Division 1

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

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IN THE MATTER OF APPLICATION NUMBER 2904 BY W. D. DUKE FOR A PERMIT TO APPROPRIATE UNAPPROPRIATED WATER FROM PARKS CREEK, IN SISKIYOU COUNTY, FOR AGRICULTURAL PURPOSES.

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Decision No. D-85

Decided December 24, 1925.

APPEARANCES AT HEARING HELD June 11, 1925:

For Applicant:	James D.Fairchild,Attorney at Law
For Protestant:	George Tebbe, Attorney at Law.
Examiner:	Edward Hyatt, Jr., Chief of Division of Water Rights.
In Attendance:	Gordon Zander, Hydraulic Engineer, Division of Water Rights.

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OPINION

On June 26, 1922, W. D. Duke filed application No. 2904 for a permit to appropriate 160 cubic feet per second of the unappropriated waters of Shasta River, and 40 cubic feet per second of the unappropriated waters of Parks Creek, during the period between April 1st and September 30th of each year, and in addition 80,000 acre feet per annum of the flood waters of the two sources, to be collected at any time during the year and stored in a reservoir on what is known as the "Wadsworth Ranch", the

entire amount of water sought to be appropriated to be used for the irrigation of 25,000 acres of land now situated within the Montague Irrigation District.

The project contemplated the diversion of the waters of Shasta River into Parks Creek above the proposed reservoir, and the diversion of the combined water supply from Shasta River and Parks Creek at the proposed reservoir site through a main canal about 30 miles in length, extending to the lands to be irrigated. Due to the fact that the applicant contemplated that the application would be utilized by an irrigation district to be formed in Shasta Valley he was unable to place it in definite form pending the formation of such district and the making of preliminary surveys, water supply studies, etc. He was, therefore, allowed six months from the date of filing of the application within which to submit the required maps and to perfect the application, which time was successively extended until June 1, 1923, until September 1, 1923, until October 13, 1923, until July 1, 1924, and until January 1, 1925.

At the time of filing of the application, the area to be irrigated was included within the boundaries of the Klamath-Shasta Irrigation District, which was conducting a study of the possibility of securing a water supply from Klamath River. Such a water supply proved infeasible, however, and the Klamath-Shasta Irrigation District was voluntarily dissolved in the Fall of 1923.

Following an adverse report by the United States Reclamation Service as to the feasibility of the Klamath-Shasta Irrigation District, G. W. Dwinnell filed Applications Numbers 3544 and 3555 as trustee. These applications covered respectively 150 cubic feet per second direct diversion, and 60,000 acre feet per annum storage from Shasta River, and 150 cubic feet per second direct diversion and 15,000 acre feet per annum storage from Parks Creek, said waters to be used for the irrigation of approximately the same area as that proposed under Application Number 2904. The Dwinnell project contemplated the diversion of water from Parks Creek to Shasta River, and the storage of the combined supply from the two sources in a reservoir to be located on Shasta River.

A smaller district than the Klamath-Shasta being in contemplation, which district might utilize the waters applied for in the above mentioned applications, all three of said applications were extended from time to time. It then became apparent to applicant Duke that his application would not be utilized by the contemplated district and that there would be no lands available to him for his original project. Accordingly on December 29, 1924, a request was received from Mr. Duke to amend his Application Number 2904 so as to eliminate Shasta River as a source, to reduce the amount of water applied for to 850 acre feet per annum, to move the proposed point of diversion on Parks Creek about four

miles upstream, to cover a new and much smaller reservoir site situated on a tributary of Parks Creek, and to change the place of use and reduce the area to be irrigated to 2,100 acres situated within the original reservoir site. Maps showing the modified project were submitted and the amended application was perfected.

The amended application was duly advertised and a protest against the same was filed by G. W. Dwinnell, as trustee for the proposed Montague Irrigation District.

The application was set for public hearing in the City Hall at Yreka, California, at 9:00 A.M. on June 11, 1925, of which hearing the applicant and protestant were duly notified.

The hearing was held at the time and place specified in the notice, Chief of Division Edward Hyatt, Jr., presiding. Hydraulic Engineer Gordon Zander attended as a representative of the Division of Water Rights, James D. Fairchild, attorney at law, appeared for the applicant, and George Tebbe, attorney, appeared for the protestant.

At the hearing, after a general statement of the history of the application and a general description of the original and amended projects by Engineer Zander, the Examiner stated that there were three points upon which he desired testimony, as follows:

(1) The existence or non-existence of unappropriated water.

(2) The propriety of the amendments which had been made to the application.

(3) The feasibility of the amended project.

Mr. Fred E. Wadsworth, witness for the applicant, testified that there was a large quantity of unappropriated "flood water" in Parks Creek which flowed past the proposed point of diversion during the winter

months of each year. Dr. G. W. Drinnell, protestant, admitted that the engineers for the Montague Irrigation District had determined that there was a considerable amount of unappropriated water in Parks Creek during the winter months of each year which would be available for the District's subsequent Application No. 3555. He testified, further, that the engineers for the District estimated that if an additional 850 acre feet per annum had been diverted from Parks Creek during the past nine years, it would have interfered with the proposed water supply for the District during at least three years of those years. The testimony of both witnesses as to the existence of unappropriated water in Parks Creek is corroborated by the data contained in Table 37 of the "Report on Water Supply and Use of Water from Shasta River and Tributaries", prepared by the Division of Water Rights in the Shasta River Adjudication proceedings.

Very little testimony was given at the hearing as to the propriety of the amendments which had been made to the application, and at the conclusion of the hearing the attorneys for the applicant and protestant were requested to submit briefs covering this point.

Changes comparable to those now challenged have been frequently approved by the courts. From first to last the California cases repeatedly lay down the rule that changes in point of diversion, place of use, and purpose or character of use may be made if the quantity of water used be not increased, and if the rights of others be not thereby infringed. The cases so holding are numerous and suffice it to cite a few in the order of their occurrence:

Maeris v. Bicknell, 7 Cal. 261
Kidd v. Laird, 15 Cal. 161, 181
Davis v. Gale, 32 Cal. 26
Ramelli v. Irish, 96 Cal. 214
Jacobs v. Lorenz, 98 Cal. 332
Hargrave v. Cook, 108 Cal. 72
Santa Paula Water Works v. Peralta, 113 Cal. 38
Smith v. Corbil, 116 Cal. 587
San Luis Water Co. v. Estrada, 117 Cal. 168
Byers v. Colonial Irrigation Co., 134 Cal. 533
City of San Bernardino v. City of Riverside, 186 Cal. 7

Other authorities might be multiplied but we will only refer to the following:

Squaw Creek Irrigation District v. Mamero (Ore.), 214 Pac.889;

Moyle v. Salt Lake City (Utah), 167 Pac. 660;

Ironstone Ditch Co. v. Ashenfelter (Colo.), 140 Pac. 177:

2 Kinney, 2nd Edition, Chapter 48; and 1 Wiel, 3rd Edition, Chapter 22.

These authorities amply illustrate the liberality which has prevailed in the matter of changes and from them in connection with numerous other cases bearing upon change in time or season of diversion; the reason for this liberality in change appears to be that it is the right to use a given quantity of certain water beneficially which is the appropriative right and that place of use, point of diversion, and character and purpose of use are not elements of the right itself but mere incidents in its exercise or mode of enjoyment. The basic and immutable element of a water right as evidenced from these authorities is a given quantity of certain water, whereas mode, manner, and purpose or character of enjoyment are incidental and changeable. Where taken, whence taken, how taken, for what taken, if beneficial, is immaterial in so far as the maintenance of the old right and its priority is concerned, provided, of course, that it is the same water in point of identity. As stated to in the recent case of City of San Bernardino v. City of Riverside, supra:

"The reasons for the right to make the above changes are that, by his taking and devoting water to a beneficial use, the appropriator has acquired the right to take the quantity which he beneficially uses, as against others having no superior rights in the source, and that neither the particular place of use, the character of the use, nor the place of taking is a necessary factor in such acquisition."

As previously stated the cases bearing upon a change in time or season of diversion support the reason for the rule of change as deduced for they emphasize the identity of the water as of paramount concern. We refer to 2 Kinney on Water Rights, 2nd Edition, 1520, 1521, and to Cache La Poudre Res. Co. v. Water Supply & Storage Co., (Colo.) 53 Pac. 331; Colorado etc. Co. v. Larimer etc. Co., (Colo.) 56 Pac. 185; Seven Lakes Res. Co. v. New Loveland etc. Co., (Colo.) 93 Pac. 485; Cleary v. Daniels (Utah), 167 Pac. 820; Smith v. O'Hara, 43 Cal. 371; Hafford v. Dye, 162 Cal. 147, 159, 160; and Armstrong v. Payne, 188 Cal. 585,600. In Smith v. O'Hara, supra, it was said:

"An agriculturist might appropriate the waters of a stream for irrigation during the dry season, and a miner might appropriate them for his purposes during the remainder of the year. And so may several persons appropriate the waters for use during any different periods. There is no difference in principle between appropriators of waters, measured by time, and those measured by volume."

In Armstrong v. Payne, supra it was said, after reviewing authorities and quoting from Smith v. O'Hara, supra:

"It is clear, then, that a right may be gained to use water for certain periods of time as well as for certain amounts measured by volume or by flow."

As applied to the case under consideration these authorities are in point and approve of the change here made as within the rule evinced. Though the changes worked by the amendment alter the original

project materially they are but the changes heretofore and many times allowed by the courts to wit, changes in place of use and point of diversion.

Of course this right of change is limited to the condition that others shall not be injured and that intervening appropriators shall be protected. In this connection it has been contended that the application now held by the Montague District will be infringed if this amended application is to hold a priority over the district's Application No. 3555 which was filed before the amendment was made. Such a contention is without merit, for the reason that if Application No. 2904 were consummated as originally filed the District's application would probably be of no avail due to the much greater draft upon Parks Creek which would be entailed by Application No. 2904 as it originally stood, whereas since the amendment the district's application may be of great benefit to it.

In other words, the whole reason of the rule that a subsequent applicant is to be protected from changes fails, for in the instant case Application No. 2904 as it stood when Application No. 3544 3555 was filed entailed a far greater priority and detriment to the district's application than it does in its subsequent and amended form. The change has been beneficial rather than detrimental to protestant.

So far we have measured the changes in question by the law of court decision and upon the theory that said law is applicable for we find no inhibitions within the Water Commission Act and in so far as the Water Commission Act does not expressly or by necessary intendment depart from the law as heretofore established, said law is to be deemed applicable in our judgment. It is believed that said act did not abrogate

the substantive law and underlying principles of appropriation theretofore established in hundreds of court decisions and is not to be lightly accepted as having intended any such drastic result. It is believed that said act is primarily regulatory. (Tulare Water Company v. State Water Commission, 187 Cal. 533, 536, 2 Kinney, 2nd Ed., 1213).

In so far as changes are concerned, the act, sections 16 and 39, adopts the well established law of court decision merely providing a procedure in cases wherein changes are desired after advertisement of an application. As to changes prior to advertisement the act is silent (Section 17 relates merely to perfecting an incomplete application), and it is deemed that such changes are allowable at the option of the appropriator unless they are violative of the well established law of court decision.

Our conclusion is that unless clearly inhibited by the provisions of the Water Commission Act, the courts will adhere to a liberal policy relative to the initiation and consummation of an appropriative water right; that they will do so because of the historical development of the doctrine; because of the previous liberality of law and decision; and because of the underlying idea that the Water Commission Act is primarily regulatory. A final consideration which should be noted is that the question of the right of change by amendment should not be confused with the question of diligence in maintenance of an application. In the instant case the application was maintained in good standing and while being so maintained was amended. Hence the question of diligence does not enter into the problem presented.

This question of right to change and amend has been previously given consideration in other instances and the conclusion in the instant case is supported by previous opinions filed by the attorney for this Division.

E. H. Day, witness for the applicant, testified that the proposed amended project was feasible both from a physical and from a financial standpoint, which testimony was corroborated, in part, by that of witness Fred E. Wadsworth. In the written statement from applicant Duke, which was read into the record at the hearing, he stated that he could "proceed at once with the necessary construction work and commence actual use of the water within a reasonable time".

It is, therefore, found that there is unappropriated water available for use under the application, that the amendments which were made to the application are valid in law, and that the applicant is willing to proceed with the construction of the project.

O R D E R

Application No. 2904 for a permit to appropriate unappropriated water having been filed with the Division of Water Rights, a protest against the same having been filed, a public hearing having been held, and the Division of Water Rights being now fully advised in the premises:

IT IS HEREBY ORDERED that said amended application No. 2904 be approved, and that a permit be issued to the applicant, said permit to be subject to such of the usual terms and conditions as may be appropriate.

Dated at Sacramento, California, this 24th day of December, 1925.

(Edward Hyatt, Jr.)
CHIEF OF DIVISION OF WATER RIGHTS.

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