

BEFORE THE DIVISION OF WATER RIGHTS
Department of Public Works
State of California

IN THE MATTER OF APPLICATIONS NO. 3139 OF TURLOCK IRRIGATION
DISTRICT AND NO. 3312 OF MODESTO IRRIGATION DISTRICT FOR
PERMITS TO APPROPRIATE WATER FROM TUOLUMNE RIVER IN
TUOLUMNE AND SUTTER COUNTIES FOR POWER PURPOSES

DECISION A-3139-3312 ^p 4
Decided April 18, 1924

APPEARANCE AT HEARING, NOVEMBER 8, 1923:

P. H. Griffin, Attorney, and R. V. Keikle, Engineer for
Turlock Irrigation District, Applicant in Application No. 3139.
J. C. Garrison, President, - Gretchel director, A. S. Johnson,
Attorney, and H. A. Storrs, Engineer for Modesto Irrigation
District, Applicant in Application No. 3312.
Senator L. L. Dennett, Attorney, and W. Lehmkuhl, Engineer,
for Waterford Irrigation District, Protestant to both Appli-
cations.

NO APPEARANCE:

Byron-Bethany Irrigation District, Protestant to Application
No. 3139.

Edward Hyatt, Jr., Acting Chief of Division of Water Rights

O P I N I O N

On November 16, 1922, Turlock Irrigation District filed its
Application Number 3139, and on March 21, 1923, Modesto Irrigation District
filed its Application Number 3312, both for permits to appropriate unaporo-
priated waters from Tuolumne River for use for power development, each in

its own power house which power houses are situated below La Grange Dam, which dam is the joint property of the two districts. Thereafter protests were filed by Waterford Irrigation District against each application; also a protest was filed by Byron-Bethany Irrigation District against Application Number 3139. In due course a hearing was held by the Division of Water Rights, in the matter of these applications.

These applications are very similar in character and purpose, and will therefore now be given joint consideration, this course being consistent with the procedure heretofore adopted in such matters by the Division of Water Rights.

Both protestants object to the approval of Application Number 3139 of Turlock Irrigation District on the ground that it proposes the storage of water during the irrigation season, which storage may interfere with the exercise and enjoyment of prior rights of protestants to appropriate at points lower on the river for the irrigation of lands within the boundaries of protesting districts. Waterford Irrigation District as further grounds of objection to the approval of both applications urges that the use of water as contemplated is contrary to public policy because agricultural use is recognized as a higher use than power use and these applications propose a draft for power purposes upon a supply already insufficient to serve the agricultural area dependent upon Tuolumne River, which water so withdrawn will be returned to the river at a point too low down for its economic recovery.

The existence of surplus water in Tuolumne River during a portion of the year is a matter of common knowledge with which any one examining the

records of flow in Toluame and San Joaquin rivers,- as published by the United States Geological Survey,- may become readily acquainted. These records speak for themselves and no argument on the point need be offered here.

The objection that if these applications are approved the applicants may divert at times when there is no unappropriated water available under the priorities of said applications is one which may be urged against any application by all downstream users.

It is pertinent in this connection to cite the facts first that each application is for permission to appropriate unappropriated water subject to existing rights, and second that approval can be made only subject to vested rights. Any interference with the use of water under vested rights of downstream users must therefore be illegal and it is felt that assurance against danger of such diversion must be had through other means than denial of these applications. There is ample legal recourse should illegal diversion be made by the applicants. It is the law of the state that unappropriated water shall be subject to appropriation subject to the provisions of the Water Commission Act. Of the reasonable probability of unappropriated water we have no doubt.

It is pertinent also to state that these applications do not propose the storage of any other or additional quantity of water beyond that to be stored in Don Pedro Reservoir and to be used at Don Pedro Power House under Application Number 1232, Permit Number 1164, but seek rather to use unappropriated natural flow as may be available at the lower points of diversion under Applications Number 3139 and Number 3312 and to

reappropriate as may become necessary in order to augment the natural flow, that portion of the water passing through Don Pedro Power House and not needed for agricultural use by the applicants.

The objection on the grounds of public policy is of a more difficult nature. While agricultural use of water has been declared a higher use than power the exact course which the Division should pursue in order to give effect to this evident intent has not been prescribed. It appears clear, however, that it is not in the public interest that a bona fide present power development should be denied because of a possible or even probable ultimate agricultural development which may be discouraged thereby. Fortunately in this use the applicants and protestants have themselves agreed upon the desirability of recognizing and giving effect in a practical way to this principle and declared intent that agricultural use of water is a higher use than power use, as they have by common consent agreed to the inclusion in the permits to be issued upon these applications of a limiting clause such as would appear to accomplish the desired end insofar as it now seems attainable.

C R D E R

Applications Number 3139 and Number 3312 for permits having been regularly 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 being now fully informed in the matter.

IT IS HEREBY ORDERED that Application Number 3139 be approved and permit issued subject to such of the usual terms and conditions as may be appropriate and with the following special terms and conditions:

"The amount of water appropriated shall be limited to the amount which can be beneficially used and shall not exceed 1725 cubic feet per second from January first to December thirty-first of each season, which 1725 cubic feet per second may be derived from natural flow as available or from the reappropriation of water stored under Application Number 1232, Permit Number 1164 of Modesto and Turlock Irrigation District;" and

"It is expressly recognized by all parties hereto that no rights to water, except stored water, are to be acquired under this permit which may in the future operate to the disadvantage of irrigation development."

IT IS FURTHER ORDERED that Application Number 3312 be approved and permit issued subject to such of the usual terms and conditions as may be appropriate and with the following special terms and conditions:

"The amount of water appropriated shall be limited to the amount which can be beneficially used and shall not exceed 1500 cubic feet per second from January first to December thirty-first of each season which 1500 cubic feet per second may be derived from natural flow as available or from the reappropriation of water stored under Application Number 1232, Permit Number 1164 of Modesto and Turlock Irrigation District;" and

"It is expressly recognized by all parties hereto that no rights to water, except stored water, are to be acquired under this permit which may in the future operate to the disadvantage of irrigation development."

Dated at Sacramento, California, this 18th day of April,

1924.

Acting Chief of Division of Water Rights
Department of Public Works
State of California