

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

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In the Matter of Application 4790 of J. E. Mount to
Appropriate from Turner Slough, Tributary of Mer-
ced River, in Merced County for Agricultural
and Domestic Purposes

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DECISION A 4790 D 182

Decided *January 25, 1928*
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APPEARANCES AT HEARING HELD May 20, 1927.

For Applicant
J. E. Mount

In propria persona

For Protestants

James J. Stevinson, a Corporation)
East Side Canal & Irrigation Company)
A. J. Stevinson)
J. G. Walther)

Fred B. Wood

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EXAMINER: E. M. Bryan, Deputy Chief for Edward Hyatt, Jr., Chief of
Division of Water Rights, Department of Public Works,
State of California.

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O P I N I O N

Application 4790 was filed October 1, 1925. It proposes an appro-
priation of 2.61 cubic feet per second throughout the entire year from Turner
Slough, a tributary of the Merced River for domestic purposes and the irriga-
tion of 225 acres of land located in Sections 16, 17, 20 and 21, T 7 S, R 10 E,
M.D.B. & M. The application was protested by James J. Stevinson, a corpora-
tion, East Side Canal and Irrigation Company, A. J. Stevinson and J. G. Walther.

The application was completed in accordance with the Water Commission Act and the requirements of the Rules and Regulations of the Division of Water Rights and being protested was set for a public hearing at the Jury Room of the Court House at Merced, at 10:30 o'clock a.m. on Friday, May 20, 1927. Of this hearing applicant and protestants were duly notified.

OUTLINE OF PROTESTS

John G. Walther claims that he is owner of twenty acres of land on Turner Slough below the proposed point of diversion of the applicant which land is located in Section 20, T 7 S, R 10 E, M.D.B. & M. and that the proposed diversion of the applicant would deprive him of water to which he is entitled.

A. J. Stevinson claims that he is the owner of 80 acres of land lying within the $N\frac{1}{2}$ Section 16, T 7 S, R 10 E, M.D.B. & M. and is lessee of several hundred acres of land situate in Sections 19, 20 and 21, T 7 S, R 10 E, M.D.B. & M. which lands are entitled to be served with water for irrigation purposes from the canals and works of the East Side Canal Company and alleges in effect that any obstruction placed in Turner Slough would cause flooding and seepage upon the lands adjacent and in the vicinity of the proposed dam and hinder and impair the delivery of water to his lands for irrigation purposes.

The East Side Canal and Irrigation Company claims that for more than 20 years last past it has been a public utility serving about 20,000 acres of irrigable land in Merced County and alleges in effect that the waters of Turner Slough which are tributary to the San Joaquin River and not to the Merced River as stated in the application belong to the Company and are dedicated to the public use, that Turner Slough throughout its entire length from the main

canal of the Company to the San Joaquin River is used by it as an irrigation distributing canal and drainage ditch and any diversion as proposed by the applicant could only be made by trespassing upon its easements and rights of way along the Slough and interfering with waters which rightfully belong to the company. They also allege that the placing of a dam or other obstruction in the Slough would cause damage to the adjoining lands by flooding and seepage.

James J. Stevinson, a corporation, claims riparian rights to the waters of San Joaquin River and its tributary Turner Slough by virtue of the ownership of several thousand acres of land adjacent thereto and which have been irrigated from the distributing canals of the East Side Canal and Irrigation Company for the last twenty years and alleges injury to the extent that the right of the East Side Canal and Irrigation Company would be interfered with as set up in the protest of that company. This protestant alleges also that among the lands which the applicant proposes to irrigate are included fifty acres of land which belong to the protestant.

PHYSICAL CHARACTERISTICS OF SOURCE OF PROPOSED DIVERSION

Turner Slough is a natural watercourse extending along its downward course from the Merced River at a point in the northeast quarter of Section 4, T 7 S, R 10 E, M.D.B. & M. in a general southwesterly direction to its junction with the San Joaquin River at points in Sections 20 and 29, T 7 S, R 10 E, M.D.B. & M.

About the year 1907 there was a solid earthen levee constructed along the southerly bank of the Merced River and across Turner Slough at its junction with the Merced River which prevents the water from entering Turner Slough from the river.

Turner Slough intersects and crosses the main canal of the East Side Canal and Irrigation Company at a point on the south line of Section 9,

T 7 S, R 10 E. At this point there has been a 12 inch syphon constructed under the main canal through which the surface drainage and seepage waters may be conducted from the portion of Turner Slough lying north of the main canal into that portion of the Slough which lies south of the canal. At this point also there are two gates in the south bank of the main canal which are so constructed as to permit the flowage of water out of the main canal into the channel of Turner Slough.

The flow in Turner Slough north of the main canal consists of seepage or natural return water from the surrounding irrigated lands and south of the main canal in addition to the seepage and return water the flow consists in water which is spilled into the Slough from the main canals and the laterals. The seepage water appears to be a small amount, perhaps one per cent of the average flow in the slough.

South of the main canal the slough has a width varying from 20 to 150 feet and has been artificially cleaned and deepened in several places to give the water surface a better grade.

Since the flow of water in Turner Slough is always toward the San Joaquin River it is tributary to that river rather than to the Merced River as stated in the application.

JUDGMENT AND DECREE IN THE CASE OF STEVINSON vs. MOUNT

In the case of Stevinson v. Mount by judgment and decree of April 12, 1926 it is adjudged by the Superior Court in and for the county of Merced that the East Side Canal and Irrigation Company owns an easement and right of way in, along, by, over and through Turner Slough along and across the lands of J. E. Mount for the transmission of water for irrigation to said company's customers and for the purpose of carrying the surplus waters from the main canal of said company, together with all rights and privileges incidental or

necessary to the full enjoyment of said easement and right of way, including the right to remove all obstructions from said slough.

It is adjudged that said company owns a right to divert water flowing in the San Joaquin River at the head of its canal and to transmit said water in said canal and in the laterals therefrom including said Turner Slough and this right is quieted as against said J. E. Mount.

J. E. Mount is also enjoined from in any wise interfering with, hindering or obstructing said company in the full, complete, continuous and uninterrupted use and enjoyment of its said easement and from in any wise interfering with, obstructing, hindering, or retarding the flow of any waters or of any of the waters flowing in said slough below the main canal of said company.

J. E. Mount is ordered to remove his dam and the obstructions placed in the slough by him and to restore the channel to its natural condition and is enjoined from building or maintaining any obstructions in the channel of the slough.

FINDINGS OF FACT IN CASE OF STEVINSON v. MOUNT

In its findings of fact the court finds that the company is now and for more than 35 years last past has been diverting water from the San Joaquin River in and through its canal leading from said river and the laterals therefrom including Turner Slough and has been using said water beneficially for irrigation, household, domestic and stock purposes, and for sale, rental and distribution and has acquired a prescriptive right so to do; that said right of the company to divert and use water as aforesaid is superior and prior to any of the rights of J. E. Mount; that the lands of the company and of J. E. Mount are riparian to the natural stream

or water course known as Turner Slough; that said water course known as Turner Slough has extended and does now extend along its downward course along a southwesterly direction from the Merced River and intersects the main canal of the company, and terminates in the San Joaquin River; that at the point where said slough intersects and crosses said main canal there are three gates in the canal one of which is in the northern bank, is automatic and allows water flowing against it to flow into said canal, the other two being in the southern bank and operable so as to permit water to flow out of the canal into the channel of the slough; that the slough carries, during the seasons of the year when water is naturally present in the territory drained by it, large quantities of water from its upper to its lower terminal; that the slough carries the drainage of surface waters which seek an outlet from adjacent lands; that each year during the irrigation season it carries large quantities of water which drain into it from irrigated lands adjacent to or in its vicinity, including lands north of the main canal, which water consists of seepage and runoff from irrigation of said lands; that the slough also carries large quantities of surplus waters of numerous irrigation ditches through which ditches water for irrigation is conducted to customers from the main canal, which ditches naturally drain into it and have no other outlet; that some ditches drain and empty into the slough above the lands of J. E. Mount; that the slough from the point of intersection with the main canal to its terminal in the San Joaquin River carries surplus waters from the main canal and also large quantities for irrigation; that the uninterrupted use of said slough to carry off surplus waters from the main canal has been and is indispensable to the company in that during the irrigation season the level of water in the main canal fluctuates for reasons over which the company has no control and the water often rises in the canal to such a point that it would

overflow and break down the banks were it not for the release of water out of the canal and into the slough; that the company has acquired a prescriptive right for using the slough to carry off such surplus waters; that the depression surrounding Turner Slough is of gradual slope and varying width and gradually disappears in the surrounding country without regular or well defined banks but that there has been from times immemorial and now is in the bottom of said depression a well defined channel of a well defined stream and watercourse known as Turner Slough; that said slough exists all the way from the Merced to the San Joaquin Rivers, connects with and discharges into the San Joaquin and is not and has not been cut off from the Merced River although about the year 1907 a levee was constructed across the slough at its head in or near the south bank of the Merced River which levee at the present time prevents waters of the usual, ordinary flow of the Merced River from entering and flowing into the Slough but that extreme high waters of the Merced have at various times in years past washed out and around said levee and flooded down the slough and may from time to time, hereafter, as such high waters occur, again do likewise. It is found that the canal company uses that portion of Turner Slough lying south of its main canal "as a ditch and as a part of said" company's "distributing works and the same is a ditch or canal for said purposes and is a part of said works of" said company. (Transcript, p. 215, lines 10-14). It is found that the company has been a public service corporation for 13 years last past and engaged in distributing its waters for sale to the public which it serves.

CAUSE OF ACTION AGAINST MOUNT

The litigation above discussed arose out of the activities of Mount in building a dam across the slough and partially damming its flow and in plowing up the channel of the slough and further retarding the flow therein. It

was evidently Mount's purpose to ward off the waters of the slough. By so doing he flooded lands above and threatened the supply of lands below. Mount denied in his answer that the slough was a water course or that it flowed any waters other than waters wrongfully permitted to flow therein by the company.

MOUNT'S APPLICATION FOR A PERMIT TO APPROPRIATE

Mr. Mount now seeks a permit to appropriate from Turner Slough. His application was filed October 1, 1925, approximately a year after the date of trial of the case above referred to but six months prior to the rendition of judgment and decree therein. A hearing in the matter of this application was held by the Division of Water Rights in May, 1927 and protestant's reply brief was filed in July, 1927.

PROTEST OF EAST SIDE CANAL & IRRIGATION COMPANY

The East Side Canal and Irrigation Company vigorously protests against the grant of a permit to applicant urging the judgment and decree in the suit between it and applicant as conclusive in its favor.

EFFECT OF JUDGMENT AND DECREE
IN THE MATTER OF THIS APPLICATION

The judgment and decree of the superior court is that Turner Slough is a natural watercourse but that during the irrigation season it is utilized as a lateral of the company's canal system and that for said season the company has acquired prescriptive title to an easement for a right of way across applicant's lands for the purpose of flowing waters conducted by it from the San Joaquin River in and through this lateral. Protestant contends in effect that Turner Slough is by the decree of the superior court during the times when this applicant would divert from it a canal or ditch of the protestant for the maintenance of which and exclusive right of possession and enjoyment of which the protestant has obtained an easement right by prescription, and insofar as this decree is concerned that applicant has no more right to in

any wise tamper with said slough than he would have to interfere with a ditch, canal, or pipe line across his lands for the maintenance of which protestant might have acquired a right by prescription. The decree not only enjoins interference with the slough by applicant but quiets the title of protestant to the waters therein flowing as against the applicant.

The question which presents itself is whether this office may find that there is unappropriated water flowing in the slough and may grant a permit to applicant to take and use from the slough despite the existence of this decree and its injunctions against applicant.

In view of the judgment and findings referred to we feel that applicant herein is precluded from interfering in any wise with the waters which he seeks to appropriate and that any attempt on his part so to do would subject him to punishment for contempt of court.

Insofar as this applicant or parties claiming through or under him are concerned, it has been adjudged against them that Turner Slough is the canal or ditch of the company for which the company has a right of way through, over and across the lands of Mr. Mount. Therefore, insofar as this applicant is concerned the application before the Division of Water Rights is to appropriate from the privately owned canal or ditch of the protestant. That water in the canal, ditch, or pipe line of another may not be taken therefrom without the owner's consent is, of course, undeniable as is also the statement that water may not be appropriated from the canals or ditches of others who object. (Ball v. Kehl, 95 Cal. 606; Bader Gold Min. Co. v. Oro Electric Corp., 245 Fed. 449, 453; 2 Kinney 1153, ¶662, Second Edition; 1 Wiel 45, Chapter 4, 3rd Edition; Fawkes v. Reynolds, 190 Cal. 207, 211)

Furthermore, the judgment and decree of the court quiets the title of the protestant company to the water in question as against the applicant.

It therefore appears that insofar as applicant or those claiming under

applicant are concerned, the right and title to the water in question has been adjudicated to be vested in the protestant and that it has also been adjudged against applicant that the source from which applicant proposes to appropriate is the canal or ditch of the protestant. This judgment has become final in favor of protestant as against applicant and applicant cannot legally divert from this source without the consent of protestant.

It would therefore be a vain and futile act for this office to grant a permit to applicant and we feel constrained by virtue of the aforesaid judgment and decree to regard the pending application as one to appropriate from the canal of protestant company. Hence the application must be rejected.

O R D E R

Application 4790 for a permit to appropriate water having been filed with the Division of Water Rights as above stated, protests having been filed, a public hearing having been held and the Division of Water Rights now being fully informed in the premises:

IT IS HEREBY ORDERED that the said Application 4790 be rejected and cancelled upon the records of this office.

Dated at Sacramento, California this 25th day of January
1928.

(Harold Conkling)
CHIEF OF DIVISION OF WATER RIGHTS

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