

STATE OF CALIFORNIA
STATE WATER RIGHTS BOARD

In the Matter of License 1205,)
Issued on Application 882,)
of Helen Knox Dixon, et al.,) Decision D 1282
to Appropriate from Sacramento)
River in Sutter County)

DECISION AND ORDER DENYING PETITION
FOR CHANGE IN PLACE OF USE

On July 12, 1965, Helen Knox Dixon, Carolyn Knox, and Marilyn Knox Larson filed a petition pursuant to Water Code Section 1702 to change the place of use authorized by License 1205 (Application 882) from an area adjacent to the Sacramento River to an area which is separated from the river by a railroad right-of-way. (A small parcel between the railroad and a county road would be retained in the place of use.) Petitioners are already authorized to irrigate the proposed place of use with water from the Sacramento River by License 7218, issued on Application 13646, with a priority of 1950. If the petition is allowed, the petitioners' land north of the railroad right-of-way will be entitled to water with a priority of 1918, the year in which Application 882 was filed. The petitioners propose to continue to irrigate the existing, licensed place of use under claim of riparian right.

Before the Board grants permission to make the change, Water Code Section 1702 requires the petitioners to establish,

and the Board to find, "that the change will not operate to the injury of any legal user of the water involved."

The petition was protested by the United States Bureau of Reclamation (Bureau). The Bureau stores water in Shasta and other reservoirs for summer release down the Sacramento River, and it has direct diversion rights to appropriate water from the river, with priorities of 1927 and 1938. The Bureau claims that increased use by petitioners under priorities superior to its own, would encroach on the supply to which it is entitled, since no surplus is now available during the summer months.

Hearings were held on the petition on December 21, 1966, and January 25, 1967. The petitioners and the Bureau then filed simultaneous opening and reply briefs. Petitioners contend that their admitted riparian right to use water on the land between the river and the county road was dormant while they were acquiring an unqualified appropriative right with a 1918 priority by use on that riparian land; that this dormant riparian right can be revived at any time thus freeing the appropriative right for use on other land; that if the dormant riparian right is revived on the existing place of use and the appropriative right transferred to another place of use, although admittedly the total water used and usable under these two rights will be greater than at present, nevertheless the increased use of water will be authorized by the revival of the dormant riparian right, and will not constitute legal injury to anyone. These contentions involve a consideration of the basic relationship of appropriative and riparian rights. The briefs exhaustively analyzed the evidence

and the collateral contentions of the parties, but barely touched upon this basic relationship. We will consider it directly, after a description of the licensed area.

Application 882 was filed in 1918 in the name of Knox and Leiser, a partnership of two families. For convenience, the name Dixon will be used instead of Knox. License 1205 was issued in 1932 confirming a right to divert 1.51 cubic feet per second (cfs) from the Sacramento River between about April 1 and November 1 of each year. A second point of diversion from the river was authorized in 1934. The authorized place of use consists of 181.5 acres immediately north of a bend in the Sacramento River and south of the Southern Pacific Railroad right-of-way (see the attached map). The licensed place of use was formerly owned jointly by the two families, but the westerly portion was subsequently partitioned to the Leiser family, and is not involved in these proceedings. The water right covered by License 1205 was also subsequently partitioned between the Dixon and Leiser families, with 52 percent of the 1.51 cfs (.7852 cfs) going to the Dixon family. The three petitioners now own the full Dixon holdings of land and water rights.

The Dixon lands immediately north of the river, south of the county road, east of the Leiser holdings, and constituting most of the Dixon present place of use under License 1205, are included in a patent issued in 1872 to George Aten. The lands of petitioners which lie to the north, and constitute

all but the southwest portion of their proposed new place of use, were patented in 1885. This patented area does not touch the Sacramento River or any other watercourse. The southwest portion of the proposed new place of use is a portion of an area patented in 1870, which includes the Leiser place of use under License 1205, and extends north from the river (USBR Exh. 18).

That riparian rights are paramount to rights acquired by appropriation was established in the leading case of Lux v. Haggin, 69 Cal. 255.

In Rindge v. Craggs Land Co., 56 Cal. App. 247, the court states:

"It is established in California that a person may be possessed of rights as to the use of the waters in a stream both because of the riparian character of the land owned by him and also as an appropriator. An appropriator can gain nothing as against riparian rights which have attached, and, once such rights have become affixed, they continue and are not lost, regardless of whether the water has been put to any beneficial use upon the land; the right is one continually and perpetually appurtenant. There would remain, then, as subject to appropriation, only the excess water over and above what might reasonably be subjected to a beneficial use by the lands bordering the stream ...

"And thus it may happen that a riparian owner, being insufficiently supplied with water by the flow of a stream ... may ... make an appropriation... this to be qualified only with the condition that the total water claimed under the combined rights does not amount to more than is reasonably necessary to satisfy the necessary uses to which it is designed to be put. As to the proposition last announced, see Senior v. Anderson, 130 Cal. 290, 62 Pac. 563, where the court says:

'Her riparian rights could only entitle her to a reasonable use of the water upon

her riparian lands, but having before she acquired title from the United States appropriated more water than was required for beneficial uses upon said land, she could acquire no right to any additional quantity under the law of riparian rights.'" (Emphasis added)

The petitioners rely upon the case of Porters Bar Dredging Co. v. Beaudry, 15 Cal. App. 751, in which the court says, at page 763:

"We know of no reason why a party may not acquire by appropriation a right to the use of the water of a stream to which his lands are riparian."

The complaint relied upon two different and distinct claims of title to the water, first a riparian, and second an appropriate right. At page 763 the court also said:

"In the case here, it may happen that the plaintiff may utterly fail to establish in himself riparian ownership of the waters of the South Fork of Scott River and its tributaries, yet may have ample proof to establish his right to use such waters as an appropriator, or vice versa."

The court does not directly or by inference in any way suggest that establishment of satisfactory proof for both causes of action would have entitled the plaintiff to twice the total amount of water he had ever put to use.

Hutchins, at page 209 of "The California Law of Water Rights," says:

"The fact that the privilege of claiming dual water rights cannot be made a vehicle for acquiring the right to more water than can be put to reasonable beneficial use has also been emphasized elsewhere."

Applying these cases to the petition, we believe that petitioners' share of the licensed appropriation of 1.51 cfs is included in their riparian right and is not in addition thereto. Transfer of the license to new land would give petitioners the right to use their share, which is 0.7852 cfs, on the new land in addition to whatever quantity is reasonably required on the present place of use and would therefore be illegal, at least as against junior appropriators who would be deprived of water which otherwise would be available to them.

Persons with apparent but unadjudicated riparian rights sometimes have reason to file with the Board applications to appropriate unappropriated water for use on such lands. To prevent situations such as that which would result from approval of this petition, the Board now uses where appropriate a permit clause which reads:

"Upon a judicial determination that the place of use under this permit or a portion thereof is entitled to the use of water by riparian right, the right so determined and the right acquired under this permit shall not result in a combined right to the use of water in excess of that which could be claimed under the larger of the two rights."

We believe that case law closely follows this clause, is therefore impliedly present in License 1205, and governs the disposition of this petition.

The Bureau's protest to the petition is based on its 1927 and 1938 priorities to appropriate by storage and direct diversion Sacramento River water, as established in Decision D 990,

and further defined in Decisions D 1045 and D 1117, of which the Board takes official notice. These decisions show that in Reach 2 of the river, where the Dixon-Leiser diversions are located, there is no unappropriated water available in the months of July and August. The Bureau has offered to sell Central Valley Project water to the Dixons for use on the area north of the railroad (Tr. 26). Mrs. Dixon testified that the object of the petition was to improve her position as against other water users and gain as much water free of charge from the Bureau as is possible (RT 24). The injury to the Bureau would consist of the loss of revenue to which it is entitled because of its prior rights. This would be an injury within the meaning of Water Code Section 1702.

Several points remain for consideration.

Petitioners claim a riparian right for the entire new proposed place of use, or at least for the southwest portion of it, consisting of 11 acres. They say that the Bureau cannot be injured by allowance of the petition because they could use the summer river flows under claim of riparian right. The riparian right status of the land north of the railroad is not admitted by the Bureau, but firmly contested. The Board has no power to adjudicate this or any other claimed riparian right. If petitioners have such a right, they can as rightfully use Sacramento River water thereon as on the present place of use. They would in no way be legally prejudiced by denial of their petition.

Petitioners also contend that in any event they are entitled to change their place of use as to the 21 acres between Ensley Road and the railroad. They say that deleting from a licensed area some acreage which has gone to subdivision and irrigating an equivalent amount of acreage elsewhere presents no case of injury to anyone. (Presumably this figure of 21 acres would be reduced by the amount of the 5.4 acres retained by petitioners in this area, which would remain in the proposed new place of use.)

According to the inspection report dated September 24, 1927:

"There is some Knox property north of the railroad and Mr. Knox contemplates bringing this area under irrigation, together with that between the county road and the railroad through a subsequent filing."

The inspection report of February 18, 1932, shows that total irrigated acreage upon which the license was based was 132, and the 1.51 cfs was computed on the basis of 1.0 cfs to 87 acres. This report also says:

"It appears that all of the permit area has been irrigated at one time or another with the exception of the strip between the county road and the S. P. right of way.... in the license the entire permit area should be named as the place of use."

The area in the strip that has been sold for residential use is not served water from the Sacramento River. According to the testimony, it definitely is not served water by the petitioners' diversion works (RT 23, 38), and has no

access to the river. The sales of this acreage did not include rights to License 1205 and Application 882 (RT 22). Apparently the grantees use and have used ground water from wells (RT 38). Since the deeds did not expressly convey appropriative rights to these grantees, since the contemporaneous acts of these parties indicated they were not to be served by License 1205, and since this acreage is in excess of the 132 acres on which the amount under License 1205 was based, we believe in legal effect the grantor Dixon family retained their full appropriative rights to License 1205, and in effect the authorized place of use shrank to a size exclusive of the granted acres. Accordingly, we find no existing place of use between the county road and railroad available for transfer.

Petitioners argue that what they seek in reality is Board confirmation of a change that took place more than thirty years ago. They urge that the Board's interest should be in determining whether in fact any injury occurred when the change was made. However, the Board is required by the Water Code to test possible injury by looking to the present and future, not to the past. Petitioners must satisfy the Board "that the change will not operate to the injury of any legal user of the water involved."

Petitioners also argue that the Board approved a like change in Change Order No. 74. However, in Change Order No. 74 the Board limited the total amount of acreage to be

irrigated to that contained in the permits, "...whether under these permits and License 1200 or under any other right...." (Emphasis supplied). The place of use was merely enlarged within which the total acreage irrigated remained the same in any particular year. The Board could approve the pending petition, subject to a condition comparable to that in Change Order No. 74. However, such a condition would defeat the purpose of the petition.

The Board's analysis and disposition of this matter does not require a detailed consideration of other arguments of petitioners, including the argument that no permission is really required from the Board.

The Board finds that petitioners intend in the future to use as much or more water on the presently authorized place of use under claim of riparian right as they are now using; that they have an admitted riparian right covering their present place of use authorized by License 1205; that under California law, the limit of their riparian right with respect to the present place of use is the maximum amount of water that can reasonably be put to beneficial use on this land; that the maximum amount of water that can reasonably be put to beneficial use on the existing place of use is inclusive of, and not in addition to, petitioners' appropriative rights under License 1205; and that approval of this petition would therefore be prejudicial to the United States Bureau of Reclamation and its Central Valley Project operation with 1927 and 1938 priorities.

ORDER

The petition for change of place of use, which was filed July 20, 1965, should be, and it is, denied.

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


Dated: AUG 31 1967


/s/ George B. Maul
George B. Maul, Chairman


/s/ W. A. Alexander
W. A. Alexander, Member

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Board Member Ralph J. McGill dissents from the foregoing decision.

 ORIGINAL PLACE OF USE UNDER LICENSE 1205

 TO BE DELETED

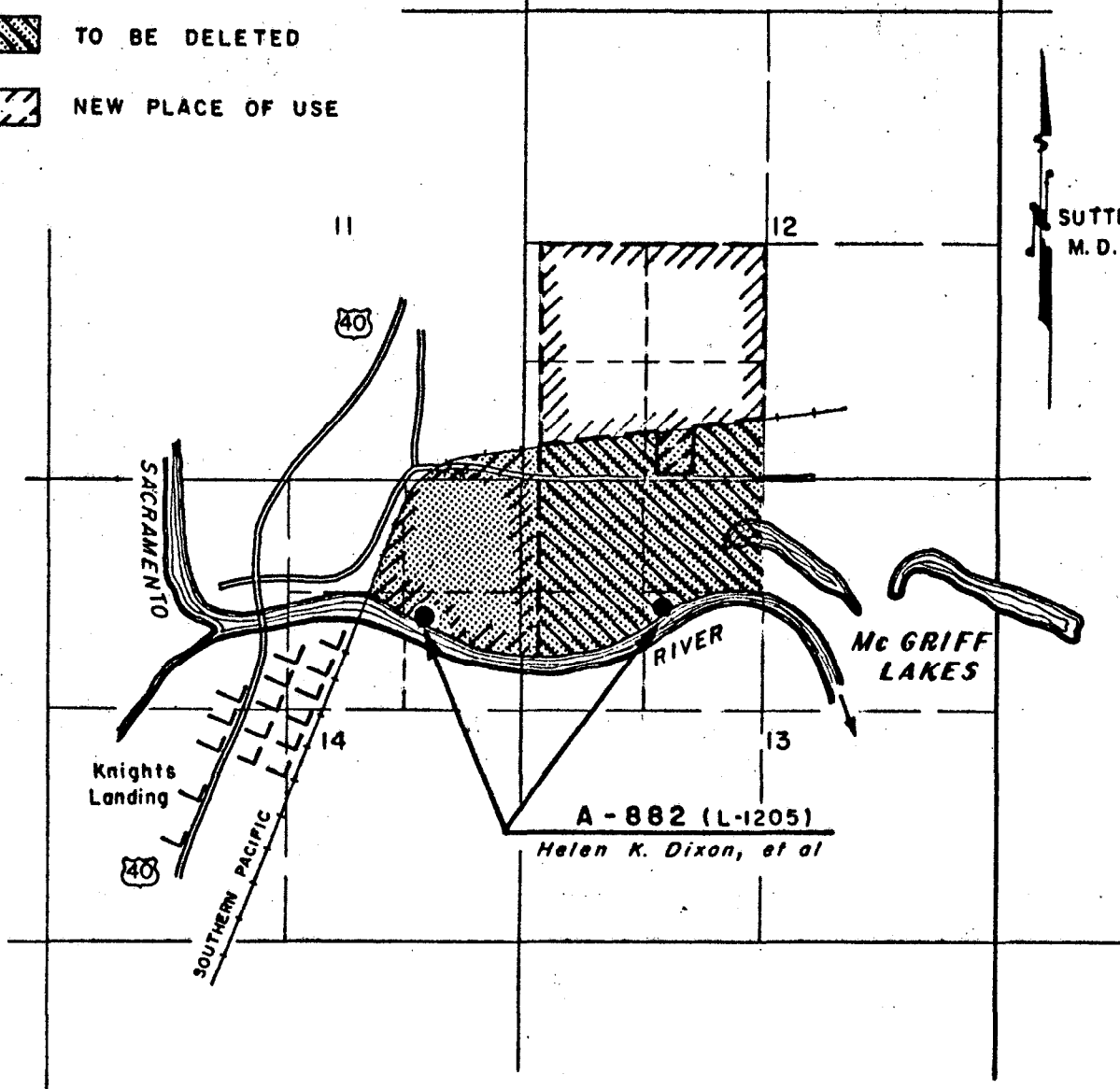
 NEW PLACE OF USE

R. 2 E.

R. 3 E.

SUTTER CO.
M. D. B. & M.

T. 11 N.



A - 882 (L-1205)

Helen K. Dixon, et al

PROTESTANT
U. S. Bureau of Reclamation

STATE OF CALIFORNIA
STATE WATER RIGHTS BOARD

MAP TO ACCOMPANY
DECISION D 1282

SCALE

0 1000 2000 3000 FT.

DATE: 11-18-66 DRAWN: A.G. CHECKED: C.M.H. DWG. 2724