not claim a permanent right to such use. To this end an agreement between the two districts was entered into subsequent to the hearing whereby the Glenn-Colusa Irrigation District agreed to withdraw its protest provided that any permit granted by the Division to the Maxwell Irrigation District refer to and be made subject to the restrictions and conditions of the agreement.

It is not the practice of the Division to incorporate in the terms of a permit a reference to any agreement between private parties. While an agreement may be entered into by the parties themselves, the Division cannot be a party thereto. An agreement is just as binding upon the parties as if it were incorporated in a permit and it is not seen wherein any purpose can be served by reference thereto in the permit terms.

Future diversion through its intake of the waters of the Maxwell Irrigation District has not been definitely denied by the Glenn-Colusa Irrigation District although the latter District owns and controls the diversion works. The Glenn-Colusa Irrigation District is apparently in a position at any time to deny the Maxwell Irrigation District this privilege and it is not seen wherein the right of the District will be injured by the approval of Application 8631. In the event that this privilege should be denied by the Glenn-Colusa Irrigation District after issuance of permit, the Maxwell Irrigation District may then petition for a change in point of diversion.

Without definite assurance on the part of the Glenn-Colusa Irrigation District that right of access is or will be denied, its protest must necessarily be dismissed.

As to the objections by the Farrott Investment Company and M. & T. Incorporated, this office has already ruled. There is no right to insist upon maintenance of water level for the sole purpose of facilitating pumping.

Protestants must defer to the declaration of public interest and policy indicated in Section 3, Article XIV of the Constitution of the State of California. This office has heretofore also ruled that a permit will not be denied upon the ground that the appropriation may interfere with the future prospective use of a riparian owner. These rulings are clearly set forth in Decision A. 1554, 1624, 1633 D. 240 of August 21, 1934 and nothing has been submitted by these companies either at the hearing or subsequent thereto which in any way would cause the Division to change its position on these matters. As to the complaint that there is insufficient water in the Sacramento River during periods of low flow to supply the present users, it is admitted that during years of deficient run-off there are periods of low flow in the river when, with present development under riparian claims and with full development under appropriative rights already initiated there is need of conservation and, on occasion, later appropriators may of necessity be obliged to restrict their use. This fact in itself, however, does not justify the denial of future appropriators. The Division since the year 1924 has kept careful and complete records of river discharge and diversions in the Sacramento Valley and Delta and these records indicate that during years of normal run-off there is unappropriated water in the Sacramento River.

As to the inference that applicant was not acting in good faith by filing a new application instead of proceeding under the petition we can see no merit therein. So long as there is unappropriated water available for appropriation, an application may be filed for the diversion and use of this water. Although Applicant is initiating a right under Application 8631 to a larger quantity of water, by the withdrawal of the petition under Application 188 it is forfeiting the early priority to a portion of the water.

CONCLUSION

Inasmuch as the privilege of utilizing the excess capacity of its diversion works has not been definitely denied by the Glenn-Colusa Irrigation District and apparently this use may continue under an agreement between applicant and protestant, the protest of Glenn-Colusa Irrigation District may be dismissed. Both applicant and protestant should be advised however that while the Division is of the opinion that the terms and conditions of a private agreement have no proper place in a permit issued by this office, the agreement is none the less binding between the parties themselves and neither the issuance of the permit nor the use of the water thereunder will give any color of right to the use of the facilities of the Glenn-Colusa Irrigation District.

The protests of the Parrott-Investment Company and M. & T. Incorporated were dismissed prior to the hearing and although testimony was given at the hearing and briefs filed in support of their contentions, there is apparently nothing in the record which would cause this office to reverse its former action.

It is therefore the opinion of this office that Application 8631 should be approved and permit issued to the applicant subject to such of the usual terms and conditions as may be appropriate.

ORDER

Application 8631 for a permit to appropriate water having been filed with the Division of Water Resources as above stated, a protest having been received, a public hearing having been held, briefs having been filed and the Division of Water Resources now being fully informed in the premises:

IT IS HEREBY ORDERED that Application 8631 be approved and that a permit be granted 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 28 day of *Mar* 1938.

EDWARD HYATT
State Engineer.

(Seal)

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