

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

IN THE MATTER OF APPLICATION NO. 1544 OF CHARLES HANSEN
FOR A PERMIT TO APPROPRIATE WATER FROM BUTTE CREEK,
IN BUTTE COUNTY, FOR AGRICULTURAL PURPOSES.

DECISION A-1544. D-6.
Decided May 1, 1924.

APPEARANCES AT HEARING:

Herbert W. Whitten, for Applicant.
Francis Carr, for the Anderson-Cottonwood Irrigation
District, Protestant.
Jerome D. Peters, for James H. Jones, Protestant.
Orville G. Pratt, Jr. and George T. Jones, for G. H. V.
Land Company, Protestant.

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

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OPINION

This application was filed with the State Water Commission, predecessor to the Division of Water Rights on November 29, 1919, by Samuel J. Munn. At a considerable later date, November 18, 1921, the application was assigned to Charles Hansen, the present applicant. At the time this assignment was made the assignee reduced the amount of water requested in the application from 26 to 10 cubic feet per second. The application was properly advertised early in 1920. Protest was entered by the Moulton Water Company on March 3, 1920, by J. W. Browning on April 9, 1920, and in January, 1921, protests were entered by California Delta Farms, Inc.,

Empire Navigation Company, City of Sacramento, and Anderson-Cottonwood Irrigation District.

The protest of the Moulton Water Company alleges in effect that this protestant has a prior right to the waters of Butte Creek and that during the periods when water is most needed there is not enough water in Butte Creek to serve the purposes of protestant.

The protest of J. W. Browning alleges in effect that he is the owner of 5500 acres riparian to Butte Creek in Townships 17 and 18 North, Range 1 East, Mount Diablo Base and Meridian; that he and his predecessors in interest have occupied these lands for more than ten years prior to the filing of this application and have used the water of Butte Creek for irrigation, stock watering and domestic purposes during this period; that diversion of water by the applicant will interfere with and prevent the use of water by the protestant; that in addition to riparian right the protestant has an appropriative right to Butte Creek waters by virtue of appropriation initiated in 1903 through diversion of 15 cubic feet of water per second at a point near the center of the North-east quarter of Section 17, T 18 N, R 1 E, M. D. M., and continuous diversion and beneficial use of this water from this time to the present; that by virtue of a certain stipulation entered into by various parties in a suit instituted to determine the extent of Butte Creek water rights, the protestant was granted 6/108 of the natural flow of Butte Creek.

The protest of California Delta Farms, Inc., alleges in effect that this corporation is the owner, in fee, of 22,200 acres in the Counties of Contra Costa and San Joaquin, riparian both to the Sacramento and San Joaquin Rivers; that there are no surplus waters in Butte Creek available

for appropriation; that all waters of the stream are now used by riparian owners and prior appropriators; that appropriation by the applicant will deprive protestant of the use of water to which it is lawfully entitled; and that such appropriation will aid to keep fresh water out of the Sacramento and San Joaquin Deltas, permitting the influx of salt water to the injury of protestant's lands, both because of seepage conditions and the need of fresh water for irrigation.

The protest of Empire Navigation Company alleges that this Company is the owner in fee of 11,400 acres in the County of San Joaquin, riparian both to the Sacramento and San Joaquin Rivers. The remainder of the protest of this Company is identical with that of California Delta Farms, Inc.

The protest of the City of Sacramento alleges in effect that permit granted under this application will deplete the quantity of water in the Sacramento River in a degree materially prejudicial to the City; that the basis of the City's right lies in an appropriation made early in the history of the City, as well as in riparian rights incident to the lands constituting the site of the City of Sacramento; that the City claims the right to use not less than 300 cubic feet of water per second for present and future needs. This protest objects to the granting of any permit for diversion of water from the Sacramento River except insofar as such diversion shall not diminish or interfere with the water rights of the City.

The protest of the Anderson-Cottonwood Irrigation District alleges in effect that this District comprises 32,000 acres of land in the Counties of Shasta and Tehama; that said District in reliance upon a

continuance of water from the Sacramento River by virtue of notice of appropriation of 400 cubic feet per second, posted November 21, 1914, has expended large sums of money on ditches and works for the utilization of the water; that said District is distributing and using 250 cubic feet of water per second; that said amount of water is insufficient and that further expenditures will be made to provide for the full use of 400 cubic feet of water per second; that when this 400 cubic feet per second is fully utilized there will be no surplus waters in the Sacramento River for appropriation; that any further permits to appropriate water will endanger the right of protestant.

None of these protests were answered except that of J. W. Browning. S. J. Nunn, the original applicant in answering the Browning protest admits certain riparian rights of protestant but asserts the correlative riparian rights of applicant; avers that during the irrigation season each year all natural waters of Butte Creek are diverted far above both applicant and protestant by users adverse to both, but that entering Butte Creek below such points of diversion by these upper users and above the applicant and protestant there are waste waters from rice irrigation more than ample for requirements of applicant and protestant; avers that during the period of lowest water in Butte Creek opposite applicant's lands in the low water year of 1920 there was a flow in excess of 20 cubic feet per second; denies that protestant has continuously since 1903 appropriated 15 cubic feet per second or less, adversely to applicant; and avers that neither the applicant, nor any of his predecessors, not having been parties to the suit referred to by protestant, nor any part of the land to be benefitted by this application, are in any way, bound by the stipulation named by protestant.

A field investigation in connection with this application and protests thereto was made by Engineer H. M. Stafford of the Division of Water Rights in July, 1922. Report of this investigation was filed under date of November 8, 1922. Data, as given in this report, relative to the flow of water in Butte Creek at the proposed point of diversion of applicant, which point is above all of the protestants so far considered, indicates that whereas in dry seasons the flow of Butte Creek ceases during short periods of the irrigation season, at a point some ten miles above applicant, these periods ordinarily occur at a time when the minimum flow of return water from rice irrigation entering Butte Creek above the applicant and below the point where the flow of the creek ceases, is in excess of the sum of the amount requested by applicant and the amounts used in the past by protestants Browning and Moulton Water Company. That is, from about July 15th to August 1st to the end of the irrigation season, this investigation shows that there is, in some seasons, no unappropriated flow of Butte Creek at applicant's point of diversion except such a flow as is caused by the return to the stream of drainage and waste water from rice fields which are irrigated from foreign sources; but this return flow is sufficient in amount to insure that as against the protestants Browning and Moulton Water Company there is unappropriated water in the creek. This return flow originating in foreign sources is clearly subject to appropriation under the decision in E. Clemens Horst Company vs. Blue Point Mining Company and also under the law as set forth in the first sentence of Section 17 of the Water Commission Act.

It is also shown that prior to about July 1st or July 15th of each season there is normally a large flow of water originating in the Butte

Creek watershed in an amount sufficient to dispel all question as to whether or not as against protestants Browning and Moulton Water Company there is unappropriated water.

A public hearing in this matter was held at Sacramento on November 7, 1923, before Examiner Kluegel. At this hearing two new parties were permitted to enter as protestants, these being the G. H. V. Land Company and James H. Jones. No appearance was made by any of the other protestants except Anderson-Cottonwood Irrigation District.

In the case of the protestant, Anderson-Cottonwood Irrigation District, Attorney Carr withdrew the protest of this District in the course of the hearing and the necessity of consideration of this protest has thereby been eliminated.

As brought out at the hearing the G. H. V. Land Company and James H. Jones are owners of land bordering on Butte Creek at some distance upstream from the applicant. The basis of protest of each of these parties was presented at the hearing and subsequently, in this connection, briefs were filed by G. H. V. Land Company and applicant. But in view of the fact that an upper user cannot actually be deprived of water by a lower user's diversion and a lower appropriator, initiating a right to divert on privately owned lands, cannot, in law, acquire an adverse right against an upper riparian owner; (see Canal and Irrigation Co. vs. Worwick, 187 Cal. 674, 683) the opinion is reached that no consideration need be here given to the allegations and matter presented by these protestants and that as against them, permit under this application should be granted.

As to the protestants, City of Sacramento, California Delta Farms, Inc., Empire Navigation Company, Moulton Water Company and J. W. Browning, full opportunity was given them to present evidence in support of the allega-

tions made in their protests, and having failed to appear at the hearing and having failed to submit evidence in confirmation of their allegations, they have failed to support the burden of proof appropriate to a moving party. In view of these facts and in consideration of the fact that under any permit issued the protestants will be adequately protected by the granting clause "subject to existing rights" and no diversion will be authorized by any permit issued which will deplete the supply of water to prior appropriators and riparian owners possessed of valid and existing rights, whether the right be one which is presently enjoyed to its full extent or one which is in process of completion by increasing utilization, the opinion is reached that as against these protestants, permit under this application should be granted.

O R D E R

Application for permit to appropriate water having been filed with the Division of Water Rights as entitled above, protests to the granting of such permit having been received, a public hearing having been held, briefs having been submitted, and the Division of Water Rights being now fully informed in the matter:

IT IS HEREBY ORDERED, that permit be granted under this application subject to such of the usual terms and conditions as may be appropriate.

Dated at Sacramento, California, this first day of May, 1924.

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

HCS/AY