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

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In the Matter of Application 3648 by the Waterford Irrigation District to Appropriate Water from the Tuolumne River in Stanislaus County for Irrigation Use.

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DECISION A. 3648 - D 192

Decided May 26, 1928

APPEARANCES AT HEARING HELD September 3, 1924.

For Applicant

Waterford Irrigation District	L. L. Dennett

For Protestants

City and County of San Francisco	Robert M. Searls
Turlock Irrigation District	P. H. Griffin
Modesto Irrigation District	L. J. Maddux

EXAMINER: Edward Hyatt, Jr., Chief of Division of Water Rights.

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O P I N I O N

Application 3648.

Application 3648 was filed by the Waterford Irrigation District on September 24, 1923. Under the application it is proposed to divert 100 cubic feet per second from the Tuolumne River between March 1st and October 31st for agricultural purposes. The diversion point is from the La Grange Dam and the water is to be carried through the existing canal of the Modesto Irrigation District for use upon the lands of the Waterford Irrigation District comprising approximately 14,110 acres.

The application specifies the water to be appropriated as that "wasted and to be wasted over and above the normal flow from the storage reservoirs

constructed by the City and County of San Francisco at Lake Eleanor and Hetch Hetchy on the Tuolumne River, including the waste waters from the power installation at Moccasin Creek and such other waters stored by San Francisco as may be released by the said City." The application was protested by the City and County of San Francisco, and the Modesto and Turlock Irrigation Districts. The application was completed in accordance with the Water Commission Act and the requirements of the Rules and Regulations of the Division of Water Rights, and being protested was set for a public hearing at 707 Forum Building, Sacramento at 10:00 A.M., September 3, 1924. Of this hearing applicant and protestants were duly notified.

PROTESTS

Protest of the City and County of San Francisco.

The City of San Francisco has protested against this application although it is physically impossible that such a use as that proposed can interfere with the uses contemplated by San Francisco. The city bases its protest upon the provisions of the Act of Congress known as the "Raker Act", 38 U. S. Statutes at Large 242, whereunder the federal government granted rights of way to the city conditional upon the return to the stream by the city of waters stored and then released for power use, the condition being that San Francisco allow such stored waters to flow on downstream after power use and until ready to divert such waters away from the river for its municipal purposes. The city takes the position that it is its duty to protest inasmuch as it interprets the Raker Act as intending that this released water shall inure to the benefit of the Turlock and the Modesto Irrigation Districts; that a use by Waterford under such a permit as that applied for will increase the responsibility of the city in providing sufficient water for Turlock and Modesto, and will create an unfortunate situation in that Waterford will develop under a temporary supply which will later be taken from it by the city.

Protests of Turlock and Modesto Irrigation Districts.

The Turlock and the Modesto Irrigation Districts protest and claim that the storage waters released for power use and then returned to the stream by San Francisco belong to Turlock and Modesto and that Waterford may not acquire a right to any of such released water which by storage has acquired the status of personal property.

PRIORITIES ON THE TUOLUMNE

In order to understand this controversy and the contentions urged it is necessary to review the priorities claimed by the respective parties.

It is admitted and conceded that Waterford now owns the first right to use water from the natural flow of the river during six months of the year and to the extent of approximately 60 second feet. This right known as the La Grange Ditch Right was initiated in the late "fifties" or early "sixties" and in an amount of 66 second feet for use throughout the year. Subject to an allowance from this total amount of not to exceed six second feet for use at La Grange, Waterford purchased in 1919 the privilege of using under this right for six consecutive months and begins use thereunder each year on April 1st or April 15th or May 15th or June 1st as it elects.

The rights of next priority are also direct flow rights and are possessed by Turlock and Modesto Irrigation Districts. Inasmuch as these districts operate under agreement with each other and divide their combined rights upon a basis of approximately 1/3 to Modesto and 2/3 to Turlock we will consider their diversions as joint. These direct flow rights of Turlock and Modesto are based upon deeds from one Wheaton in 1890 and also upon notices of appropriation filed by Turlock in 1889 and by Modesto in 1890 and upon use of water beginning about 1901 by Turlock and about 1903 by Modesto and since used in in-

creasing amounts and upon increasing areas by said districts.

The next activity upon the river in the matter of acquiring water rights was by the City of San Francisco and it filed certain notices of appropriation in the vicinity of Lake Eleanor and the Hetch Hetchy Valley in the years 1901, 1908, 1909 and 1911. However, it is unnecessary to now determine whether or to what extent, if any, these rights may antedate those of Turlock and Modesto to storage in their foothill reservoirs, inasmuch as there is no controversy now in issue as between the city and these districts. For our present purposes and for convenience of consideration we will treat the foothill storage rights of Turlock and Modesto as next in priority and they were initiated by notices posted in 1908 by Modesto and in 1911 by Turlock for storage in foothill reservoirs. Modesto began storing about 1912 and Turlock about 1914.

The rights initiated by the city by notices posted in 1901, 1908, 1909 and 1911 are next entitled to consideration. Acting under these notices of appropriation San Francisco has to date stored waters in Lake Eleanor Reservoir and in Hetch Hetchy Valley Reservoir and has released such storage waters for power development at Moccasin Creek Power House and has thereafter returned said waters to the river and they have flowed on downstream and been available for use by the contending districts. Ultimately San Francisco plans to recapture these released waters and convey them away to municipal use at a point below the Moccasin Creek Power House and far above the diversion points of the districts.

The next priority claimed is that of Waterford for 250 second feet of direct flow under notice posted in 1913, the year when the Waterford District was organized. Use began about 1918.

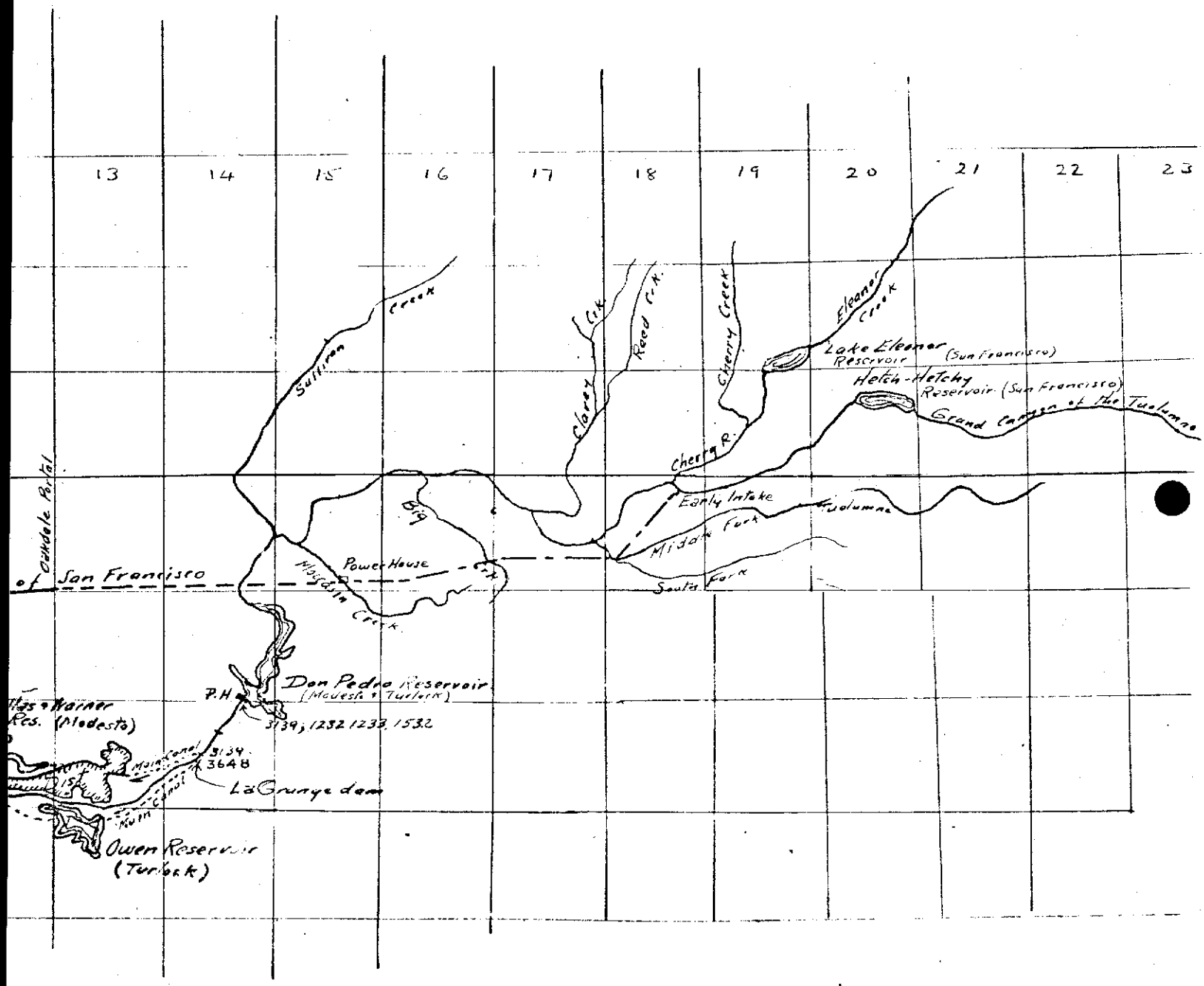
In 1918 Lake Eleanor Reservoir was completed.

In 1919, Turlock and Modesto filed applications to store water in Don

Pedro Reservoir and said reservoir was completed in 1923. Also during 1923 the city's Hetch Hetchy Reservoir was completed.

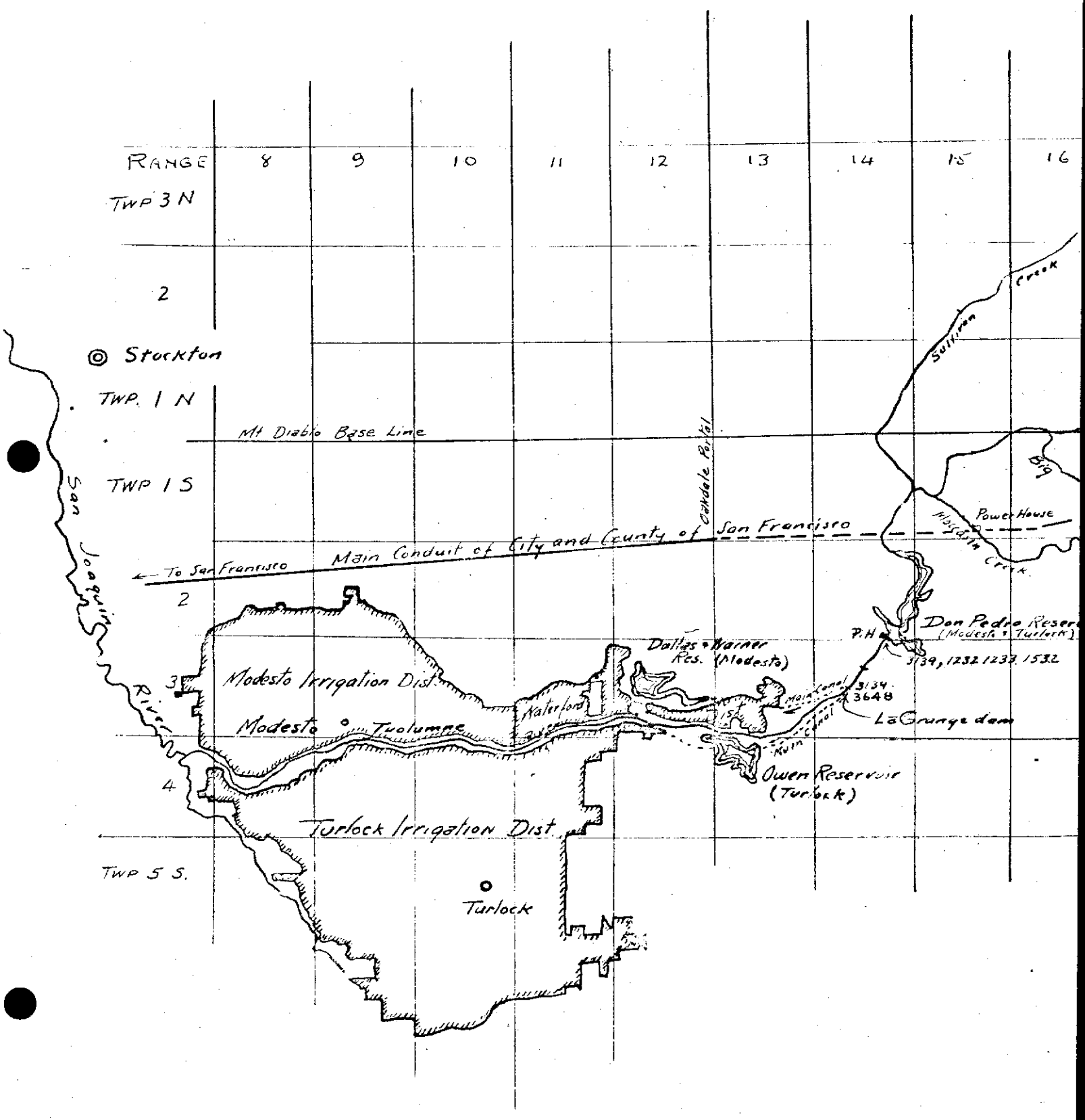
In 1923 Waterford filed the application now under consideration. Positions on the stream and uses therefrom illustrated.

Such are briefly the relative priorities of the contending parties. The relative positions upon the stream are illustrated in the accompanying sketch.



SKETCH TO ACCOMPANY

DECISION A 3648 D.


RANGE 8 9 10 11 12 13 14 15 16
TWP 3 N
2
Stockton
TWP. 1 N
Mt Diablo Base Line
TWP 1 S
San Joaquin River
Cowdale Portal
Sullivan Creek
Big
Main Conduit of City and County of San Francisco
To San Francisco
Power House
Moccasin Creek
2
Don Pedro Reser
(Modesto & Turlock)
P.H
Dallas & Warner Res. (Modesto)
3139, 1232 1233 1532
3
Modesto Irrigation Dist.
Waterford
Main Canal
3134
3648
La Grange dam
Modesto
Tuolumne
15
Ruin
Owen Reservoir
(Turlock)
4
Turlock Irrigation Dist.
TWP 5 S.
Turlock

have been severed from the stream and have become personal property and are thereafter not subject to appropriation.

The Raker Act.

The pertinent provisions of this act of Congress whereunder the city was granted rights of way for reservoirs and conduits in and through the Stanislaus National Forest, the Yosemite National Park, and public lands of the United States are contained in Sections 9, 10 and 11 thereof and are as follows:

> "Sec. 9. That this grant is made to the said grantee subject to the observance on the part of the grantee of all the conditions hereinbefore and hereinafter enumerated:
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> **********
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> "(b) That the said grantee shall recognize the prior rights of the Modesto Irrigation District and the Turlock Irrigation District as now constituted under the laws of the State of California, or as said districts may be hereafter enlarged to contain in the aggregate not to exceed three hundred thousand acres of land, to receive two thousand three hundred and fifty second-feet of the natural daily flow of the Tuolumne River, measured at the La Grange Dam, whenever the same can be beneficially used by said irrigation districts, and that the grantee shall never interfere with said rights.
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> "(c) That whenever said irrigation districts receive at the La Grange Dam less than two thousand three hundred and fifty second-feet of water, and when it is necessary for their beneficial use to receive more water the said grantee shall release free of charge, out of the natural daily flow of the streams which it has intercepted, so much water as may be necessary for the beneficial use of said irrigation districts not exceeding an amount which, with the waters of the Tuolumne and its tributaries, will cause a flow at La Grange Dam of two thousand three hundred and fifty second-feet; and shall also recognize the rights of the said irrigation districts to the extent of four thousand second-feet of water out of the natural daily flow of the Tuolumne River for combined direct use and collection into storage reservoirs as may be provided by said irrigation districts, during the period of sixty days immediately following and including April fifteenth of each year, and shall during such period release free of charge such quantity of water as may be necessary to secure to the said irrigation districts such four thousand second-feet flow or portion thereof as the said irrigation districts are capable of beneficially directly using and storing below Jawbone Creek: Provided, however, That at such times as the aggregate

storage capacity, and whenever additional storage has been provided by the said irrigation districts which is necessary to the economical utilization of the waters of said watershed, and also after water losses and wastes have been reduced to such reasonable minimum as will assure the economical and beneficial use of such water.

"(g) That the said grantee shall not be required to furnish more than the said minimum quantity of stored water hereinbefore provided for until the said irrigation districts shall have first drawn upon their own stored water to the fullest practicable extent.

"(h) That the said grantee shall not divert beyond the limits of the San Joaquin Valley any more of the waters from the Tuolumne watershed than, together with the waters which it now has or may hereafter acquire, shall be necessary for its beneficial use for domestic and other municipal purposes.

"(i) That the said grantee shall, at its own expense, locate and construct, under the direction of the Secretary of the Interior, such weirs or other suitable structures on sites to be granted, if necessary, by the United States, for accurately measuring the flow in the said river at or above La Grange Dam, and measuring the flow into and out from the reservoirs or intakes of said districts, and into and out from any reservoirs constructed by the said grantee, and at any other point on the Tuolumne River or its tributaries, which he may designate, and fit the same with water-measuring apparatus satisfactory to said Secretary and keep such hydrographic records as he may direct, such apparatus and records to be open to inspection by any interested party at any time.

"(j) That by "the flow", "natural daily flow", "aggregate daily natural flow", and "what is naturally flowing", as are used herein, is meant such flow as on any given day would flow in the Tuolumne River or its tributaries if said grantee had no storage or diversion works on the said Tuolumne watershed."

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"Sec. 10. That this grant, so far as it relates to the said irrigation districts, shall be deemed and held to constitute a binding obligation upon said grantee in favor of the said irrigation districts which said districts, or either of them, may judicially enforce in any court of competent jurisdiction.

"Sec. 11. That this Act is a grant upon certain express conditions specifically set forth herein, and nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the State of California relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired thereunder,

daily natural flow of the watershed of the Tuolumne and its tributaries measured at the La Grange Dam shall be less than said districts can beneficially use and less than two thousand three hundred and fifty second-feet, then and in that event the said grantee shall release, free of charge, the entire natural daily flow of the streams which it has under this grant intercepted.

"(d) That the said grantee whenever the said irrigation districts desire water in excess of that to which they are entitled under the foregoing, shall on the written demand of the said irrigation districts sell to the said irrigation districts from the reservoir or reservoirs of the said grantee such amounts of stored water as may be needed for the beneficial use of the said irrigation districts at such a price as will return to the grantee the actual total costs of providing such stored water, such costs to be computed in accordance with the currently accepted practice of public cost accounting as may be determined by the Secretary of the Interior, including, however, a fair proportion of the cost to said grantee of the conduit, lands, dams, and water-supply system included in the Hetch Hetchy and Lake Eleanor sites; upon the express condition, however, that the said grantee may require the said irrigation districts to purchase and pay for a minimum quantity of such stored water, and that the said grantee shall be entitled to receive compensation for a minimum quantity of stored water and shall not be required to sell and deliver to the said irrigation districts more than a maximum quantity of such stored water to be released during any calendar year: Provided, however, That if the said irrigation districts shall develop sufficient water to meet their own needs for beneficial use and shall so notify in writing the Secretary of the Interior the said grantee shall not be required to sell or deliver to said irrigation districts the maximum or minimum amount of stored waters hereinbefore provided for, and shall release the said districts from the obligation to pay for such stored water: And provided further, That said grantee shall without cost to said irrigation districts return to the Tuolumne River above the La Grange Dam for the use of the said irrigation districts all surplus or waste water resulting from the development of hydroelectric energy generated by the said grantee.

"(e) That such minimum and maximum amounts of such stored water to be so released during any calendar year as hereinbefore provided and the price to be paid therefor by the said irrigation districts are to be determined and fixed by the Secretary of the Interior in accordance with the provisions of the preceding paragraph.

"(f) That the Secretary of the Interior shall revise the maximum and minimum amounts of stored water to be supplied to said irrigation districts by said grantee as hereinbefore provided, whenever the said irrigation districts have properly developed the facilities of the Davis Reservoir of the Turlock Irrigation District and the Warner-Dallas Reservoir of the Modesto Irrigation District to the fullest practicable extent up to a development not exceeding in cost $15 per acre-foot

and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with the laws of said State."

We deem it too well established to admit of dispute that the United States has jurisdiction over rights of way in and through the public domain and that the respective states have jurisdiction over water rights within their respective boundaries. The Raker Act is therefore peculiar in that the United States imposes conditions relative to water rights in granting rights of way to the city and said Act will be confusing unless it be remembered that it specifically disclaims any attempt to interfere with the jurisdiction of the State of California over waters within its boundaries. Without granting or adjudicating water rights Congress has merely declared its conception of what is right and equitable relative to the use of the Tuolumne River by San Francisco and has in effect said to San Francisco, you may have rights of way and thereby be enabled to gain access to the river upon condition that you will not take from Turlock and Modesto waters which we believe they should not by you be deprived of the opportunity to use and will conduct yourself as we herein provide, leaving it to San Francisco to obtain rights to use the waters of the river from the State of California.

The situation is that San Francisco acquires its water rights from the State and its access across and rights in, lands of the United States which are necessary, from Congress. As a condition the city must conform to the ideas of Congress as to how it shall use water from the River. Through control of access to the River, Congress is thus indirectly enabled to force compliance upon its grantee with conditions as to use of water by its grantee but does not claim or attempt to do so upon any basis of right over water itself.

Also, insofar as the use of water is concerned, the act merely establishes a contractual relationship between the United States and San Francisco in favor of certain beneficiaries, Turlock and Modesto, who are given the privilege of enforcing their claims against San Francisco by direct legal action. Having accepted this grant and all its conditions San Francisco is very properly on guard to protect itself from any responsibility for any uses which may operate to violate this grant or increase the burden of complying with its conditions.

However, we fail to see wherein San Francisco is involved by appropriations after it has used and returned water it is obligated to return to the stream. The act merely requires that: "said grantee shall without cost to said irrigation districts return to the Tuolumne River above the La Grange Dam for the use of the said irrigation districts all surplus or waste water resulting from the development of hydroelectric energy generated by the said grantee." Having done this San Francisco has complied with the condition stated and only upon a theory that San Francisco is also obligated to police the stream thereafter and actually deliver this water at La Grange can the city be held responsible, not only this but having so policed the stream, how could it prevent Waterford with a permit to appropriate from compelling the districts to convey this water through their Modesto canal to Waterford. The latter district will get this water under a permit, if granted, only by reason of its delivery to it by Modesto itself. The peculiar physical situation as well as the very condition concerned operate to relieve San Francisco of a diversion beyond its power to prevent and would place the United States in an untenable position in attempting to invoke such a diversion as a violation on the part of San Francisco as a grantee under the Raker Act. The United States would then be attempting to forfeit a grant by reason

of the operation of the laws of the State of California, which in that very grant it denys intention to interfere with and certainly the United States did not condition its grant to San Francisco upon the theory that San Francisco's inability to override state laws should work a forfeiture.

The Turlock and Modesto Irrigation Districts join with San Francisco in urging that they (said districts) have acquired a right to use waters stored by San Francisco and used for power development pending their complete utilization by San Francisco by recapture and diversion away from the river to municipal use by the city. In some way or other the Raker Act is urged to constitute the basis of such a right in the districts.

It is said on pages 9 and 10 of the brief filed on behalf of the city:

> "The only other point involved is whether, having the right to recapture water thus diverted and used at the Moccasin Creek Power House and discharged into Moccasin Creek, the city can assign temporarily that right of recapture to the Modesto and Turlock Irrigation Districts. The contract between the government and the city for the benefit of the Districts above referred to is in effect nothing more nor less than such a temporary assignment."

It is said on pages 2 and 3 of the brief filed on behalf of Turlock and Modesto.

> "The Modesto Irrigation District and the Turlock Irrigation District have claimed such waters under and by virtue of the provisions of an act of Congress which granted to the Modesto Irrigation District and the Turlock Irrigation District these waters *****" (quoting from subdivision (d) of Section 9)
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> **********
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> "The irrigation districts had, prior to the passage of the Water Commission Act, acquired through legislative grant by the Congress of the United States in contractual relations with the City and County of San Francisco the waters herein concerned and San Francisco had given the waters in question to the Modesto and Turlock Irrigation Districts. **********
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> **********

"The City and County of San Francisco accepted all of the provisions of the Raker Bill, and in that contractual relation with the government the waters used for the purpose of generating power and then returned to the stream became the property of the Modesto and Turlock Irrigation Districts. It therefore follows that such waters are not unappropriated waters, nor is the water abandoned."

We can attribute no such effect to the "Raker Act" as that here contended for. As we view that act it involves merely a disposal of rights of way and reservoir easements by the federal government and specifically disclaims interference with state control in the matter of water rights. The city having filed notices seeking to appropriate water for beneficial uses within and near its boundaries sought necessary easements and rights of way over, in and through government lands. The United States granted these easements and rights of way but upon conditions designed to insure protection to established uses within the watershed and to encourage future development therein. Upon first consideration it would appear that the United States thereby undertook to control water rights but in view of the explicitness with which Congress denied any such attempt on its part and in view of the well established federal policy of recognizing state authority in the matter of water rights, it should be concluded that these conditions relative to water were intended to be effective in subordination to state control over water and only insofar as consistent with the laws of the State of California.

The conditions of use imposed by the Raker Act upon San Francisco are operable without the slightest trespass upon the powers of the State of California over water rights. It is entirely unnecessary to construe that act as a grant of a water right to San Francisco or to Turlock and Modesto, or as the assignment of a water right from San Francisco to Turlock and Modesto, or as, by any fiction whatsoever, an adjudication of a water right in favor of Turlock and Modesto. The condition that stored waters used for

power by San Francisco and not recaptured and rediverted to San Francisco shall be returned to the stream until they are recaptured and diverted away to San Francisco is in entire consonance with the doctrine of law that an appropriator having used water and released it without further intention to use it has abandoned that water so released. San Francisco is merely required to convey back into the stream any waters, which having used, it abandons. The opportunity of use by lower uses is thus safeguarded against an abandonment at a point where the water might not return to the stream.

We would further call attention to the illogical result of an interpretation that the Raker Act is or operates as an assignment from San Francisco to the districts. What has San Francisco to assign? It did not appropriate for the districts, it has initiated no rights for, or in behalf of the districts. May it then assign abandoned water to the districts or may Congress do so for San Francisco? We think not. Certainly the city as an appropriator has not the right to substitute itself in the place and stead of the State of California and by and at its own pleasure create other appropriators and users of said water. It has the right to store and use but having completed its use and returned the water to the stream it may not as to such returned water create a preference right in others to that water pending future use of future waters so stored, used and returned and then recaptured and diverted away by it.

In so creating preferential rights San Francisco would be establishing a new doctrine of law to wit, that an appropriator of water may after satisfying his own needs oust the state of jurisdiction and create subsequent appropriators at his pleasure.

Nature of Right Acquired in and to Waters Stored in a Reservoir.

It is argued that the right of San Francisco to dictate who shall receive water stored in its reservoirs is absolute in that San Francisco by

virtue of storing unappropriated water has thereby reduced water so stored to possession and to the status of personal property and by severing this water from the stream and taking possession of the very corpus, has become invested with ownership as absolute as that which exists in any other personal property it might own or acquire.

On page 12 of the City's brief after referring to the waters which the city must permit to pass through its reservoirs without storage as being water of which the city merely takes the usufruct in running same through its power houses, it is said:

> "The storage water, on the other hand, which is held in the City's reservoirs and reduced to actual physical possession and then at some later date used through its power plants and temporarily assigned to the Modesto and Turlock Districts is clearly in a different category. It becomes the personal property of the City, and it may release and recapture the same or assign the right to recapture the same as it sees fit."

Also on page 5 of the brief submitted by the Turlock and Modesto districts it is said:

> "The water stored in Lake Eleanor or Hetch Hetchy or in any other reservoir built by the City and County of San Francisco as a part of the whole project now under construction by the City and County of San Francisco is personal property and not water flowing in a stream subject to appropriation."

The case of Heyneman v. Blake, 19 Cal. 594 is quoted from in support of this statement.

While this early California case does afford support for the contention that water severed from a stream and of which physical possession is obtained does thereby become personal property and is the subject of absolute ownership yet later California cases have completely overruled this early case insofar as it may be applicable to waters impounded in reservoirs or diverted into irrigation ditches. (Stanislaus Water Co. v. Bachman, 152 Cal. 716, 725, 726, 227; Copeland v. Fairview Land etc. Co., 165 Cal. 148,153;

Lindblom v. Round Valley Water Co., 178 Cal. 450, 456; Fawkes v. Reynolds, 190 Cal. 204, 211.

Not only do the cases negative this contention but also upon consideration of the basic principles of the doctrine of appropriation it appears entirely untenable. San Francisco acquires no more than does any other appropriator who diverts and beneficially uses water. All that any appropriator can so acquire is a right of use and right to continue to take and use within the scope of the appropriation. The right to a continued taking is dependent upon a continued application to beneficial use within the scope of the appropriation made. Yet the effect of this doctrine contended for would be to invest an appropriator with an absolute title the moment water is impounded and, by some magic which attaches to the act of impounding, convert a usufructuary right into a right of absolute ownership entirely foreign to the nature of the right which may be acquired under the doctrine of appropriation as well as foreign to even the usufructuary right which inheres in a riparian owner. Under the doctrine contended for an appropriator would base his right to impound upon a right of use within the scope of his appropriation and having impounded would then base a right of absolute ownership upon the mere act of impounding and so would violate the very conditions under which he was permitted to impound and so obtain possession. Briefly, the right of San Francisco to take is conditional in the first instance, it is upon condition that the city shall have a right of use only and having acquired possession the conditions under which it did so cannot be repudiated. A conditional possession only was obtained not a right of absolute possession.

Of course, an appropriator may impound and may thereafter use for power and release from power use for conveyance down a stream channel and

subsequent recapture and rediversion to use, but all of this procedure must be within the scope of the appropriation made. San Francisco has appropriated for its own use and has initiated appropriative rights to recapture and redivert to itself but it has not initiated a right of recapture or rediversion in favor of Turlock and Modesto. To so hold would be to expand the scope of the appropriation made and this can be done only by another appropriation having later priority. The case at hand is not a case wherein A appropriates for storage, power use by himself, and for irrigation use by B after he has used for power development. Such an appropriation may be made, the point is, it has not been made by San Francisco for Turlock and Modesto.

Also it should be noted that in the instant case, the dispute is not over waters stored and sought to be withheld but is concerning waters restored to the stream by the city and permitted by it to flow on downstream. There is a voluntary restoration to the stream by San Francisco without intent or purpose to again use the particular waters so released into the stream by it. Having used the waters so restored as fully as it is prepared to use them within the scope of its appropriations San Francisco is abandoning the particular waters so released and restoring them to the natural stream and releasing them from its possession and control.

Provisions of the Water Commission Act.

Having disposed of contentions advanced by protestants it remains to consider those of applicant. It is urged that an uncertain status of the law, relative to such water as that stored by the city and subsequently released after power use and allowed to flow on downstream pending recapture and rediversion by the city, has been removed and replaced by positive and controlling provisions of the legislature contained in the Water Commission Act of this state. Dependence is placed upon Sections 17 and 20 of said Act wherein it is provided in part as follows:

"Sec. 17. Any person, firm, association or corporation may apply for and secure from the state water commission, in conformity with this act and in conformity with reasonable rules and regulations adopted from time to time by the state water commission, a permit for any unappropriated water or for water which having been appropriated or used flows back into a stream, lake or other body of water within this state."

"Sec. 20. **********The application for a permit by municipalities for the use of water for said municipalities or the inhabitants thereof for domestic purposes shall be considered first in right, irrespective of whether they are first in time; provided, however, that such application for a permit or the granting thereafter of permission to any municipality to appropriate waters, shall not authorize the appropriation of any water for other than municipal purposes; and providing, further, that where permission to appropriate is granted by the state water commission to any municipality for any quantity of water in excess of the existing municipal needs therefor, that pending the application of the entire appropriation permitted, the state water commission shall have the power to issue permits for the temporary appropriation of the excess of such permitted appropriation over and above the quantity being applied from time to time by such municipality; and providing, further, that in lieu of the granting of such temporary permits for appropriation, the state water commission may authorize such municipality to become as to such surplus a public utility, subject to the jurisdiction and control of the railroad commission of the State of California for such period or periods from and after the date of the issuance of such permission to appropriate, as may be allowed for the application to municipal uses of the entire appropriation permitted; and provided, further, that when such municipality shall desire to use the additional water granted in its said application it may do so upon making just compensation for the facilities for taking, conveying and storing such additional water rendered valueless for said purposes, to the person, firm or corporation which constructed said facilities for the temporary use of said excess waters and which compensation, if not agreed upon between the municipality and said person, firm or corporation, may be determined in the manner provided by law for determining the value of property taken by and through eminent domain proceedings."

Other provisions of the Water Commission Act should be noted and are as follows:

"Sec. 11. All water or the use of water which has never been appropriated, or which has been heretofore appropriated and which has not been in process, from the date of the initial act of appropriation, of being put, with due diligence in proportion to the magnitude of the work necessary properly to utilize for the purpose of such appropriation such water or the use of water, or which has not been put, or which has ceased to be put to some useful or bene-

ficial purpose, or which may hereafter be appropriated and ceased to be put, to the useful or beneficial purpose for which it was appropriated, or which in the future may be appropriated and not be, in the process of being put, from the date of the initial act of appropriation, to the useful or beneficial purpose for which it was appropriated, with due diligence in proportion to the magnitude of the work necessary properly to utilize for the purpose of such appropriation such water or the use of water, is hereby declared to be unappropriated. 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 insofar 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."

"Sec. 1c. No right to appropriate or use water which is subject to the provisions of this act shall be initiated or acquired by any person, firm, association, or corporation except upon compliance with the provisions of this act."

"Sec. 38. The diversion or use of water subject to the provisions of this act other than as it is in this act authorized is hereby declared to be a trespass, and the state water commission is hereby authorized to institute in the superior court in and for any county wherein such diversion or use is attempted appropriate action to have such trespass enjoined."

Relative to Section 20 protestants point out that it is inapplicable because San Francisco's rights were initiated prior to the Water Commission Act and Section 20 governs only in cases wherein a city is an applicant before the commission and is proceeding under a permit from the commission. Nevertheless the right to temporarily appropriate pending completion of use by a prior appropriator is too well established to permit of dispute and irrespective of this limitation of Section 20 to cases wherein a city is proceeding under a permit issued by the commission, the right of temporary appropriation is thoroughly established in law. (1 Wiel 321, 3rd Ed., and cases cited in footnotes.)

Though the Water Commission Act does not give specific legislative sanction to this doctrine of temporary appropriation as concerns appropria-

tions initiated prior to the act there is no inconsistency or repugnancy between the act and the applicability of this doctrine. Nor is there any attempt made in the Water Commission Act to set forth the entire law relative to appropriative water rights and wherein there is no conflict between provisions of the Act and principles of law established prior to the Act, it is certainly not to be construed that the act negatives principles not in conflict therewith. Hence it is deemed established that waters in process of appropriation by one entity but not yet taken are subject to temporary appropriation by another whether the primary rights were initiated under or prior to the Water Commission Act. But if further inquiry is necessary to establish the appropriable character of this water Section 17 of the Water Commission Act is definite and conclusive and will now be considered.

Either the storage used by the city for power and then released into the stream is, so long as it continues pending its recapture and rediversion away from the stream to the city, appropriated or unappropriated. If unappropriated it is certainly within the scope of the Water Commission Act and subject to use in accordance with applications to appropriate filed thereunder. If appropriated by San Francisco or others, it cannot of course now be taken from its prior appropriators by the applicant herein.

Unquestionably this storage released, used for power and then returned to the stream is water which having been appropriated or used flows back into the stream and therefore comes within the precise language of Section 17 which declares that a permit may be secured for such water. Nevertheless, we will especially consider the status of this released storage and whether it is open to temporary appropriation by applicant pending its rediversion to use by San Francisco.

Status of Waters Which Applicant Seeks to Appropriate.

The waters which the applicant herein seeks are waters which prior to their storage by San Francisco were unappropriated. They were unappropriated, because they flowed down the river during the periods of heavy flow and ultimately wasted into the ocean without beneficial use having been made of them. These waters which formerly flowed to waste are now impounded by the city under appropriations thereof, and subsequently released during periods of low flow and therefore constitute an increase above the natural flow of the river during those months in which in a state of nature they were not wont to flow. The real question involved as we view the matter of this application may be simply stated, to wit, do waters stored at times when they would otherwise waste, and then returned to the stream after use for the purpose for which stored and returned during a season when they would not be present in the stream except by intervention of man, become a portion of the natural flow of the season of release and as such subject to prior rights of use for that season or is said increment analogous to waters introduced from another watershed and released after use by the parties introducing same and therefore foreign to the rights of use which have vested in the natural flow (E. Clemens Horst v. New Blue Point Min. Co., 177 Cal. 631). According to the determination as to which status is to be accorded such water, will turn the decision as to whether direct flow, irrigation season priorities of protestant districts are to be first supplied out of this released storage.

To avoid confusion it should be noted that in the case of the Tuolumne River as in the case of many other California rivers the irrigation season and the season of heavy runoff overlap and hence it occurs that during the early portion of the irrigation season waters are being diverted directly to beneficial use and also during that time the river is in what we will for

convenience call the flood stage or season of heavy runoff. In other words the latter portion of the season of heavy runoff coincides with the early portion of the irrigation season. Thus from about April 1st to about July 1st direct diversions to irrigation are being made and at the same time the river is in flood stage and discharging in excess of direct flow diversion rights.

With this understanding of the conditions which obtain, it appears that waters stored while the flow of the river is more than adequate to supply priorities for direct diversion to beneficial use are waters which are unappropriated and of the storage of which owners of direct flow rights may not complain. It further seems to be logical that such waters having been stored without infringement of direct flow priorities may be taken away from the river by the city without impairment of those priorities and hence is appropriated water of the city which when released from storage and further use by the city again becomes unappropriated and is water within the provisions of Section 17 of the Water Commission Act wherein it is declared that a permit may be secured for "water which having been appropriated or used flows back into a stream." If such water as that here involved does not come within the meaning of the portion of Section 17 of the Water Commission Act quoted from we fail to understand what effect can be given to said wording and certainly it is to be given effect if that can be done.

It is further our opinion that the water in question is not a part and parcel of the irrigation season supply of the river during the period of its release and that it would be a purely fictitious conclusion to so hold. We do not see how it may be considered that such water withheld by man during the period of time when it would naturally flow down the river and stored and then released and caused to flow down the river during a different period of time is part of the natural flow of the period of release. Such water we

deem to be an obviously artificial increment to the natural flow of the period of release and water which is part of the natural flow of a different period of time and which if allowed to naturally flow would be in the ocean at the time it is artificially caused to flow. It is water which in a state of nature had flowed down the stream and never previously been available to direct flow appropriators during the latter part of the irrigation season, a flow which was in excess of the needs of direct flow appropriators during the time of its natural occurrence and of which they could not have availed themselves during the latter part of the irrigation season without making a separate and distinct appropriation for use by means of storage and a flow not within the scope of their appropriations. This artificial increment, this flood water or winter water or early irrigation season water caused by man to flow in the late irrigation season does not become part of the natural late irrigation season flow any more than does water added from a different watershed become part of the natural flow of the watershed into which it is introduced. The physical fact that foreign water flows down the channel together with the waters originating in the watershed tributary to the stream and may be indistinguishable in appearance from the water with which mingled and the fact that it flows by gravity or naturally flows as does the other water, does not make it part and parcel of the natural flow and no more reason exists wherefore waters withheld during the winter and released during the summer should ipso facto become summer water or water originating in the summer season. In the latter case the identity of the water and its origin appears just as distinctive as in the former. It is foreign in time or season and as such the subject of distinct and separate appropriations which have no relationship to or conflict with priorities of right to use the flows of another time or season.

(Smith v. O'Hara, 43 Cal. 371; Hufford v. Dye, 162 Cal. 147, 159, 160; Armstrong v. Payne, 188 Cal. 585, 600; Cache La Poudre Reservoir 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; Davis v. Chamberlain, (Ore.) 98 Pac. 154; Cleary V. Daniels, (Utah) 167 Pac. 820 2 Kinney, 2nd Ed., 1369, 1370, 1371, 1520, 1521).

It being thus amply established in law that the waters of one period of time or season are not those of another period of time or season, and it being likewise established that waters foreign in origin do not become a portion of the natural flow of the stream into which they may be released, it appears that waters may be either foreign in time or foreign in origin and that in the former case they are not to be confused with the natural flow of another season or period of time and that in the latter case they are not to be confused with the natural flow of the stream. Our Supreme Court having not only definitely held that riparian rights attach only to the natural flow (E. Clemens Horst v. New Blue Point Min. Co. supra; Lindblom v. Round Valley Water Co., 178 Cal. 457) but also that appropriative rights by direct diversion to beneficial use are limited to the season or time of diversion to use, cases supra, it follows more as a restatement of or corollary to the cases cited than as a logical and necessary deduction therefrom, that direct flow rights of appropriation of one season or period of time do not attach to waters of another season or period of time which are artificially caused to flow during another season or period of time.

In this connection the two comparatively recent California decisions last referred to are worthy of more extended consideration. In the Horst case, supra, foreign waters from the Yuba River were being conveyed to and used at Grass Valley by the appropriators thereof and then abandoned by said appropriators and discharged into Wolf Creek tributary to Bear River above the lands of plaintiff which were riparian to Bear River.

The defendants were appropriators of these foreign waters and were intercepting them by a dam across Wolf Creek and were conveying them out of the watershed of Bear River. The Supreme Court held that plaintiffs as riparian owners had no title to this foreign increment and could not enjoin its diversion by defendants.

In its opinion the Supreme Court stated the principal question at issue as follows:

> "The principal question involved in this appeal is the following: Where the flow of a natural stream is augmented by artificial means, that is, by waters which, without the intervention of human agency, would never reach the stream, does this artificial flow inure to the benefit of riparian owners or is it merely in the nature of abandoned personalty which may be appropriated by the first person who can take it from the stream?"

This question it will be noted is very similar to the question we have previously stated, to wit, whether waters stored at times when they would otherwise waste, and then returned during a season when they would not be present except by intervention of man, become a portion of the natural flow of the season of release and as such subject to prior rights of use for that season or is said increment analogous to waters introduced from another watershed and released after use by the parties introducing same and therefore foreign to rights of use which have vested in the natural flow.

We think that there could hardly be a more apt analogy than exists between the artificial increment to the waters of the Tuolumne River involved in this case and the artificial increment to the waters of Wolf Creek and Bear River involved in the Horst case. In this case the waters released from storage during a period of time when otherwise they would have ceased to be in the river are just as foreign to the natural flow of the river during the period of their release as were the waters in the Horst case to the natural flow of Wolf Creek and Bear River. In neither case would the waters in question have

been in said streams except for artificial conditions created by third parties and in both cases the increments above the natural flow are clearly and definitely ascertainable. We can see no difference in principle between a quantum of water turned down a stream which comes from another stream and a quantum of water turned down which though water of the stream is nevertheless water which would have long since flowed down and passed out into the ocean. In both cases the water in question is present only as a result of the intervention of a human agency and the flow of a natural stream is augmented by artificial means and to a known and definitely ascertainable quantum, a quantum readily traceable and distinguishable from the natural flow with which it is mingled.

It was said in the Horst case opinion:

> "So in the present case it may be said that as the surplus waters would not in the course of nature reach appellant's land, that corporation may not complain of being deprived thereof either by the producers of the excess, by their assignees, or by a stranger to their title who appropriated the abandoned excess for proper purposes."

And so it may be said in this case that in the course of nature the surplus waters withheld during times of abundant supply and later released during periods of low flow would not reach the protestant's lands during said periods. Also it may be said in this case that the protestants do not contend as against the producers of the excess but would be upheld as against a stranger to their title who has appropriated this excess and claims a right until such time as the producer may dispose of it otherwise.

In the Horst case supra, the appropriation of the excess by the stranger was upheld and we see no reason why it should not be upheld in this case by the stranger, the applicant. The following statement from the Horst case is apropos:

"We are convinced that plaintiff and respondents were upon an equal footing with reference to the surplus water, and that the ones who first secured it may not be deprived of the right to the use of it, even outside of the watershed of Wolf Creek, by the person or corporation claiming as a lower riparian appropriator on Bear River."

In denying a hearing in the Horst case, supra, the Supreme Court limited the scope of its opinion by declaring:

"The court does not construe the opinion herein as deciding the question as to what rights may be acquired in so-called 'foreign waters' as between appropriators, or by prescription. The record in these cases presents a controversy between the plaintiffs claiming the waters in question solely by virtue of their lower riparian ownership of the banks of Bear River, of which Wolf Creek is a tributary, and the defendants claiming the right to divert the foreign waters of Wolf Creek by virtue of their appropriation and application of the same to beneficial uses."

This statement was obviously in reply to a request for rehearing and modification of opinion filed by the State Water Commission wherein the Commission states its emphatic concurrence with the proposition that riparian rights do not attach to "foreign water" but expressed fear that the court had declared a doctrine of first in position in lieu of first in priority as being applicable to foreign water. In other words the Commission feared that the opinion would be interpreted to mean that an appropriator of foreign water would be unable to enjoin a subsequent taker who might divert from a point above. The words of the court in the statement of the principal question were that foreign water might be appropriated by the first person who can take. Hence the court delivered the above statement in denying a rehearing.

It is in point here to note the argument of the Commission in its petition for rehearing in this case.

"If water brought to one stream from another is 'foreign' water because not part of the natural flow of the receiving stream, it would seem to follow that any water flowing in a stream and not part of the natural flow thereof is 'foreign' water. Flood water, therefore,

stored by artificial means and allowed to return to the stream from which taken after use for developing power, mining, etc., being added to the natural flow by artificial means, is 'foreign' water. The logical development and application of the rule would, therefore, affect the water flowing in many streams in California.

"That the rule of this case as it now stands is contrary to the expressed intent of the law making body of the state seems evident from a reading of Section 17 of the Water Commission Act. It is there provided:

> 'Any person, firm, association, or corporation may apply for and secure from the State Water Commission****a permit for any unappropriated water or for water which, having been appropriated or used flows back into a stream, lake or other body of water within this state.'

"The legislature, and the people of the state by their vote for the Water Commission Act, put water once used and returned to any stream or other body of water, whether that from which originally taken or not, on the same basis, so far as the doctrine of prior appropriation is concerned and as between parties other than those causing such return, with the water naturally flowing or standing in such stream or other body of water. Acting under this authority the State Water Commission conceives its duty to be to grant permits for the use of 'foreign' water so long as it flows into a stream or other body of water, as though it were a part of the natural flow or body. In ascertaining existing rights on stream systems as provided by the Water Commission Act, the Commission will, unless obliged to do otherwise by the adherence of this court to the rule of the opinion herein, consider that the provision quoted above is but declaratory of the existing law and will find that prior (in time) use of 'foreign' water established a right to the use of such water as against s subsequent claimant without a superior right, nor will it consider access to the stream above the first user a superior right."

By its statement in denying a rehearing the court set at rest the fears of the Commission and in no wise indicated that the views entertained by the Commission were in error. The views of the Division of Water Rights are in accord with those of its predecessor the State Water Commission wherein it is declared that it seems to follow from the opinion in the Horst case that flood water stored and returned by artificial means is 'foreign' water.

In the Lindblom case, supra, the defendant had impounded all the waters of a stream and was controlling the flow from its reservoir down the stream, releasing water only when it suited its purposes to do so. Although at one time all of the water impounded was beneficially used through sale to mining operators, many of its users had ceased business, and for more than five years preceding this suit a large portion of the impounded water had not been sold to beneficial use. Plaintiff was a downstream riparian owner. Said the Supreme Court:

> "In so far as the right to any of the water had been forfeited by nonuser, the plaintiff would be entitled to have the amount so forfeited flow down the stream in its accustomed course. This does not mean that the plaintiff may claim any benefit from the maintaining by the defendant of its dam and reservoir. He is not in a position to demand that the defendant shall, by its artificial works, furnish a constant flow of water throughout the year. His only rights are those which he would have had under the natural conditions existing before the dam was erected, subject to the deduction of so much water as defendant has continuously applied to a beneficial use. In other words, he cannot require the defendant to discharge any water into the stream during those months in which there would be no flow if no dam had ever been built. He may merely insist that, during the months of natural flow, the defendant shall permit the escape into the canyon of the surplus of the natural flow over and above what is required to enable the defendant to meet its reasonable needs, measured by its maximum requirements during the five years preceding the commencement of the action."

Herein certainly the Supreme Court had definitely in mind the distinction between the natural flow and an artificial increment made available by storage and caused to flow at times when the natural flow was negligible. Furthermore the court was discoursing in regard to the waters of the same stream and distinguishing between the flows of the same stream during different seasons of the year.

It therefore being concluded that water of one season or period of time is not water of another season or period of time, that water made to flow in another season or period of time is not natural flow of the season or period

of time wherein it is made to flow; that rights by appropriation are measured and limited by time or season of use as well as by amount of water; and that waters of one season or period of time which are in excess of vested rights of use during that season or period of time and cannot be used by direct flow appropriators during the time of their natural occurrence are not within the right of such direct flow appropriators, it but remains to apply the law to the facts presented. Hence all claims of protestants which are based on direct diversion rights for use during the irrigation season may be eliminated as not attaching to the released storage involved and coming therefore to storage rights of protestants which consist of storages in the Turlock and in the Modesto Foothill Reservoirs and in Don Pedro Reservoir, it clearly appears that the foothill storages are of a priority anterior to the Water Commission Act and are recognized by San Francisco and protected by the provisions of the Raker Act. They are thus of an established and recognized priority which will insure a first right to storage from the waters of the river. These rights are so safeguarded and the supply of the river so ample to supply them that they may be dismissed as not in jeopardy and this brings us to a final question of law and of fact, to wit, whether the Don Pedro Reservoir application and permit to appropriate water with a priority as of 1919 is entitled to priority over the 1923 application now under consideration and if so as to whether there will be any surplus of water to supply the 1923 application. As to the question of law involved the applicant contends that the failure of the districts to specifically apply for released storage water precludes the applicability of their application to such water and that applicant has filed the first and only application for a temporary appropriation and use of said released water. However, the application for Don Pedro storage is for diversion to storage throughout the year and is for unappropriated waters of the Tuolumne River which language

is certainly inclusive of all unappropriated water available at any time of year. Furthermore it is only reasonable to assume that the districts filed with the intent and purpose of using released water, insofar as it might be necessary to fill their reservoir. The entire history of the case supports such a conclusion and at the time of the filing of this application in 1919 Lake Eleanor Reservoir was completed and Hetch Hetchy Reservoir was in course of construction and obviously it had for some time previously been known to the districts and contemplated by them that San Francisco would build the reservoirs in question and that released storage waters would be an item of importance.

WATER SUPPLY

According to Bulletin 5 of the Division of Engineering and Irrigation, Department of Public Works, State of California, entitled "Flow in California's Streams" the mean seasonal runoff of the Tuolumne River watershed above La Grange dam is 2,055,800 acre feet, as estimated over a fifty year period from 1871 to 1921 inclusive. The estimated runoff varies from a minimum of 561,000 acre feet during the season of 1876-1877 to a maximum of 5,099,000 acre feet during the season of 1899-1890.

The total area of the Turlock and Modesto Irrigation Districts is 263,000 acres. (transcript of hearing page 50) Of this acreage the districts estimate that 250,000 acres will ultimately be irrigated requiring a quantity of water equal to 1,150,000 acre feet per annum. (Transcript page 46) The duty of water is estimated at 4.6 acre feet per acre per annum. The estimate of the area to be ultimately irrigated in any one year is rather high and the duty of water is rather low, but even assuming that the estimate is correct, the Turlock and Modesto Irrigation District will require approximately 56% of

the mean seasonal runoff of the Tuolumne River. The Waterford Irrigation District on the same assumption may require 64,400 acre feet per annum for an area of 14,000 acres.

The three irrigation districts, at the most generous estimate, would not require more than 1,214,400 acre feet per annum which amount is less than 60% of the mean seasonal runoff of the river. Based upon the data in Bulletin 5 above mentioned, it would appear that on an average the stream flow would fall below this amount only once in every five years.

The applicant is asking only for such waters as the City and County of San Francisco may release prior to the time when it will become necessary to divert these waters out of the watershed.

It is thus apparent that there will ordinarily be an abundance of water to supply the storages of the protestant districts out of the natural flow and without any reliance upon released storage from San Francisco's reservoirs, although it is recognized that the protestant districts have a priority to this water if it be necessary to supply the Don Pedro Reservoir storage. In this connection it should be noted that Don Pedro Reservoir will be releasing from storage during a considerable portion of the season of use under the permit to be granted and a storage right is not entitled to prevent other uses when it is not itself being exercised.

O R D E R

IT IS HEREBY ORDERED that said Application 3648 be approved and that a permit be granted to the applicant subject to such of the usual terms and conditions as may be appropriate, and to the following special condition, to wit:

> That permittee's diversions hereunder are subject to diversions away from the river to use under such prior rights as the City and County of San Francisco has initiated and may perfect by completion of works and beneficial use of water.

That this permit is limited to waters as described in Paragraph one of the foregoing application and the supplement thereto and will therefore prove to be temporary to the extent that the City and County of San Francisco ultimately diverts away the waters sought under the foregoing application.

Dated at Sacramento, California, this twenty-sixth day of May, 1928.

Harold Conkling

(Harold Conkling)
CHIEF OF DIVISION OF WATER RIGHTS