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

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In the matter of Application 5109 of James D. and Mary Louise Phelan and Application 5110 of the Parrott Investment Company to Appropriate from Philbrook Creek and Big Butte Creek, tributaries of the Feather River in Butte County for Irrigation Purposes, Application 5143 of the State Land Settlement Board and Application 5473 of A. F. Lieurance to appropriate from Butte Creek, tributary of the Sacramento River in Butte County for Irrigation Purposes.

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DECISION A 5109, 5110, 5143, 5473 D 213

Decided January 18, 1929

APPEARANCES AT HEARING HELD July 17, 1928

For Applicants

James D. Phelan, Mary Louise Phelan and Parrott Investment Company	Andrew F. Burke, Attorney John D. Hubbard, Engineer
State Land Settlement Board	Harry Dierup
A. F. Lieurance	Edward R. Eliassen

For Protestants

A. F. Lieurance	E. R. Eliassen, Attorney Frank S. Robinson, Engineer
A. M. Compton, H. C. Compton, B. P. Compton and W. G. Patrick	Phil Ware, Attorney Frank S. Robinson, Engineer
Pacific Gas & Electric Company	Thomas J. Straub, Attorney Geo. A. Hunt, Engineer
John Hannah	No appearance
J. F. Entler	Frank S. Robinson
Maude C. Maddrill	No appearance
Eliza Hegan & Bank of Italy	"
W. C. Stevens	"
Estate of C. H. Olinger	"
Richard White	"

EXAMINER: Harold Conkling, Chief of the Division of Water Rights, Department of Public Works, State of California.

O P I N I O N

GENERAL FEATURES OF APPLICATIONS

Application 5109.

Application 5109 was filed by James D. and Mary Louise Phelan on July 17, 1926. It proposes an appropriation of 100 cubic feet per second from the regulated flow of Philbrook Creek resulting from the operation of the Philbrook reservoir constructed by the Pacific Gas & Electric Company. It is proposed to redivert the water stored by the Pacific Gas & Electric Company which has been used for power purposes through the De Sabla and Centerville Plants and returned to Big Butte Creek.

The point at which these waters will be diverted by the applicants is within the NE¼ of NE¼ of Section 4, T 21 N, R 2 E, M.D.B. & M. on Big Butte Creek. From this point the waters will flow down a constructed ditch for a distance of three-quarters of a mile into Wild Cat Creek and thence to Edgar Slough and will be rediverted therefrom at a point within the SE¼ of SW¼ of Section 18, T 21 N, R 1 E, MD.B. & M.

Diversions from the regulated flow collected in Philbrook Reservoir from October 1st to April 1st of each season will be made as same may become available. The gross diversion proposed under the application will not exceed 3,000 acre feet per annum.

The water so diverted will be used for the irrigation of rice, alfalfa and general crops on 2,080 acres of land located within Sections 12, 13, 18, 19 and 24, T 21 N, R 1 E, M.D.B. & M. The irrigation period is from about April 1st to about October 1st of each season.

The application was protested by the Pacific Gas & Electric Company prior to the hearing and subsequent to the hearing briefs in opposition thereto

were filed by the State Land Settlement Board and by A. M. Compton, H. C. Compton, B. P. Compton and W. G. Patrick.

Application 5110

Application 5110 was filed by the Parrott Investment Company on July 17, 1926. It proposes an appropriation of 100 cubic feet per second, not to exceed 3,000 acre feet per annum, of the regulated stored waters from Philbrook Reservoir, for the irrigation of 14,671 acres of land located in T 20 and 21 N, R 1 W.

Diversions from the regulated flow in Philbrook Reservoir from October 1st to April 1st of each season will be made as same may become available. The irrigation season is from about April 1st to about October 1st of each season.

The point of diversion is located on Butte Creek within the NE¼ of NE¼ of Section 4, T 21 N, R 2 E, M.D.B. & M. from which point the water will flow down a constructed ditch for three quarters of a mile into Wild Cat Creek and from thence to Edgar Slough and will be rediverted therefrom at a point within the SE¼ of SW¼ of Section 18, T 21 N, R 1 E, M.D.B. & M.

The application was formally protested by the Pacific Gas & Electric Company prior to the hearing and subsequent thereto briefs in opposition to the application were filed by the State Land Settlement Board and by A. M. Compton, H. C. Compton, B. P. Compton and W. G. Patrick.

Application 5143

Application 5143 was filed by the State Land Settlement Board on August 5, 1926. It proposes an appropriation of 20 cubic feet per second from Butte Creek to be diverted from about July 1st to about September 1st

of each season. Two points of diversion are named in the application, one of which is located within the NW¼ of SE¼ of Section 5 and the other within the NW¼ of SW¼ of projected Section 20, T 21 N, R 2 E, M.D.B. & M. It is proposed to use the water for the irrigation of 3,610 acres of land located in the Durham State Land Settlement.

The application was protested by the following:

John Hannah
A. F. Lieurance
A. M. Compton and H. C. Compton
B. P. Compton and W. G. Patrick
J. F. Entler
Maude C. Maddrill
W. C. Stevens
Eliza Hegan and the Bank of Italy
Allen M. Olinger, administrator of the Estate of C. H. Olinger, deceased
Richard White

Application 5473

Application 5473 was filed by A. F. Lieurance on May 19, 1927. It proposes an appropriation of 4 cubic feet per second for irrigation purposes, to be diverted from Butte Creek from about May 1st to about October 1st of each season. The point of diversion is described as being within the SE¼ of SW¼ of Section 5, T 21 N, R 2 E, M.D.B. & M. It is proposed to irrigate 477 acres of land within Sections 5, 6, 7 and 8, T 21 N, R 2 E, M.D.B. & M.

The application was protested by Allen M. Olinger, administrator of the Estate of C. H. Olinger, deceased.

PROTESTS

The Pacific Gas & Electric Company alleges in effect that the approval of Applications 5109 and 5110 would directly infringe upon and encumber its property rights and would tend to restrict it to the present plan of utilizing the waters of Philbrook Creek for power development while it might here-

after find it economically advisable to divert and conduct said waters elsewhere than to the Centerville Power House on Butte Creek.

The State Land Settlement Board protested Applications 5109 and 5110 on the following grounds:

1. Applicants already have an adequate water supply without the proposed appropriations.

2. The proposed appropriations will not best conserve the public interest.

3. The necessary right of way has not been acquired.

A. M. Compton, H. C. Compton, B. P. Compton and W. G. Patrick protested the approval of Applications 5109 and 5110 on the following grounds:

1. The applications were prematurely filed and are ineffectual for any purpose.

2. The necessary right of way has not been acquired.

3. The applicants already have an adequate water supply for all purposes.

4. Protestants are entitled to an equitable proportion of any excess water abandoned in Butte Creek under a decree of the Superior Court of Sutter County entered May 25, 1920.

John Hannah, A. F. Lieurance, A. M. and H. C. Compton, B. P. Compton and W. G. Patrick; J. F. Entler; Maude C. Maddrill, W. C. Stevens, Eliza Hegan and the Bank of Italy, Allen M. Olinger, administrator of the Estate of C. H. Oligner, deceased and Richard White protested Application 5143 on the following grounds:

1. There is insufficient water in Butte Creek to satisfy prior rights.

2. The approval of the application would interfere with their rights under the decree of the Superior Court of Sutter County entered on May 25, 1920 and any excess water in Butte Creek should be apportioned under said decree to all users thereunder.

Allen M. Olinger, administrator of the Estate of C. H. Olinger,

deceased, protested Application 5473 on the grounds that there is insufficient water in Butte Creek to meet the present irrigation and domestic requirements.

HEARING HELD IN ACCORDANCE WITH SECTION 1a OF THE WATER COMMISSION ACT

The several applications were 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 were set for a public hearing in accordance with Section 1a of the Water Commission Act on July 17, 1928 at 10:00 o'clock a.m. in Room 707 Forum Building, Sacramento, California. Of this hearing applicants and protestants were duly notified.

SOURCE OF WATER SUPPLY

Under Application 2755, Permit 2006, the Pacific Gas & Electric Company has the privilege of appropriating 5,060 acre feet per annum throughout the entire year from Philbrook Creek by storage in the Philbrook Reservoir. The point of diversion is located within the NE¼ of NW¼ of Section 13, T 25 N, R 4 E, M.D.B. & M.

The water thus stored is released from the Philbrook Reservoir at the rate of 20 cubic feet per second, flows down Philbrook Creek to its junction with the West Branch of the North Fork of the Feather River and thence down the West Branch to a point in the SW¼ of NE¼ of Section 16, T 24 N, R 4 E, M.D.B. & M. From this point it is rediverted through the Hendricks Canal, the Toadtown Canal and the Butte Creek Canal to the penstock of the DeSabla Power House where it is used for power purposes. After passing through the DeSabla Power House in the NW¼ of the NW¼ of Section 10, T 23 N, R 3 E, the water is again rediverted at the Centerville head dam located on Butte Creek in the SW¼ of NW¼ of Section 10, T 23 N, R 3 E, directly below

the DeSabla tailrace and passes through the Centerville canal to the Centerville Power House which is located in the NE¼ of SE¼ of Section 5, T 22 N, R 3 E, M.D.B. & M. and the water is returned to Butte Creek at that point and flows down Butte Creek as foreign water.

Under date of December 13, 1928 this office was informed that the project had been completed and the water put to beneficial use.

Under Application 2749, Permit 2004, the Pacific Gas & Electric Company has the privilege of diverting 5,740 acre feet per annum throughout the entire year from Clear Creek, a tributary of Butte Creek by storage in the Clear Creek Reservoir. The point of diversion to storage in Clear Creek Reservoir is located within the SE¼ of NE¼ of Section 7, T 24 N, R 4 E, M.D.B. & M. The water thus stored is to be released into Clear Creek at the rate of 20 cubic feet per second, flows down Clear Creek to a point within the SW¼ SE¼ of Section 12, T 24 N, R 3 E, M.D.B. & M. and is there to be rediverted through a small length of flume to the Butte Creek Canal. The water will then pass down this canal to the forebay of the DeSabla Power Plant, pass through the De Sabla Power Plant and be utilized for the generation of electrical energy. After passing through this power plant the water is again to be rediverted at the Centerville head dam located on Butte Creek in the SW¼ of NW¼ of Section 10, T 23 N, R 3 E, directly below the DeSabla tailrace and will pass through the Centerville canal to the Centerville Power House which is located in the NE¼ of SE¼ of Section 5, T 22 N, R 3 E, M.D.B. &M. and the water will be returned to Butte Creek at the tailrace of that power plant.

The construction work has been delayed pending the granting of a license by the Federal Power Commission and according to the Pacific Gas &

Electric Company construction work will probably be commenced about June 1, 1931 and the project completed by December 31, 1933.

The applications filed by the Phelan and Parrot interests state very definitely that the waters which they wish to appropriate are those waters stored by the Pacific Gas & Electric Company in Philbrook Reservoir under Application 2755 and later released for power purposes and returned to Butte Creek as foreign water. Nothing in the application or the correspondence in connection therewith would indicate that these interests proposed to utilize waters to be stored by the Pacific Gas and Electric Company in the Clear Creek Reservoir.

Although Application 5143 of the State Land Settlement Board states the proposed appropriation is to be made from Butte Creek the correspondence prior to the filing of the application would indicate that it was the waters released from storage in Philbrook Reservoir which the applicant sought to appropriate and correspondence subsequent to the filing of the application would appear to indicate that the waters of Clear Creek were also in mind.

Application 5473 of A. F. Lieurance seeks to appropriate waters from Butte Creek only and nothing in the correspondence would indicate any other source. The applicant however must be cognizant of the fact that all the natural flow of Butte Creek was adjudicated by a court decree to which he was a party and therefore it appears that the applicant had in mind waters which have been or may be stored by the Pacific Gas & Electric Company and later released for power purposes.

DISCUSSION OF PROTESTS

The waters sought are open to appropriation.

The opinion rendered by the Division of Water Rights in the matter

of Application 3648 of the Waterford Irrigation District held that waters made available by the storage works of San Francisco and released into the Tuolumne River after use by San Francisco and pending the re-diversion of said waters by San Francisco were open to appropriation by Waterford Irrigation District until the completion of the San Francisco appropriation and their diversion out of the watershed by San Francisco. The basis of this decision was that waters stored during times of surplus over the needs of existing appropriators were waters to which the prior direct flow appropriators had no title and were expressly made subject to appropriation under Section 17 of the Water Commission Act when released after use by the first appropriator thereor (San Francisco). Section 17 provides that "any person, firm, association or corporation may apply for and secure******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 decision referred to is even more applicable in its reasoning to the facts in the case of Applications 5109 and 5110 than to the facts of the Waterford case, in that, therein the water is foreign in source and not merely foreign in time or season.

It should be noted however, in this connection that argument is here made that the judgment and decree in the case of Central California Investment Company v. Crouch, et al is inclusive of and distributes the waters applied for. This argument that a decree in 1920 dealing with waters naturally flowing in Butte Creek and certain specific foreign waters then emptied into Butte Creek intended to or did include other waters which might in the future be brought into Butte Creek is fundamentally illogical and irrational unless it be true that foreign waters inure to prior appropriators and are not subject

to appropriation until prior appropriators are satisfied. Having held that such is not the case there appears to be no merit in this argument.

Applications Not Prematurely Filed.

The first applications filed were those of Phelan-Parrott and it appears that they were filed about the time the Pacific Gas & Electric Company began construction work, over four years after the company filed the application under which it conveys Philbrook storage into Butte Creek and over a year after a permit had been granted to the company. Nevertheless it seems to be the theory of protestants that such applications are void if filed before water is actually available. The unreasonableness of such a contention is manifest in that if upheld it would prevent an orderly procedure and leave prospective applicants to watch the stream, ascertain the first moment water was emptied therein from a foreign source, and then rush to the Division of Water Rights and get an application on file. Necessarily the first man to conceive the use of such water would have to physically defeat all later comers and engage in an actual campaign of vigilance and speed with possible defeat in the end, not to mention the possibilities of physical combat involved and disorderly conduct throughout. Such a situation is certainly at variance with the spirit and intent of the Water Commission Act and its design and purpose among other things to provide a systematic and orderly method for the initiation of appropriative water rights and in general to give to the first in time a preference in right and a protection of priority.

It is therefore the conclusion of the Division of Water Rights that an application is not premature if filed at a time when there is a reasonable prospect of water being made available in the near future. In this instance the facts recited certainly gave rise to such a prospect when these applications were filed.

Protestants quote from Section 11 wherein it states that certain waters are subject to appropriation, to wit, waters flowing in any river, etc. as sustaining their contention that water may not be appropriated until available in the source applied from. But this section merely defines water subject to appropriation and does not relate to the time of filing an application and nowhere in the act is the question as to when an application may be filed specified. A ready answer, however, is that Section 11 says that water flowing in a river, etc. may be appropriated whereas, the filing of an application does not constitute an appropriation of water. Even if Section 11 does mean that water cannot be appropriated from Butte Creek until it is present in Butte Creek, the filing of an application for a permit to appropriate is not in violation of this section.

Protest of Pacific Gas & Electric Company Irrelevant.

The objection of the Pacific Gas & Electric Company to the Phelan-Parrott applications is merely that they mention Philbrook storage as a source of supply. It is feared that said mention may injure the company if it later desires to dispose of Philbrook storage otherwise than at present. We do not see any prejudice to the company. The applicants are not claiming any title to the reservoir or the water in the reservoir or in the conduits or in the applicances of the company. The effect of the naming of Philbrook storage as a source is merely descriptive and for the purpose of identification of the water which it is sought to appropriate when same has become available by reason of release into Butte Creek.

Sections 11 and 17 of the Water Commission Act make such water released after use by the first appropriator subject to re-appropriation. It is therefore incumbent upon the Division to permit appropriations thereof

without regard to what may or may not be the respective rights of the first or primary appropriator and the subsequent or secondary appropriator of this same water. Contests which may or may not in the future develop between the two will have to be decided when they arise with recourse to the courts if necessary and are not relevant to whether or not a permit shall be granted under ~~Section 17 of~~ the Water Commission Act.

Right of Way to Use Edgar Slough Not Requisite to Issuance of Permit.

It is contended by protestants and by applicant State Land Settlement Board that the Phelan-Parrott applications should be denied because no right of way to use Edgar Slough as a conduit has been shown. Certain of the protestants own lands through which the slough runs and object to its use by Phelan-Parrott as a conduit for the waters sought by them.

In the first place Edgar Slough is apparently a natural water course and is in fact a tributary of the Sacramento River. (United States Geological Survey Maps, California Chico Sheet, edition of May 1895, reprinted September 1905 and Durham Quadrangle Sheet, edition of November, 1912.) No evidence to the contrary is presented and no contention is even made that Edgar Slough is not a natural watercourse. The sole basis of protest is that no permission or right of way to use Edgar Slough as a conduit has been given by certain owners through whose lands the slough runs. It is elementary, however, that natural water courses may be used for the conveyance of water by appropriators. Section 1413 of the Civil Code, which section was enacted in 1872, recognizes a rule of decision established by cases before its enactment. It provides:

> Sec. 1413. The water appropriated may be turned into the channel of another stream and mingled with its water, and then reclaimed; but in reclaiming it the water already appropriated by another must not be diminished.

Numerous California decisions are cited in the footnotes to Sec. 348 of Volume

26 California Jurisprudence page 143 which establish this right to use a stream channel in lieu of a conduit. In the section of California Jurisprudence referred to it is said:

> "It is settled that a stream may be used to carry stored water or water developed from sources not naturally a part thereof ******* A prior right to the use of the natural water of a stream does not entitle the owner of such a right to the exclusive use of the channel; so long as his right is not interfered with there is no reason why the bed of the stream may not be used by others as a channel for conducting water."

Although the right of applicants to use Edgar Slough as a means of conveyance may be questioned in view of the fact that certain of the protestants herein own the bed and banks of the slough, being riparian owners upon a non-navigable watercourse, nevertheless it does not clearly or certainly appear that as such riparian owners they may prevent the use of the slough as a conduit. In this connection Regulation 14 of the Division of Water Rights is urged by protestants. Said regulation provides that an application will be rejected if applicant "is unable to give satisfactory evidence of his ability to secure necessary rights of way."

This regulation was adopted upon the theory that the Division should not perform an obviously futile function such as the issuance of a permit to an applicant who could not fulfill its terms because his use did not authorize eminent domain and parties opposed to him refused access. This regulation was not intended for enforcement in doubtful cases nor in such a case as the present wherein it may well be that applicant has the legal right to use the slough and need not acquire any right of way much less make a showing of his ability to secure such a right of way.

The Supreme Court of Washington has decided that an appropriator may use the channel of a stream without securing a right of way from an objecting

riparian owner, Pleasant Valley Irrigation & Power Co. v. Barker, 167 Pac. 1092. Also in this case the court had before it a statutory provision similar in character and intent to that of our Civil Code Section 1413. Said the Washington Supreme Court:

> "It is contended in appellant's behalf that, since Tallent Creek is a non-navigable stream, and they being the owners of the bed thereof where it passes over their land, respondent has no right to cause its stored waters to flow in the channel of the creek over their land, and thereby, in effect, use the channel of the creek as a way for such water without acquiring such right by eminent domain proceedings, which it has not done. The answer to this contention seems to be found in Section 6337, Rem. Code, reading in part as follows:
>
> > 'Any person may take any water which he may have a right to use along any of the natural streams or lakes of this state, but not so as to raise the waters thereof above ordinary high water mark.'
>
> "This is a statutory recognition of the natural streams of the state as highways for the purposes of conveying water therein, open to the free use of all persons for the conveying of any water so long as such use does not 'raise the waters thereof above ordinary high-water mark.' In other words, the streams of the state are highways for the flow of water therein to the extent that nature has made them such. This permitted use of the channel of Tallent Creek we think has not been exceeded by respondent, and we may add that we think the evidence shows this use by respondent causes no damage to the channel of the creek through appellant's land, by erosion or otherwise. This limited use of the natural streams of the state as ways for the flow of water other than what naturally flows therein, it seems to us, is not inconsistent with the ownership of the bed of the stream by the owner of adjoining riparian lands. Our decision in Miller v. Wheeler, 54 Wash. 429, 103 Pac. 641, in effect so holds."

A further reason for resolving doubts, which may exist as to a right of way, in favor of an applicant is the fact that the Water Commission Act does not mention right of access or right of way as prerequisite to the issuance of a permit nor does a permit authorize access or grant a right of way.

Section 15 of Water Commission Act Inapplicable.

Protestants Comptons and Patrick contend that it should be the policy of the Division to deny applications to those who have an adequate existing source of supply and who seek to avail themselves of another source, especially in a case wherein others having no other source than that sought will be deprived of water. A similar contention is made by the State Land Settlement Board.

Section 15 of the Water Commission Act is apparently relied upon as furnishing support for the above contention and is cited by the State Land Settlement Board as the basis for an argument that the Division has ample power and authority to reject the prior filings of the Phelan-Parrott interests and should reject them as not best conserving the public interest, especially in view of the greater public interest which would be served by filings of the State Land Settlement Board.

The legal proposition involved in the first contention urged is that a prior applicant cannot maintain an application against a subsequent applicant, if the former has an adequate existing supply and the latter has no other source of supply. Of course, an appropriator may not waste water or use more water than is reasonably necessary and in perfecting an appropriative right to use on lands otherwise adequately supplied such an appropriator would have to forego his existing usage to the extent that he made use from a new supply. Permits to use new supplies for old are conditioned upon substitution of the new supply for the old and licenses are granted only to the extent of such a substitution. Therefore no greater amounts than can be beneficially used are allowed and hence violation of the public interest in the beneficial use of water is safeguarded. Herein, however, an additional fact is assumed, to wit, that if the

prior applicant be denied a subsequent applicant will get water which is not available to him otherwise and in support of a denial to the prior applicant the interest of the public welfare is invoked. The public welfare, however, does not operate to favor B over A or vice versa, and in the present case if the Parrott-Phelan interests forego waters used or available from the Sacramento River such waters are thereby available to others and will not be wasted. Furthermore the new source sought by the Parrott-Phelans may be a much more economical source of supply than their present source is or would be and it does not appear that the public interest demands that they be deprived of such a source or benefit so that a like benefit may be conferred upon the State Land Settlement Board.

The public interest and welfare which it is sought to insure by the provisions of Section 15 is believed to refer to use of water rather than to parties using same.

Briefly the element of the public interest and welfare does not appear to be involved in the matter of these applications and in the absence of a case wherein the public welfare is clearly in issue the Division does not feel called upon to deny prior applicants in favor of subsequent applicants. The old time well recognized and generally accepted doctrine of "prior in time, prior in right" should not be lightly departed from.

In acting upon applications for permits the Division has heretofore had occasion to deal with attempts to invoke Section 15 upon the ground of public welfare. In the matter of several applications to appropriate from the Mokelumne River certain protestants urged Section 15. Said the Division after quoting Section 15:

"This section directs the Division, when issuing a permit for the appropriation of water, to insert such terms and conditions as in its judgment will best develop, conserve and utilize in the public interests such water and to reject an application which is clearly against the public interest. It announces as a state policy that domestic use of water is the highest use and that the next highest use is for irrigation and directs the Division to be guided by such policy.

"Considering Section 15 in connection with the other sections of the Water Commission Act and also in the light of the many Superior Court Decisions which have in past years construed the fundamental principles of the doctrine of appropriation of water, it is our interpretation of Section 15 that the Division is authorized to insert terms and conditions relative to use of water by an applicant which are directly pertinent to the manner of his use and the time of his use in order to insure the most beneficial use by him which can reasonably be expected under all the circumstances involved and which may be designed to carry out and safeguard positive provisions of the act but that the act does not impower the Division to impose any conditions which as a legislature it might consider applicable or even to speculate upon what might or might not prove to be of general public welfare and then act according to its best estimate as to what the future developments of this state may prove to be in the public interest. Outside of a manifest and indisputable certainty as to what is against public welfare we would hesitate to deny an application as not best conserving the public interest.

"The Division does not hesitate when issuing a permit to insert such conditions as in its judgment are advisable to afford protection to prior rights, to restrict the permittee to unappropriated water, and to safeguard public welfare generally insofar as compatible with its conceptions of the underlying principles of the appropriation doctrine, the Water Commission Act and Section 15 thereof and the constitution and codes of the State."

Also in the matter of an application to appropriate from the Tuolumne River, the Division again had occasion to consider Section 15 and said:

"The contention is advanced by joint protestants Turlock Irrigation District and Modesto Irrigation District that the second and third sentences of Section 15 of the act are meaningless unless they be applied to the case at hand and held to confer a priority in right upon the districts in favor of their joint application number 5266. In other words the declaration of policy that agricultural use is next highest to domestic use and that the commission shall be guided thereby in acting upon applications is urged

as controlling through in conflict with the fundamental principle of appropriation which has obtained from the beginning of that doctrine and which was carried on into the water commission act, to wit, 'first in time, first in right'. More specifically the argument is that a pending application for power purposes is to be relegated in priority in deference to a subsequent application for agricultural purposes.

"The second and third sentences referred to, if they stood alone as a complete section would lend themselves more to such an interpretation but even then such a meaning would be debatable. However, it is a familiar rule of statutory interpretation that all of an act and all of its sections and each section must be considered as a whole and the context given due consideration. In the light of the fundamental principle of appropriation that 'first in time is first in right' we would expect departures from that doctrine to be expressly declared or so clearly indicated as to leave no room for doubt especially in view of the fact that date of filing an application is made the date to which the priority of a right initiated under the act relates.

"It has been heretofore held by the Division of Water Rights, in the matter of an application filed by the East Bay Municipal Utility District to appropriate from the Mokelumne River for municipal purposes, that such an application is prior in right as against applications prior in time and pending before the Division for other purposes. However, Section 20 of the Water Commission Act is very explicit wherein it declares that such applications 'shall be considered first in right, irrespective of whether they are first in time.' Here then is an instance wherein the act does depart from the fundamental principle of priority which it otherwise observes. In so doing the act as we would expect is very explicit and leaves no room for doubt or uncertainty. Such cannot be said of Section 15 if it be urged that it also constitutes such a departure in every case as between domestic and agricultural applications on the one hand and applications for other purposes on the other hand.

"The true applicability of the declaration of policy contained in these sentences of this section, it seems to us, is clearly indicated by the legislature. The opening sentence of the section and also its closing sentence disclose its subject matter as that of the 'public interest' and the weight to be accorded considerations of 'public interest' in acting upon an application. Hence the two sentences under consideration seem to be merely a declaration that therein the 'public interest' is involved agricultural use shall rank next to domestic use. In other words the importance of agricultural use is emphasized and in the event that an application for direct flow for power purposes such as a low head development near the mouth of a stream were filed, such an application might result in a dedication of the stream exclusively to power development and such a dedication might well be detrimental

to the 'public interest' and especially to agricultural development. Herein the section would come into play with its guiding declaration that agricultural use is next highest to domestic use. This clause would in such an event serve its purpose as declarative of what is the public interest and in pursuance of Section 15 it would appear that the application should either be rejected as against public interest or so conditioned as to allow subsequent agricultural developments to proceed even to the detriment of such a power development and this in the absence of any other pending applications.

"But in the matter of the pending application, the storage for power purposes proposed by applicant is to be made on the upper reaches of the stream system and the water is to be returned to the stream and will even be available to lower storage in reservoirs of these protestants or to use for direct application by them. There is nothing per se detrimental to the public interest in such a storage and in general the ideal regulation of stream flow seems to be by upper storages and uses for power with a return to the stream for lower storage or direct application for agricultural purposes. We think the second and third sentences of this section serve as a guide in such cases for instance as those wherein a proposed use for non-agricultural and non-domestic purposes will be so prohibitive of agricultural or domestic uses as to raise the issue as to whether a stream is to be dedicated to power use for instance to the exclusion of agricultural use, and in such a case agricultural use is declared by the legislature to be more in the public interest. In applying this section then the proposed use must be such as to operate against the 'public interest' and if the controversy should hinge on whether the use of a given stream system shall be for power or for agriculture then agriculture must be given the preference.

"It is therefore concluded that the instant situation is not one wherein the provisions of Section 15 of the Water Commission Act are intended to apply and furthermore the division is not able to say that the proposed use by applicant will prove to be less in the public interest than would that of the protestants if this application were to be denied in favor of protestants usage under their subsequent application number 5266."

In accordance with the precedents above quoted from the Division is of opinion in the instant case that an application of Section 15 is not involved by the facts presented. Also, in accordance with the precedents quoted from above, the Division is of opinion that the Legislature has not and could

not constitutionally delegate its general legislative authority to determine public policy and welfare to an administrative official, board, or body. In other words the legislature has not and could not delegate unlimited and undefined authority upon the Division whereby it is or would be empowered to use its own unrestricted judgment and discretion as to what is or might be in the public interest or for the public welfare.

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CONCLUSION

Applications 5109 and 5110 were filed simultaneously with the intent of applicants to share and share alike the water which would become available through the operation of Philbrook Reservoir. This amount cannot exceed 5,060 acre feet per annum which is the amount to be stored by Pacific Gas & Electric Company in said reservoir, and the combined rate of diversion under Applications 5109 and 5110 cannot exceed 20 cubic feet per second, which is the maximum rate of release proposed by the Pacific Gas & Electric Company. Either applicant may on occasion however desire to divert the full amount of said release at a time when the other of said applicants does not desire to use the water and therefore while each application may be approved for the full amount of 20 cubic feet per second there should be included in the permit of each application a limiting clause to the effect that the total amount diverted under both permits shall not exceed 20 cubic feet per second.

The natural flow of Butte Creek being wholly appropriated and the importations of water stored in Philbrook Reservoir being wholly appropriated under the prior Applications 5109 and 5110 and there being no prospect of the immediate development of other ~~imported~~ supplies it appears reasonable that action should be withheld upon Applications 5143 and 5473. We are further

impelled to this course by reason of the fact that there are other pending applications to appropriate from Butte Creek which are protested and must be heard involving the use of any additional supplies which are ultimately in prospect. Our action therefore at this time upon these applications is not governed by considerations developing out of the protests filed.

O R D E R

Application 5109 of James D. and Mary Louise Phelan, Application 5110 of the Parrott Investment Company, Application 5143 of the State Land Settlement Board and Application 5473 of A. F. Lieurance, for permits 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 Applications 5109 and 5110 be approved each for an amount not to exceed 20 cubic feet per second and that permits be granted to the applicants subject to such of the usual terms and conditions as may be appropriate and a special term or condition to the effect that the total amount of water diverted under both permits shall not exceed 20 cubic feet per second.

IT IS FURTHER ORDERED that action on Applications 5143 and 5473 be withheld until further order is entered.

Dated at Sacramento, California, this 18 day of Jan. 1929.

Harold Conkling
(Harold Conkling)
CHIEF OF DIVISION OF WATER RIGHTS

SEB: MP
WES:

Apps 5109 1929 E.N.B.