see : Decision 1602

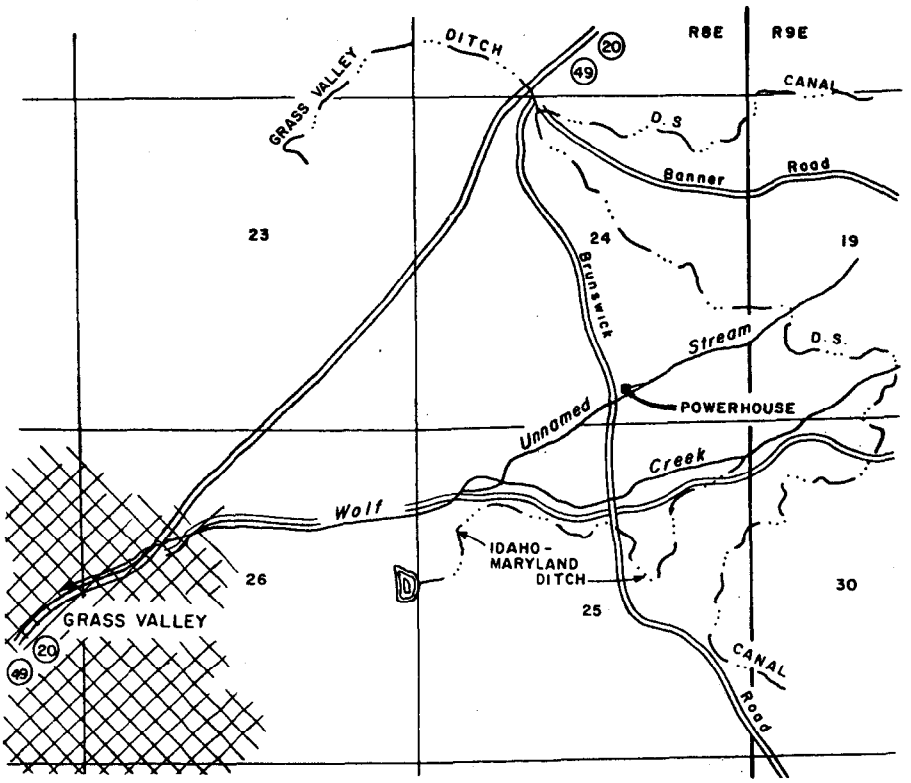
HAEMMIG HYDROELECTRIC PROJECT

IN NEVADA COUNTY

APPLICATION 26876

ORDER 84-14

AFFIRMING DECISION 1602 AND DENYING PETITION FOR RECONSIDERATION



NOVEMBER 1984

STATE WATER RESOURCES CONTROL BOARD

STATE OF CALIFORNIA

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STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Application 26876, ADRIAN B. and JANICE L. HAEMMIG, Applicant, NEVADA IRRIGATION DISTRICT, Protestant.	ORDER:	WR 84-14
	SOURCES:	Unnamed Tributary to Wolf Creek, thence the Bear & Feather Rivers
	COUNTY:	Nevada

ORDER DISMISSING PETITIONS FOR RECONSIDERATION
AND AFFIRMING DECISION 1602

1.0 BY BOARD MEMBER KENNETH W. WILLIS

On August 16, 1984 the State Water Resources Control Board (Board) adopted Decision 1602 approving Application 26876 by Andrian B. and Janice L. Haemmig (Applicant) for the appropriation of water. Petitions for reconsideration were filed with the Board on September 17, 1984 on behalf of Nevada Irrigation District (District) and on behalf of the Applicant.

2.0 BACKGROUND INFORMATION

2.1 Application

Application 26876 is for a permit to divert up to 16 cubic feet per second (cfs) by direct diversion from January 1 through December 31 from an unnamed stream tributary to Wolf Creek, and thence the Bear and Feather Rivers for power purposes. Water will be diverted, put to use and returned to the stream within the SW1/4 of SE1/4, Section 24, T16N, R8E, MDB&M.

2.2 Project Description

The Applicant owns property adjoining the unnamed stream within the District's boundaries. Facilities for diverting a maximum of 16 cfs from the stream by means of a dam approximately three feet high into a ditch and flume to a power house have been constructed. The power house is located on the right bank of the stream about 190 feet downstream from the diversion dam on land owned by the Applicant. The project has an installed capacity of 10 kW and can produce up to 60,000 kWhs annually. The project is located about one mile north and two miles east of Grass Valley.

2.3 Project Operation

During the irrigation season the District releases from 7 to 47 cfs of water to the unnamed stream. These flows are relatively steady and provide a suitable condition for project operation. The upstream watershed is at a relatively low elevation and no more than five square miles in area. Consequently, runoff during November through April from rainfall is erratic, of short duration and unsuitable for sustained plant operation. Operation during these months is made more difficult by the necessity to clear debris frequently from the trash racks at the point of diversion. The plant was operated about 16 hours from November of 1983 through April 1984. By contrast, during May through October of 1983 the project operated for 3,432 hours. Clearly, the plant's operation depends almost completely upon releases of imported water to the stream by the District.

2.4 District's Water

In addition to post-1914 appropriative rights, the District claims pre-1914 appropriative water rights to redivert and use the water it releases into the stream. The water imported by the District and paid for by its customers is the water which is used during May through October by Applicant's project.

2.5 Decision Approving Application

In reaching our decision approving the application we stated, in part:

> "In concluding that the Applicant should not, by permit condition, be required to pay the District for the use of water, we are mindful of the fact that the water used by the Applicant is developed at the expense of the District and its customers. We conclude, however, that this fact does not overcome our analysis ... that, under Water Code Sections 1201 and 1700, interpreted in light of the fullest beneficial use command of Article X, Section 2 of the Constitution and of Section 100 of the Water Code, unappropriated water is presently available for the power use being made by Applicant. A repayment condition would be inconsistent with our affirmative finding on the question of availability of unappropriated water. The only apparent justification for imposing a repayment condition would be a conclusion that use of the water sought by Applicant is pursuant to a "service furnished by the district", within the meaning of Water Code Section 2280 (sic). Where the water sought by Applicant has been introduced by the District for the sole purpose of supplying consumptive use needs of downstream customers, and where the District does not presently possess the right to appropriate water for power use at Applicant's point of diversion, we cannot conclude that the District is furnishing a service to the Applicant. Accordingly, we deem this an appropriate case for application of the policy articulated in Bloss v. Rahilly, supra, and conclude that the water involved here is subject to

appropriation insofar as the appropriation does not interfere with vested rights.

"Being mindful that the water used by the Applicant is imported at the expense of the District and its customers, explicit recognition of the request that the Board recognize the District's paramount right to the use of the water is appropriate ... Condition 4 (sic) in our order recognizes the District's paramount right to the use of the water released from the D. S. Canal to serve its customer's consumptive uses and to use the water to operate a competing hydroelectric project even though the Applicant's project may be affected adversely."*

3.0 APPLICANT'S PETITION FOR RECONSIDERATION

Water appropriated under the Water Code for one purpose is not deemed appropriated for other purposes; however, the purpose of use, place of use, or point of diversion may be changed as provided by the Code (Sections 1700 et seq.). In general, no change may be made if another legal user of water will be injured. The Applicant requests that Condition 6 (see following paragraph) be modified to make it clear the Board is not waiving the applicability of Section 1700 et seq. to the District's delivery of water through the unnamed tributary to Wolf Creek.

3.1 Condition 6

Condition 6 provides as follows:

"To the extent that water available for use under this permit is imported water, this permit shall not be construed as giving any right to the continuance of such supply. Permittee is put on notice that the

* Condition 6 was incorrectly typed as condition 4 due to a typographical error and Section 22280 was incorrectly typed as Section 2280.

District may discontinue releases of water into the unnamed stream at any time in order to serve its customers more effectively or to operate a competing hydroelectric project."

3.2 Changes in Pre-1914 Water Rights

An unquantified but probably significant quantity of the water released into the unnamed tributary is water for which the District claims pre-1914 water rights. No statutory procedure is required to change the place of use, purpose of use, or point of diversion of pre-1914 water rights (Section 1706). Nevertheless, changes affecting natural flow may be enjoined by legal users of water injured by such changes (Junkans v. Bergin, 1885, 67 Cal. 267, 7 Pac. 684). With regard to water foreign in source or time, persons incidentally benefitted may ordinarily not enjoin changes by the developer (Stevens v. Oakdale Irrigation District, 1939, 13 Cal.2d 343, 90 P.2d 58). In conclusion, we have no authority to require the District to petition the Board for approval before changing the place of use, purpose of use or point of diversion of pre-1914 water rights.

3.3 Changes in Post-1914 Water Rights Within Place of Use

As evidenced by our regulations, when approving applications for irrigation districts, our long standing practice has been to describe the place of use with reference to the exterior boundaries of a district. (23 Cal.Adm.Code §674; Department of Public Works, Division of Water Resources, 1935 Rules and Regulations, Regulation 5 implementing Chapter 586, Statutes 1913). The applicant's point of diversion and unnamed tributary to Wolf Creek are situated within the

District's boundaries. To the extent that the place of use in the District's post-1914 water rights are defined by boundaries encompassing the applicant, the District may reroute water within its overall permitted place of use without seeking our approval in accord with Sections 1700 et seq.

3.4 Applicability of Stevens v. Oakdale Irrigation District To Post-1914 Water Rights; Applicability of Article 10, Section 2 To Changes

Stevens v. Oakdale Irrigation District provides in part:

> "... one who produces a flow of foreign water for beneficial use and thereafter permits it to drain down a natural channel, is ordinarily under no duty to lower claimants to continue importing the supply or to continue maintaining the volume of discharge into the second channel at any fixed rate."

Our conclusion in the preceeding paragraphs makes it unnecessary to determine whether the principle enunciated in Stevens v. Oakdale Irrigation District is applicable to post-1914 appropriative water rights. However, (1) even assuming that Stevens v. Oakdale Irrigation District is not applicable and given that (2) the District may reroute water within its overall permitted place of use without seeking our approval, the Constitutional requirement that the fullest beneficial use be made of water (Article X, Section 2) may preclude the District from routing water to bypass the unnamed tributary to Wolf Creek if the needs of the District's customers can be reasonably satisfied without terminating or reducing the beneficial use made of the water by the Applicant.

4.0 DISTRICT'S PETITION FOR RECONSIDERATION

Contending the Board failed to give proper consideration to Irrigation District Water Code Provisions 22430 and 22280(d), the District seeks reconsideration of Decision 1602. Before turning to the District's contention regarding these sections, we will first respond to another matter raised by the petition.

4.1 Too Much Ado

A semantic problem is resulting in confusion. The District states that it is not requesting the Board to impose "conditions" on the appropriation of water but is seeking an order "directing" the applicant to purchase water from the District. The confusion arises from the fact that language within Board decisions directing or ordering applicants to do certain things is denominated as "conditions". (See Decision 1602, Section 10.0, for an example.) The District's request for an order directing the Applicant to do something is therefor understood, in Board parlance, as a request for a condition.

4.2 Contention Regarding Section 22280(d)

The District contends that the Board ignored Section 22280(d) which provides, in part:

> "Any district may in lieu in whole or in part of levying assessments fix and collect charges for any service furnished by the district, including any and all of the following:
>
> * * *
>
> "(d) use of water for power purposes."

4.2.1 Decision 1602 and Section 22280(d)

Section 22280(d) was discussed in paragraph 6.5 and 9.1 of Decision 1602 and was not ignored. To reiterate paragraph 9.1, we stated, in part:

> "The only apparent justification for imposing a repayment condition would be a conclusion that use of the water sought by Applicant is pursuant to a "service furnished by the district", within the meaning of Water Code Section 2280 (sic). Where the water sought by Applicant has been introduced by the District for the sole purpose of supplying consumptive use needs of downstream customers, and where the District does not presently possess the right to appropriate water for power use at Applicant's point of diversion, we cannot conclude that the District is furnishing a service to the Applicant. Accordingly, we deem this an appropriate case for application of the policy articulated in Bloss v. Rahilly, supra, and conclude that the water involved here is subject to appropriation insofar as the appropriation does not interefere with vested rights." (Emphasis added.)

Fundamentally, the District is contending that water may be sold for all purposes because the water has been appropriated for some purposes and because the water is within its boundaries and under its control (albeit in a natural watercourse).

4.2.2 Clarifying Remarks

Our decision neither affirms or denys the District's authority to levy charges for services rendered to the Applicant. We merely decline to require the applicant, as a condition of our approval, to attempt to obtain a contract with the District. Our reasons are restated above and, in our view, are appropriate. Decision 1602 does not in any

manner constrain the District from seeking relief against the Applicant in another forum.

4.3 Equitable Consideration

Another point of confusion arises out of subsequent discussion in paragraph 9.1 setting forth additional reasons why we denied the request for a condition requiring the Applicant to pay the District for the use of water. We stated therein, in part:

> "Our conclusion is also influenced by the following equities present in this matter. The District makes delivery of water for its customers through a natural watercourse on the Applicant's property and the District makes no payment to the Applicant. We have found that the Applicant's project does not reduce the quantity of water available to the District for sale to its consumptive use customers. Finally, so long as a customer pays for the use of water he can usually expect continued delivery of water from a supplier; in this case, the District expressly disclaims any such warranty because it may wish to use the same water for its own power project."

4.3.1 Clarifying Remarks

The District erroneously perceives our statement as a limitation on Section 22280(d) which enables the District to levy charges for services rendered. Our statement was not intended to indicate that the District could not levy fees for the service of delivering water for power. Rather, our statement was intended to further explain why we did not choose to require the Applicant to pay a fee for water in the unnamed tributary as a condition of our approval of the application.

4.4 Contention Regarding Section 22430

The District contends that Section 22430 "... constitutes a recognition by the California Legislature that sales and use of water within the boundaries of a District ... should be governed in the first instance by the District...." Section 22430 provides as follows:

> "There is given, dedicated and set apart for the use and purposes of the District all water and water rights belonging to the State of California within the district."

The District cites no authority to support the contention.

4.4.1 Legislative History

Section 22430 was originally part of Section 56 of the Irrigation District Act of 1897. The 1897 Act states that its purpose is to provide for the organization and government of irrigation districts, the acquisition or construction of works for the irrigation of irrigation district lands and to provide for the distribution of water for irrigation. Section 56 grants the irrigation districts the right to construct canals across streams, roadways, conduits and railways. At the end of Section 56, the Legislature granted the right of way through or over state owned lands to the irrigation districts for the purpose of locating, constructing and maintaining canals. Almost as an afterthought, the last sentence of Section 56 dedicated state owned water and water rights to the irrigation districts as follows: "...and also there is given, dedicated and set apart for the uses and purposes aforesaid, all waters and water rights belonging to the state

within the district." This appears to be a grant of state owned water and water rights to the irrigation districts similar to the previous grant of canal easements through or over state owned lands. There is no basis for an inference that this section operated to convey the State's regulatory power to allocate unappropriated water, nor can any authority be found to support such an inference.

4.4.2 Literal Interpretation

Viewed most favorably to the District, Section 22430 appears to convey proprietary rights to the use of water belonging to the State. Our decision already presupposes that the water in the unnamed tributary is water for which the District holds appropriative rights for certain purposes. The District does not allege nor identify the water rights it has acquired from the State from this section which entitles the District to make greater use of water than can be made under existing rights.

4.4.3 Effect of Palmer v. Railroad Commission and Constitutional Amendment

If Section 22430 is not a grant to any specific right to water, does the section transfer some broader interest in water from the State to the District? Water Code Section 102 states that "[a]ll water of the state is the property of the people of the state". Added to the Civil Code in 1911, this is the first statutory enactment in California laying claim to the waters of the State (Civil Code §1410, Stats. 1911, C. 407, p. 821). Shortly thereafter, in 1914, the California Supreme Court held that the right to water flowing in streams, prior to sale or other disposition of the lands by the State, was vested in the

State as the proprietary owner of riparian lands and not in its capacity as the sovereign. (Palmer v. Railroad Commission, 138 Pac. 997; Section 102 Code Commission Notes.) The Court's initial view of Section 102 gives substantial weight to the application of a proprietary reading to Section 22430. The 1928 amendment to the California Constitution (Article 14, Section 3; now Article 10, Section 2), however, made all water not required for reasonable beneficial use on riparian land, or not previously appropriated for beneficial use, available for appropriation by others. Such water is available, accordingly, for appropriation by persons such as the Applicant.

4.4.4 Effect of Modern Water Code and People v. Shirokow

Water Code Sections 102, 104 and 105 are a declaration that the State will exercise police power (not proprietory ownership) to protect the public interest in the appropriation, development and use of state water. To this end the Legislature has also declared that "... no right to appropriate or use water subject to appropriation shall be initiated except upon compliance with..." the provisions of the Water Code respecting the appropriation of water (Section 1225). Further, Water Code Section 1201 provides that all water flowing in a natural channel not being applied to beneficial use or not otherwise appropriated, is available for appropriation. When considering these provisions the California Supreme Court has stated:

> "... section 1201 should be interpreted in such a manner that the waters of the state be available for allocation in accordance with the code to the fullest extent consistent with its terms. In Bloss v. Rahilly,

> ... we observed the language of section 1201 evinces 'an intention to declare the waters of the state to be subject to appropriation in so far as that can be done without interfering with vested rights.' The Constitution, too, provides for the protection of appropriators, but only to the extent the appropriator is 'lawfully entitled' to water .... The rights not subject to the statutory appropriation procedures are narrowly circumscribed by the exception clause of the statute and include only riparian rights and those which have been otherwise appropriated prior to December 19, 1914, the effective date of the statute. Any use other than those excepted is, in our view, conditioned upon compliance with the appropriation procedures of division 2." (People v. Shirokow, 1980, 162 Cal.Rptr. 30; 26 Cal.3d 301.)

In view of the foregoing, we conclude that prior to 1914 Section 22430 would have only conveyed specific riparian or appropriative water rights held by the State as a proprietor. The District has not identified any such rights. Further, since 1914, Section 22430 has been superseded by Water Code Sections 1200 et seq. respecting the acquisition of appropriative rights and has no force or effect respecting such acquisition. In summary, we are unable to conclude that Section 22430 may be construed, reasonably, as direction by the Legislature that unappropriated water should be governed by the Irrigation Districts Code as opposed to the modern water code respecting the acquisition of water rights.

5.0 ORDER

IT IS HEREBY ORDERED that:

1. The petition for reconsideration filed on behalf of Adrian B. and Janice L. Haemmig is denied.

2. The petition for reconsideration filed on behalf of Nevada Irrigation District is denied.

3. Decision 1602 is affirmed as adopted on August 16, 1984.

CERTIFICATION

The undersigned, Executive Director of the State Water Resources Control Board, does hereby certify that the foregoing is a full, true, and correct copy of anorder duly and regularly adopted at a meeting of the State Water Resources Control Board held on November 7, 1984.

AYE: Carole A. Onorato
Warren D. Noteware
Kenneth W. Willis
Darlene E. Ruiz
Edwin H. "Ted" Finster

NO:

ABSENT:

ABSTAIN:

Michael A. Campos
Executive Director

STATE WATER RESOURCES CONTROL BOARD

P. O. Box 100, Sacramento, CA 95801

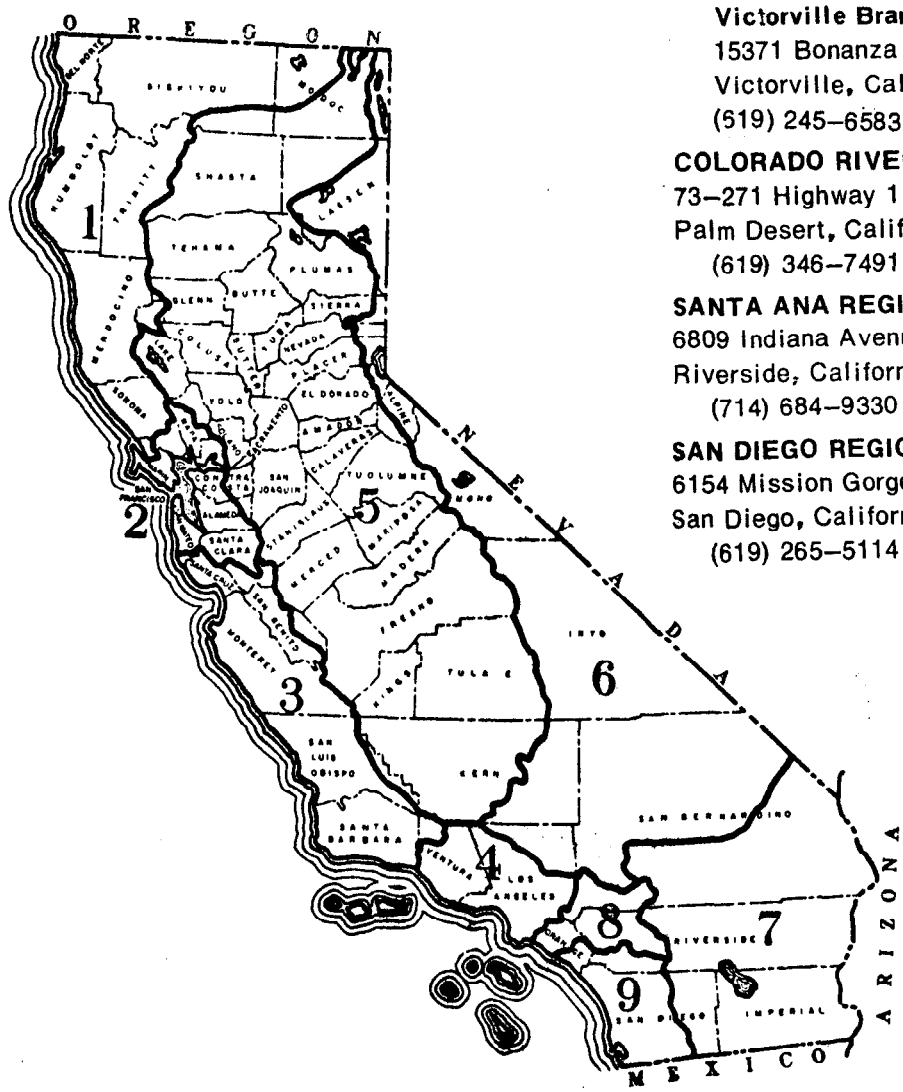
CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARDS

NORTH COAST REGION (1)
1000 Coddingtown Center
Santa Rosa, California 95401
(707) 576–2220

SAN FRANCISCO BAY REGION (2)
1111 Jackson Street, Room 6040
Oakland, California 94607
(415) 464–1255

CENTRAL COAST REGION (3)
1102–A Laurel Lane
San Luis Obispo, California 93401
(805) 549–3147

LOS ANGELES REGION (4)
107 South Broadway, Room 4027
Los Angeles, California 90012
(213) 620–4460



CENTRAL VALLEY REGION (5)
3201 S Street
Sacramento, California 95816
(916) 445–0270

Fresno Branch Office
3374 East Shields Avenue, Rm. 18
Fresno, California 93726
(209) 445–5116

Redding Branch Office
100 East Cypress Avenue
Redding, California 96002
(916) 225–2045

LAHONTAN REGION (6)
2092 Lake Tahoe Boulevard
P.. O. Box 9428
South Lake Tahoe, California 95731
(916) 544–3481

Victorville Branch Office
15371 Bonanza Road
Victorville, California 92392
(519) 245–6583

COLORADO RIVER BASIN REGION (7)
73–271 Highway 111, Suite 21
Palm Desert, California 92260
(619) 346–7491

SANTA ANA REGION (8)
6809 Indiana Avenue, Ste. 200
Riverside, California 92506
(714) 684–9330

SAN DIEGO REGION (9)
6154 Mission Gorge Road, Suite 205
San Diego, California 92120
(619) 265–5114

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