

STATE OF CALIFORNIA
STATE WATER RIGHTS BOARD

In the Matter of Application 22041
of Albert O. Fruetel and William D.
Middleton to Appropriate from Coon
Creek in Sutter County

Decision D 1286

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DECISION APPROVING APPLICATION

Albert O. Fruetel and William D. Middleton having filed Application 22041 for a permit to appropriate unappropriated water; protests having been received; the applicants and protestants having stipulated to proceedings in lieu of hearing as provided for by Title 23, California Administrative Code, Section 737; an investigation having been made by the State Water Rights Board pursuant to said stipulation; the Board, having considered all available information and now being fully advised in the premises, finds as follows:

1. Application 22041 as amended is for a permit to appropriate 6.02 cubic feet per second (cfs) by direct diversion from April 15 to June 15 and from September 1 to September 15 of each year for irrigation purposes from Coon Creek in Sutter County. The point of diversion is to be located within the SW $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Section 10, T12N, R4E, MDB&M.

2. Coon Creek heads in the Sierra foothills approximately seven miles northeast of Auburn and flows in a general

southwesterly direction approximately 26 miles to where it is intercepted by East Canal. East Canal continues in a general southerly direction approximately 4.5 miles to Cross Canal. Cross Canal continues on in a general southwesterly direction approximately 5.5 miles to the Sacramento River.

3. The applicants propose to pump from Coon Creek approximately one mile above its interception by East Canal for the irrigation of 232 acres of rice. They plan to re-activate an old well on their property and pump water from the underlying ground water basin to carry them through the portion of the irrigation season which is not covered by Application 22041.

4. Protestant South Sutter Water District (hereinafter referred to as "the District") holds Permit 14871 (Application 10221) and Permit 11297 (Application 14804) to appropriate a maximum of 410 cfs and 115,000 acre-feet per annum from the Bear River for its Camp Far West project. Water is conveyed through the District's canal and released into various laterals and natural stream courses, including Coon Creek, for use within the District.

5. The District contends that Water Code Section 35602 requires a denial of Application 22041. This section reads as follows:

There is given, dedicated, and set apart for the uses and purposes of each district all water and water rights belonging to the State within the district.

Section 35602 of the Water Code is found in the California Water District Law, pursuant to which protestant District was organized. An examination of the original statute from which this code section was derived shows that it was not the intention of the Legislature to recognize water rights for a California water district solely because water occurs within its boundaries or exempt it from the procedure for appropriating water established by the Water Commission Act.

Water Code Section 35602 was derived from the California Statutes, 1913, Chapter 387, page 832, Section 26, which reads as follows:

The board of directors shall have power to construct the irrigation works across any stream of water, water course, street, avenue, highway, railway, canal, ditch, or flume which the route of a canal or canals of said works may intersect or cross, in such manner as to afford security for life and property; A right of way is hereby given, dedicated, and set apart to locate, construct, and maintain said works over and through any of the lands which are now or may be the property of this state; and also there is given, dedicated, and set apart for the uses and purposes aforesaid, all waters and water rights belonging to this state within the district. The rights of way, ditches, flumes, pipe lines, dams, water rights, reservoirs and other property of like character belonging to any district organized under this act shall not be taxed for state and county or municipal purposes. (Emphasis ours)

Practically identical provisions are found in Section 56 of the California Irrigation District Act of 1897 (Stats. 1897, p. 273) which can be traced back to the original

Wright Act of 1887. Water Code Section 22430, which applies to irrigation districts, is derived from Section 56 and is the same as Water Code Section 35602. As the codification of statutes into the Water Code made no change in the law (Water Code Section 2), these code sections must be construed in the light of conditions as they existed in 1897 and 1913. Prior to the constitutional amendment of 1928 (Article 14, Section 3), repeated decisions of the California courts held that, beginning with statehood, all water rights belonged to the riparian owners, including the federal and state governments. Palmer v. Railroad Commission, 167 Cal. 163 (1914), held that there was no such thing as "public waters", that the State was in the same category as any other landowner, that the Civil Code procedure for appropriating water was merely a means by which an appropriator might obtain rights paramount to the riparian rights adhering to state lands, and that the 1911 amendment to Civil Code Section 1410* was at most a dedication to public use of any riparian rights the State had at the time. It therefore follows that the only

*1410. "All water or the use of water within the State of California is the property of the people of the State of California, but the right to the use of running water flowing in a river or stream or down a canyon or ravine may be acquired by appropriation in the manner provided by law;"

water rights a district can claim pursuant to Water Code Section 35602 are those held by the State by virtue of its ownership of riparian land within the district.

The constitutional amendment of 1928 freed all water not required for reasonable beneficial use on riparian lands from the legitimate claims of riparian owners and made such water available for appropriation by others. However, even now unappropriated water flowing in a stream is not "owned" by the State in a proprietary sense but is the property of the people of the State subject to appropriation in the manner provided by law (Water Code Section 102).

Our interpretation of the meaning of Water Code Section 35602 is fortified by the context of the parent language in the California Water District Act of 1913, which makes it clear that the legislative purpose was to remove obstacles in the path of a district's distribution system so far as the use of state lands was concerned.

6. The total discharge of Coon Creek for the water year 1959-60, a dry year, was 22,610 acre-feet, and the daily mean discharge was 31.5 cfs for the month of May and 5.2 cfs for the month of September. The creek was measured at the Highway 99E crossing approximately two miles above the applicants. In most years water occurs in Coon Creek during the applicants' diversion season which is surplus to uses under prior rights.

7. Unappropriated water is available to supply the applicants, and, subject to suitable conditions, such water may be diverted and used in the manner proposed without causing substantial injury to any lawful user of water.

8. The intended use is beneficial.

9. The District requests that any permit issued on Application 22041 contain conditions to assure that the water in Coon Creek that belongs to the District will not be diverted by the applicants. The District has the right to use Coon Creek, a natural channel, for the conveyance of water covered by its appropriative rights. However, one who uses a natural channel in such a manner and causes the water to commingle with other water in the channel has the burden of proving what water is his. It is the District's obligation to establish necessary measuring devices or take whatever means are necessary to identify its water and this problem should not be passed on to the applicants by conditions to their permit.

In the early case of The Butte Canal and Ditch Company v. Vaughn, 11 Cal. 143, which was concerned with use of a natural channel for conveyance of foreign water and the resulting problem of identifying the commingled water, the court held at pages 152-153:

... The burden of proof rests with the party causing the mixture. He must show clearly to what portion he is entitled. He can claim only such portion as is established by decisive proof. ...

Of course, once water has been identified as belonging to the District, applicants will be obligated by law not to divert it from the stream channel.

10. The applicants claim that the place of use under Application 22041 is entitled to water under riparian right. The permit issued on Application 22041 should contain a term stating that the right under the permit and the right under any riparian right the permittee may have 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.

From the foregoing findings, the Board concludes that Application 22041 should be approved and that a permit should be issued to the applicants subject to the limitations and conditions set forth in the following order.

The records, documents, and other data relied upon in determining the matter are: Application 22041 and all relevant information on file therewith, particularly the report of the field investigations made on July 6, 1966, and June 22, 1967; files on Applications 10111 and 14804; U. S. Geological Survey 7½-minute quadrangle "Nicolaus"; Department of Water Resources Bulletin 23-55, Report of Sacramento-San Joaquin Water Supervision, June 1957; Department of Water Resources Bulletin 23-60, Surface Water Flow 1960; and State Water Resources Board Bulletin No. 10, Placer County Water Investigation, June 1955.

ORDER

IT IS HEREBY ORDERED that Application 22041 be, and it is, approved, and that a permit be issued to the applicants subject to vested rights and to the following limitations and conditions:

1. The water appropriated shall be limited to the quantity which can be beneficially used and shall not exceed 6.02 cubic feet per second by direct diversion to be diverted from about April 15 to about June 15 and from about September 1 to about September 15 of each year. The equivalent of such continuous flow allowance for any 30-day period may be diverted in a shorter time if there be no interference with vested rights.

2. The maximum quantity herein stated may be reduced in the license if investigation warrants.

3. Actual construction work shall begin on or before June 1, 1968, and shall thereafter be prosecuted with reasonable diligence, and if not so commenced and prosecuted, this permit may be revoked.

4. Construction work shall be completed on or before December 1, 1970.

5. Complete application of the water to the proposed use shall be made on or before December 1, 1971.

6. Progress reports shall be filed promptly by permittee on forms which will be provided annually by the State Water Rights Board until license is issued.

7. All rights and privileges under this permit, including method of diversion, method of use, and quantity of water diverted, are subject to the continuing authority of the State Water Rights Board in accordance with law and in the interest of the public welfare to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of said water.

8. Permittee shall allow representatives of the State Water Rights Board and other parties, as may be authorized from time to time by said Board, reasonable access to project works to determine compliance with the terms of this permit.

9. 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.

10. The State Water Rights Board reserves jurisdiction over this permit for the purpose of conforming the season of diversion to later findings of the Board on prior applications involving water in the Sacramento River Basin

and Delta. Action by the Board will be taken only after notice to interested parties and opportunity for hearing.

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

Dated: **NOV 30 1967**

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

/s/ Ralph J. McGill
Ralph J. McGill, Member

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