

1 SWING, SCHARNIKOW & STANIFORTH
2 ATTORNEYS AT LAW
3 604 SAN DIEGO TRUST & SAVINGS BUILDING
4 SAN DIEGO 1, CALIFORNIA
5 FRANKLIN 9-1131

6 Attorneys for... Defendants

7
8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF SAN DIEGO

10
11 GUS L. STELLING,

12 Plaintiff,

13 -vs-

14 CLEMENT C. FLOERSCH and
15 EDGAR FLOERSCH and JOHN
16 DOES NOS. 1 to 10,
inclusive,

17 Defendants.

No. 142466

J U D G M E N T .

18
19 The above-entitled cause coming on for trial on the 19th
20 day of January, 1949, after having been regularly continued from
21 the preceding day, before the court, sitting without a jury, the
22 jury having been expressly waived, Clarence Harden, Esq. and
23 Grandall Condra, Esq., appearing as counsel for plaintiff and
24 Phil D. Swing, Esq. of Swing, Scharnikow & Staniforth, appearing
25 as counsel for defendants, Clement C. Floersach and Edgar Floersach,
26 and the court having heard testimony on that day and the trial
27 not then being concluded and being regularly continued to the
28 20th day of January, 1949, and further evidence, both oral and
29 documentary, being taken herein and after hearing the allegations
30 and proofs of the parties, the arguments of counsel, and the
31 cause having been submitted to the court for decision and the
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1 court being fully advised in the premises thereby rendered its
2 decision in writing consisting of its Findings of Fact and Con-
3 clusions of Law which are filed herein and ordered that judgment
4 be entered in accordance therewith.

5 WHEREFORE, by reason of the law and the findings aforesaid,
6 IT IS ORDERED, ADJUDGED, AND DECREED:

7 I

8 That plaintiff is the owner in fee simple of the East one-
9 half of the West one-half ($E\frac{1}{2}$ of $W\frac{1}{2}$) of Section 2, Township 14
10 South, Range 3 West, S.B.M. and the Southwest one-quarter ($SW\frac{1}{4}$)
11 and the West one-half of the Southeast one-quarter ($W\frac{1}{2}$ of $SE\frac{1}{4}$)
12 and the Southwest one-quarter of the Northeast one-quarter ($SW\frac{1}{4}$
13 of $NE\frac{1}{4}$) and the Southeast one-quarter of the Northwest one-
14 quarter ($SE\frac{1}{4}$ of the $NW\frac{1}{4}$) of Section 35, Township 13 South, Range
15 3 West, S.B.M. of which only eighty (80) acres located in the
16 East one-half of the West one-half ($E\frac{1}{2}$ of $W\frac{1}{2}$) of said Section 2
17 is riparian to said La Zanja Creek; that the waters of said La
18 Zanja Creek, if available in sufficient quantity, and when needed,
19 could be utilized beneficially on said 80 acres to an amount of
20 112.5 acre feet per year.

21 II

22 That the amount of plaintiff's riparian uses and the amount
23 of plaintiff's present reasonable requirements for all riparian
24 uses has been and is 600 gallons per day which amount has been
25 obtained by plaintiff partly from surface flow, when surface flow
26 through plaintiff's property existed, but principally from plain-
27 tiff's well and windmill.

28 III

29 That Defendant Clement C. Floersch is the owner of the
30 Southeast one-quarter ($SE\frac{1}{4}$) and the South one-half of the North-
31 east one-quarter ($S\frac{1}{2}$ of $NE\frac{1}{4}$) of Section 2 and the West one-half
32 of the West one-half of the Southwest one-quarter ($W\frac{1}{2}$ of $W\frac{1}{2}$ of

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1 SW $\frac{1}{4}$) of Section 1, all in Township 14 South, Range 3 West, S.B.M.
2 of which only two hundred sixty (260) acres are tributary to La
3 Zanja Creek; that the waters of La Zanja Creek, if available in
4 sufficient quantity, and when needed, could be utilized beneficial-
5 ly on said 260 acres to an amount of 300 acre feet per year.

6 IV

7 That the amount of said riparian uses and the amount of
8 Defendant Clement C. Floersch's present reasonable requirements
9 for all riparian purposes has been and is 300 gallons per day,
10 which amount has been obtained by Defendant Clement C. Floersch
11 partly from surface flow, when surface flow through defendant's
12 property existed, but principally from defendant's well operated
13 sometimes by windmill and sometimes by gasoline engine.

14 V

15 The plaintiff's riparian rights, in and to the waters of
16 said La Zanja Creek for use on his said riparian lands is 28%
17 of the surface and subsurface flow of said creek or so much of
18 said 28% as he can reasonably put to beneficial use on said lands
19 and that Defendant Clement C. Floersch's riparian rights, in and
20 to the waters of said La Zanja Creek for use on his riparian
21 lands is 72% of the surface and subsurface flow of said creek or
22 so much of said 72% as he can reasonably put to beneficial use on
23 said lands and said rights are correlative.

24 VI

25 That all of the said riparian rights of each, the plaintiff
26 and the defendant, in and to the waters of the La Zanja Creek for
27 present and prospective reasonable beneficial use on their said
28 respective riparian lands are prior and paramount to any appro-
29 priative rights of Defendant Clement C. Floersch or any appropria-
30 tive rights which he may hereafter acquire.

31 VII

32 That there is an excess of surplus of water in the said

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1 La Zanja Creek which Defendant Clement C. Floersch is entitled to
2 appropriate, store, and use subject to the riparian and vested
3 rights of plaintiff and others on the said creek.

4 VIII

5 That plaintiff is not entitled to an injunction to prohibit
6 defendants from building the proposed dam to store, conserve, and
7 appropriate the excess and surplus waters of said La Zanja Creek,
8 but the defendants must not construct or operate said dam in such
9 a manner as to interfere with or decrease the reasonable riparian
10 requirements of plaintiff.

11 IX

12 That Defendant Clement C. Floersch must make provision in
13 said dam when the same is being constructed for the release of
14 waters therefrom sufficient to meet the reasonable riparian require-
15 ments of plaintiff for beneficial use on his said lands and so as to
16 enable him to divert from the surface flow or from the subsurface
17 flow through the instrumentality of plaintiff's said well, an amount
18 not less than 600 gallons per day and not in excess of 28% of the
19 then surface and subsurface flow of said creek at defendant's said
20 dam when the same is reasonably required by plaintiff for beneficial
21 use on his said riparian lands.

22 X

23 That defendants are not entitled to divert and export any
24 water from said La Zanja Creek under the riparian rights of Defen-
25 dant Clement C. Floersch for use on lands not riparian to said La
26 Zanja Creek except when same can be done for beneficial use without
27 injury to plaintiff.

28 XI

29 The defendants are enjoined and restrained from operating
30 their hog ranch in such a manner as would contaminate the surface
31 or subsurface flow of La Zanja Creek passing through plaintiff's
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1 said land and specifically defendants and each of them are enjoined
2 and restrained from hauling from their said hog ranch the waste
3 and manure accumulated thereon and depositing the same so near
4 the banks of said La Zanja Creek as would contaminate the surface
5 and subsurface flow thereof.

6 XII

7 That plaintiff is not entitled to damages in the sum of
8 \$10,000.00 or any sum whatever for the alleged contamination of
9 the surface and subsurface flow of La Zanja Creek on account of the
10 manner in which defendants have operated their hog ranch or on ac-
11 count of the claim that defendants had contaminated said creek by
12 depositing waste and manure immediately adjacent to the banks of
13 said creek.

14 XIII

15 That plaintiff is not entitled to damages in the sum of
16 \$300.00 on account of loss of pasturage because of the alleged
17 contamination of or interference with the flow of the waters
18 of La Zanja Creek by defendants.

19 XIV

20 That plaintiff is entitled to his costs incurred herein,
21 taxed in the amount of \$ _____

22 XV

23 That plaintiff is granted the right to claim releases from
24 defendant's reservoir, but only in an amount sufficient to make
25 up any deficiency in the water available to plaintiff to meet his
26 said reasonable requirements or the difference between the diver-
27 sions or production of his said well and 600 gallons per day and
28 not in excess of 28% of the then surface and subsurface flow of
29 said La Zanja Creek. Plaintiff's claim for releases and the
30 notice of the amount claimed as necessary to make up plaintiff's
31 deficiency shall be given by written notice to defendant 24 hours
32 in advance of the time the release shall be made. Plaintiff,

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1 however, must use reasonable means and facilities for the diversion
2 of his present and future requirements from the surface and sub-
3 surface flow of said creek and to that end must keep his well,
4 pump, and windmill (or other facilities used by him for diversion)
5 in a reasonable condition of repair for reasonably efficient opera-
6 tion and shall meter and record the diversion of water by him or
7 the production of his said well and report the amount thereof
8 monthly to Defendant Clement G. Floersch.

9 XVI

10 That while the excavation is being made for the foundation
11 for said dam the water pumped out of the excavation shall be
12 measured by defendant and a record kept of the amount of this
13 underflow. Each party may have the right to appoint an engineer
14 to represent them at the test herein provided for. The defendant,
15 or the engineers, if one or more are appointed, shall report to
16 the court the results of the test and their conclusions thereon
17 as to what the underflow at the dam site was and plaintiff shall
18 be given a copy thereof.

19 XVII

20 That when construction of the dam is completed, the "rising
21 water" entering the reservoir from the underground shall be eval-
22 uated before the time the surface flow begins by measuring the
23 amount of the rising water flowing through an open outlet neces-
24 sary to keep the water level in the reservoir stationary and add-
25 ing the correction factor for evaporation within the reservoir.
26 This test also may be conducted by or under the direction or
27 supervision of engineers appointed by either of said parties and
28 the defendant or said engineers shall report to the court in a like
29 manner as is provided for in the preceding paragraph and plaintiff
30 shall be given a copy thereof.

31 XVIII

32 That when the reservoir is put into operation by defendant,

1 all water pumped from or released from the reservoir, shall be
2 metered and recorded, and the records of said pumping and re-
3 leases shall be reported monthly by defendant to this court and a
4 copy given to plaintiff.

5 XIX

6 The court hereby reserves jurisdiction in this action over
7 the parties and the subject matter so that on the application of
8 any party hereto or the successor in interest of any party, it may
9 take new evidence on the reasonable riparian requirements of each
10 party as they may hereafter develop and the water available in said
11 La Zanja Creek to meet such requirements, with the right to make
12 modified or additional findings of fact and conclusions of law
13 and to modify this decree accordingly.

14 DATED this 11th day of February, 1949.

15 C M Mowbray
16 Judge of said Superior Court.
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