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

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In the Matter of Application No. 3293 of George A. Bean to Appropriate from Lassen Creek, in Modoc County, for Agricultural Purposes

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DECISION NO. 3293 D. 36
DECIDED January 28, 1925

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APPEARANCES AT HEARING HELD MAY 7, 1924.

For Applicant - J. S. Henderson and Oscar Gibbons, Attorneys at Law.

For Protestants - A. K. Wylie, Attorney at Law, for Raymond J. Rees, J. E. and Emma J. Smith, M. G. Smith and J. M. Thompson.

Examiner - Edward Hyatt, Jr., Chief of Division of Water Rights.

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OPINION

On March 13, 1923 George A. Bean filed his application No. 3293 for a permit to appropriate one cubic foot per second of unappropriated water from Lassen Creek, in Modoc County, for agricultural purposes.

This application was completed in accordance with the Water Commission Act and the requirements of the Rules and Regulations of the Division of Water Rights. Thereafter protests were separately filed by Raymond J. Rees, J. E. and Emma J. Smith, J. M. Thompson and Pitt River Power Company. In due course the matter of this application came on for hearing before the Division of Water

Rights. Of this hearing applicant and protestants were duly notified. M. G. Smith, who was not a protestant of record, appeared and entered his protest at the hearing.

The Pitt River Power Company withdrew its protest to this application prior to the hearing since it appeared that the project proposed by the applicant would not interfere with the plans of the company.

The basis of all the protests is similar in that all the waters of Lassen Creek are claimed by them under riparian rights and rights by virtue of use for many years prior to 1914. At the hearing the protestants brought forth new claims based upon a Judgment and Decree dated July 25, 1923 in the Superior Court of Modoc County.

It developed at the hearing that the total area irrigated by protestants consisted of approximately 157.8 acres. This area was not disputed. The flow of Lassen Creek was measured as 10 cubic feet per second on May 14, 1923 which was available for protestants. No other records of runoff are available on Lassen Creek, except by comparison. Accurate records of runoff of Pine Creek near Alturas are available for the four years 1919, 1920, 1921 and 1923. Pine and Lassen Creeks both head on the Western slope of the Warner Range in Modoc County, the watershed of Pine Creek being located about 25 miles to the South. The watershed of Lassen Creek is approximately 25 per cent smaller than that of Pine Creek above the gaging station. The elevation of the Lassen Creek watershed is slightly lower than that of Pine Creek but the precipitation, in the Northern portion of the Warner Range is higher than in the South as is evidenced by the records of precipitation at Fort Bidwell and Cedarville. The following summary of the

runoff of Lassen Creek has been deduced on the basis of the flow being 75 per cent of that of Pine Creek in cubic feet per second.

Year	April			May			June		
	Low Flow	High Flow	Mean Flow	Low Flow	High Flow	Mean Flow	Low Flow	High Flow	Mean Flow
1919	11	25	17	24	36	31	10	32	17
1920	8	48	16	14	40	29	16	32	25
1921	13	22	17	18	67	37	34	67	50
1923	8	12	10	10	29	17	13	31	20

The precipitation during all of the above mentioned years of record has been below normal at Fort Bidwell and at Cedarville.

If all of the above water had been used on the irrigated lands of protestants the duty of water in numbers of acres irrigated per cubic foot per second would have been as follows:

Year	April			May			June		
	Low Flow Duty	High Flow Duty	Mean Flow Duty	Low Flow Duty	High Flow Duty	Mean Flow Duty	Low Flow Duty	High Flow Duty	Mean Flow Duty
1919	14.4	6.3	9.3	6.6	4.4	5.1	15.8	4.9	9.3
1920	19.7	3.3	9.9	11.3	4.0	5.5	9.9	4.9	6.3
1921	12.1	7.2	9.3	8.8	2.4	4.3	4.6	2.4	3.2
1923	19.7	13.1	15.8	15.8	5.5	9.3	12.1	5.1	7.9

The total amount of water available for protestants in Lassen Creek during the three months, in which applicant is seeking to appropriate, expressed in acre feet per acre is shown in the following table:

Year	Acre Feet Per Acre			Total for the 3 Months
	April	May	June	
1919	6.5	12.2	6.5	25.2
1920	6.1	11.4	9.5	27.0
1921	6.5	14.5	19.0	40.0
1923	3.8	6.7	7.6	18.1

It is obvious from the above tables that the claims of protestants as to no unappropriated water are not well founded.

In the court judgment mentioned above it was decreed on July 25, 1923 that applicant George Bean had no right to divert or use any of the waters of Lassen Creek, and further, said applicant was perpetually enjoined and restrained from asserting or attempting to assert any right, title or claim to any of said waters.

It is not only the contention of the protestants that there is no surplus or unappropriated water in Lassen Creek but also that the judgment and decree and perpetual injunction heretofore mentioned should in itself operate to prevent the applicant from securing a permit to appropriate and could be availed of to subject the applicant to contempt of court proceedings in the event an attempt was made to divert water by applicant under a permit issued upon his said application.

In this contention of protestants we cannot concur. In the first place

it is our conclusion that the judgment and decree aforesaid does not relate to and is inoperative in so far as the unappropriated waters of the State of California are concerned. Although the language used in the decree would appear to be all inclusive, nevertheless, in this day and age it has come to be recognized that excessive apportionments of water are not to be tolerated and that the beneficial use of all available water is a matter of great public concern. Moreover there is no doctrine of the law of appropriation more well settled or defined than the doctrine that the limit of the right is the amount of water which has been or can be beneficially used. In this decree the plaintiffs are given proportionate shares of the entire stream flow for use upon their respective lands but the limitation which the law reads into such a decree is not to exceed the amount which is or can be beneficially used upon said lands.

Medano D. Co. v. Adams (Colo)
68 Pac. 431
White v. Nuckolls (Colo)
112 Pac. 329
Wolff v. Pomponia (Colo.)
120 Pac. 142,144

The following quotation from Kinney on Irrigation and Water Rights is in point:

> "Under no method for the adjudication of water rights, especially in these days, when practically all of the water supply is needed and claimed by various parties will waste be tolerated by the court by its awarding to one party more water than he needs. And such a decree is subject to modification by limiting the quantity of water to the amount actually needed. Or, as sometimes held, since a right to the use of water is limited in time and volume to the extent of the needs of the party in whose favor such right is established for the purpose named, the law reads this limitation into decrees establishing such rights. It is even held in a recent case that where a quantity of water was awarded to the plaintiff, as against non-answering defendant, far greater than was necessary for his use, the decree will be modified by reducing the quantity of water originally awarded." (3 Kinney, 2nd Ed., 2817)

And, in any event, a decree is void and may be set aside in so far as it attempts to apportion water in excess of the amount which can be beneficially used.

Whited v. Cavin (Ore.) 105 Pac. 396

The following quotation from Kinney is based upon the above named case:

> "Judgment may also be rendered on default for failure to answer after the service of process within the time allowed by the statute. And ordinarily a judgment by default will not be disturbed. But it is held in a recent Oregon case that water suits being sui generis, the court may exercise the discretion and set them aside, especially where it was apparent that the quantity of water awarded the plaintiff was far greater than necessary for his use." (3Kinney, 2nd Ed., 2813).

This Oregon case has been approved recently in a decision of the California Supreme Court, Pabst v. Finmand, 190 Cal. 124, 135, wherein it is said:

> "The only evidence introduced by defendants in support of their contention that the amount diverted by them had been applied to a beneficial use and was reasonably necessary for the cultivation of said tract of land was the vague and general testimony of the two witnesses that the amount diverted was 'necessary'. While conceding the difficulty of proving the quantity of water beneficially used, nevertheless considering the complicated nature of the question and in view of the declared policy of this state to require the highest and greatest duty of water because of the immense importance to the state of the economical use of water, this testimony is not sufficient to support the finding of the court that 400 inches of water had been used and was reasonably required for the irrigation of the land in question. By mathematical demonstration 400 miner's inches of water measured under a four-inch pressure applied for a year, which is the amount awarded by the judgment, and which it is claimed by defendants is necessary, would equal approximately 5,760 acre-feet, or over 19 feet for each acre of the 300 - acre H. H. Finmand tract of land. That this amount is

reasonably necessary for a beneficial use is palpably improbable. Indeed, it is conceded by counsel for defendants that the amount awarded seems exorbitant. This court is not, therefore, bound to sustain a finding based on such testimony. (Whited v. Cavin, 55 Or. 98, 105 Pac. 396)."

It is called to attention that the Supreme Court in the case quoted from above which case involved similar lands, also in Modoc County, held a duty of 19 acre feet per acre per annum to be a "palpably improbable" amount for necessary and beneficial use. But the amounts awarded in the judgment and decree relied upon by protestants are far in excess of the above mentioned duty of 19 acre feet per acre per annum. For instance, under the apportionment of this decree there was in 1919, 25 acre feet per acre available during the three months, April, May, June, for each protestant and during said months in 1920, 27 acre feet per acre, and in 1921, 40 acre feet per acre, and in 1923 18 acre feet per acre. In addition it is to be noted that all four of these years were years of sub-normal precipitation in Modoc County. Also, taking into consideration water available during other irrigation months, than these specified, the excessive amounts are less than the gross amounts which were available during those dry years.

It is concluded, first that said judgment and decree is not to be interpreted as affecting the unappropriated waters of the State of California, and secondly, that if it does apportion water in excess of amounts needed for beneficial use and the proportionate shares awarded are not subject to the implied limitation of no more than can be applied to beneficial use, then said judgment and decree is subject to modification and will not be al-

lowed to prevail against a beneficial use by the applicant herein.

As to the riparian rights which are asserted by protestants such rights are limited in amount by the doctrine of beneficial use and the following declaration from Section 11 of the Water Commission Act is apropos:

> "And all waters flowing in any river, stream, canyon, ravine or other natural channel, excepting so far as such waters have been or are being applied to useful and beneficial purposes upon, or in so far as such waters are or may be reasonably needed for useful, and beneficial purposes upon lands riparian thereto, or otherwise appropriated, is and are hereby, declared to be public waters of the State of California and subject to appropriation in accordance with the provisions of this act"

Furthermore as to riparian rights which have never been exercised, the claimants thereof are in most instances now estopped to assert same (Sec.11, Water Commission Act)

As a further basis of decision, though it is deemed unnecessary to rely thereupon, it is pointed out that a right to divert water under the Water Commission Act does not exist and does not accrue until a permit to appropriate is issued (Sec. 17, Water Commission Act) and that a permit to appropriate water cannot be issued upon a protested application until after a hearing has been held thereupon (Sec. 1a, Water Commission Act). Now, the judgment and decree, relied upon by the protestants was rendered prior to the hearing upon this application and a permit now issued marks the accrual of the right to divert. The right to divert having accrued subsequent to said judgment, the applicant is not estopped. In volume 15 California Jurisprudence, page 165, Section 207 it is said:

"Title acquired pending and subsequent to action - issue of patent.

"A party is not estopped to assert a title or interest accruing subsequent to a judgment adjudicating his rights or title in the property in question. Thus where at the time of the action and judgment only the initiatory steps have been taken to acquire title from the government, a judgment adjudicating the title is not conclusive against the patent or rights subsequently acquired by completing the proceedings previously begun."

Among the cases cited, in the footnotes to the above quotation are Thrift v. Delaney, 69 Cal. 188; Merriam v. Bachioni, 112 Cal. 191; and Amesti v. Castro, 49 Cal. 325. In the Thrift case at page 191 it is said:

"The principal question presented for decision relates to the plea in bar. It is not pretended that the appellant has any title or right to the land sued for, unless he can claim it under and by reason of his former judgment in ejectment. It is however, insisted by him that when the former judgment was rendered the respondent had perfected his homestead entry and was in such relation to the source of title that he might have defended successfully against the action, and having failed or neglected to do so, the judgment is conclusive upon all rights he then had or has since acquired to the property involved in it.

"There can be no doubt that a judgment rendered in an action to recover the possession of real property, under the system of pleading and practice adopted in this state, is, as to all matters put in issue and passed on in the action, conclusive between the parties and their privies, and a bar to another action between the parties or their privies, when the same matters are directly in issue. The bar of a judgment in such action is, however, limited to the rights of the parties as they existed at the time when it was rendered, and neither the parties nor their privies are precluded by the same from showing in a subsequent action any new matters, occuring after its rendition, which give the defeated party a title or right of possession. (Caperton v. Schmidt, 26 Cal. 479; Mahoney v. Van Winkle, 33 Cal. 448)."

In the Amesti case it is said, page 330,

> "He had no means of preventing such litigation; and when his title and right to the possession were attacked in an action of ejectment, he had no other alternative than either to surrender his estate or defend himself as best he might, before the State Court and jury, upon his incipient title with perhaps his vague and ill-defined boundaries. Nor had the State Court the necessary machinery or the requisite jurisdiction to investigate and determine the nature and legal effect of Amesti's title so as to conclude him by its judgment from afterward asserting it, when found to be valid and ripened into a perfect title, by the tribunals of the United States. These tribunals alone, in the last resort, could pass an authoritative judgment upon his title or estate; and when they invested him with the complete title, he acquired a new status which he had not before. His title, which before was only incipient, has become perfect. His boundaries which perhaps were vague, have become fixed and certain. His title, though perhaps not new in an absolute sense, has taken on a new quality, and, in a legal sense, is a different title from that which he had before."

Nor does it seem probable that the Superior Court in an action to quiet title would have the authority to take out of the hands of the Division of Water Rights the consideration of an application pending before it or in effect do so by a judgment concluding action not yet taken by the Division. Prior to issuance or refusal of a permit the law does not contemplate the intervention of the Superior Court (Sec. 1b, Water Commission Act) and thereafter only upon an independent action instituted by a dissatisfied party, asking a review by the court.

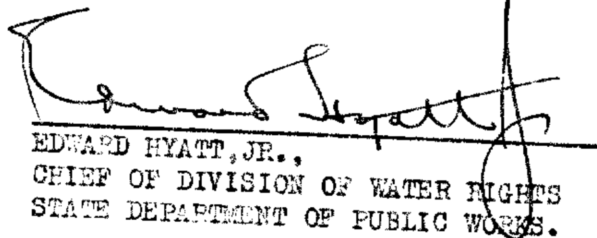
As to the effect of a judgment upon title acquired pendente lite the case of Brown v. Brown, 170 Cal. 1, is in point and as to the effect of judgment upon titles subsequently obtained see the case of Metropolis etc. Bank v. Barnet, 165 Cal. 449, 453.

O R D E R

Application No. 3293 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 said application No. 3293 be approved and that a permit be granted to the applicant subject to such of the usual terms and conditions as may be appropriate.

DATED at Sacramento, the 28th day of January, 1925.



EDWARD HYATT, JR.,
CHIEF OF DIVISION OF WATER RIGHTS
STATE DEPARTMENT OF PUBLIC WORKS.