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

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In the Matter of the Petition to Change the Points of Diversion under Permits 796, 797 and 798 heretofore issued upon Applications 1554, 1624 and 1655 of the Glenn-Colusa Irrigation District allowing the Appropriation of an Aggregate Amount of 120.78 Cubic Feet per Second from the Trough of Colusa Basin and Sacramento River in Colusa County for Rice Irrigation Purposes.

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Decision A 1554, 1624, 1655 D 249

Decided Sept. 21, 1929

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APPEARANCES AT HEARING HELD SEPTEMBER 24, 1926.

For Applicant and Petitioner:

Glenn-Colusa Irrigation Dist.

Homer J. Hankins

For Protestants:

Parrot Investment Co.,  
James D. Phelan, et al  
River Farms Co. & Recl. Dist. 108  
Princeton-Codora-Glenn Irrig. Dist.  
U. S. Engineer's Office

Andrew F. Burke  
Daniel C. Murphy  
A. E. Chandler  
H. C. Bell  
O. G. Stanley

Examiner

Edward Hyatt, Jr., Chief of  
Division of Water Rights,  
Department of Public Works  
State of California

O P I N I O N

Applications 1554, 1624 and 1655 were filed by Colbert Coldwell as a trustee for others on December 3, 1919, January 14, 1920 and February 5, 1920, respectively, each application declaring as follows:

"The source of the proposed appropriation is 1 -  
Trough of Colusa Basin, 2 - Sacramento River."

In Paragraph 4 of each of said applications the point of diversion from the trough was definitely fixed but as to the point of diversion from the river it was declared "not definitely determined but probably will be on lands of Campbell and Dwyer about one mile south of Colusa". Upon a basis of the maps filed the state water commission wrote in the following notation upon the face of Applications 1624 and 1655 after the above quoted statement as to the diversion point from the river, to wit: "See Tracing G.V.R. N. 86° 02' E. 11688.2 ft. from S.E. Cor. of Sec. 36, T 16 N, R 2 W, M.D.M." and in the notice of the application prepared for publication by the commission and published in the "Williams Farmer" the points of diversion from the river for all three of these applications were described as at a point "N. 86 deg. .02 min., E. 11,688.2 ft. from SE Cor. Sec. 36, T 16 N, R 2 W, M.D.M."

These applications were assigned to the Williams Irrigation District on December 4, 1920 and permits were issued on December 14, 1920, it being specified that construction work upon these permits should begin on or before May 1, 1921 and that construction work and use of water should be complete on or before May 1, 1923. The permits issued specify that "the total amount of water appropriated from the two sources shall be limited to the amount which can be beneficially used and shall not exceed" the quantities named therein.

An inspection in the fall of 1923 revealed that construction work for the diversion from the trough had been completed and that a usage of approximately 50% had been made from this source during the years of 1920, 1921 and 1923. As to the Sacramento River source pumps had been purchased but not installed. During 1920 and 1921 the permittee hired others to pump water from the river into the trough for its use. No use of water was made in 1924 but during this year the permittee district was consolidated and become a part of the Glenn-Colusa Irrigation District, which district in 1925 began supplying water through its canals as extended to the Williams district and from its diversion point on the Sacramento River which takes out above Hamilton City. The Glenn-Colusa District as successor in interest to the Williams District continues to supply water to the lands involved in these permits and has filed a petition under date of October 8, 1925 to change the point of diversion under these permits to that point from which it has diverted for its other lands and from which it began in 1925 to serve the lands under these permits.

The petition to change point of diversion was filed immediately after the consolidation of the Williams and Glenn-Colusa Districts, notice of the petition was duly advertised, protests against the change were filed, a hearing was held September 24, 1926 and briefs have been filed by the contending parties.

#### PROTESTS

The River Farms Company of California and Reclamation District No. 108 filed a joint protest under the impression that the petitioner sought to change a diversion point on the trough of Colusa Basin to the river. These protestants are appropriators under water commission act permits and from points on the river below the point of diversion therefrom which is named in the applications which the Glenn-Colusa District now holds as successor in

interest to the Williams Irrigation District. Attorney A. E. Chandler of San Francisco represented these protestants at the hearing but has filed no brief. No injury to these prior appropriators is apparent inasmuch as the diversion point as presently located is upstream from their points of diversion and the change proposed will move the point of diversion still farther upstream. Their only possible objection must therefore rest upon the contention that the petitioner herein now has no valid and existing diversion point from the river and therefore cannot be allowed to change that which it does not possess.

The protest of the Princeton-Codora-Glenn Irrigation District is based upon the contention that the water level in the River will be lowered at its pumps in the event that the diversion point which it is sought to change is moved from its present downstream location to the upstream location named by petitioner. In other words this protestant district is a prior appropriator from the river and is diverting at points intermediate and alleges increased pumping costs as its injury in the event of a change. This protestant was represented at the hearing by attorney H. C. Bell of Willows but has filed no brief.

Protestants Parrott Investment Company represented by Garret W. McEnerney and Andrew F. Burke and James D. Phelan, et al represented by Daniel C. Murphy are intermediate riparian owners who pump from the river and allege that the change will so lower the river level at their pumps as to compel reconstruction of their plant and cause increased pumping costs. Briefs filed by Messrs. McEnerney and Murphy and Andrew F. Burke, of counsel vigorously present the contentions of these protestants. Messrs. Hankins and Hankins have filed opposing briefs for the petitioner.

Mr. O. G. Stanley of the United States Engineers Office, Second San Francisco District, also appeared at the hearing and filed a letter from that office relative to the War Department's attitude concerning the protection of navigation.

RIGHT OF GLENN-COLUSA IRRIGATION DISTRICT  
TO DIVERT FROM SACRAMENTO RIVER

Protestants urge that the Glenn-Colusa District has failed to maintain a right to divert from the Sacramento River in that no river diversion has ever been made under the permits granted, in that works to enable such a diversion have not been constructed, and in that the times to commence construction and to complete construction and to use river water as specified in the permits have long since expired.

The historical sequence involved appears to be that in 1919 Coldwell and others formed a trusteeship with the purpose of filing applications, securing permits and building diversion works and transferring the same to an irrigation district which was to be organized. That in carrying out this purpose Coldwell filed the applications involved and named the trough of Colusa Basin and the Sacramento River as a source. In a letter from Coldwell under date of December 3, 1919 which accompanied the first of these applications it is said:

\*\*\*\*\*Please be advised that if this permit is granted that it will be agreeable to the parties to whom said permit is granted to have you rescind the permit to divert water from the 'trough' at such a time as a diversion works on the Sacramento River are completed."

Also at the hearing witnesses for petitioner testified that the Sacramento River was the ultimate source and that the trough of Colusa Basin was only a temporary source until such a time as diversion works from the river to the trough could be built. (Testimony of W. R. Lindersmith, pages 17, 54 and 55 of the transcript; William Durbrow, pages 45 and 46 of the transcript.)

Also in the report of Engineer H. H. Blee to State Engineer McClure under date of May 17, 1920, page 9, paragraph 25, the following statement is made:

"The idea of organizing the Williams Irrigation District and constructing an irrigation system to irrigate the lands to be included in this district was initiated during the latter part of October, 1919. On December 5th, 1919, the land owners entered into a written agreement with Colbert Coldwell of San Francisco and J. E. Mallon and R. E. Blevins of Colusa, employing and authorizing them 'to act as Superintendents for the organization and construction of an irrigation system and authorizing them to use their best efforts to promote the formation of an Irrigation District under the 'California Irrigation District Act' out of said land, and to apply to the proper authority for the right to divert water from the Sacramento River for the irrigation of said lands, and from 'the Trough' for the purposes of irrigating said lands temporarily and until the right to take water from the Sacramento River can be determined.'"

Also in the report of Engineer Mills to the Directors of the Williams Irrigation District under date of May 15, 1920, it is stated:

"The plans provided for taking the water supply for the District from the Sacramento River at a point on the west bank about three miles below the town of Colusa, Colusa County, California, said point of Diversion being on the lands of W. P. Dwyer and J. F. Campbell and near the north  $\frac{1}{4}$  corner of what would have been Sec. 4 - Township 15, Range 1 West had these lands been sectionized. A pumping plant will be located on the bank of the river at the proposed point of diversion.\*\*\*\*\*"

"The pumping plant which it is proposed to install at the river will have a capacity of 300 cu. ft. per second, so that so far as this equipment is concerned there will be ample capacity for satisfactory service to the district. This river pumping plant will consist of four 36 inch Byron Jackson centrifugal pumps\*\*\*\*\*"

Further strengthening the position taken by the petitioner that the River was the primary source of the appropriation contemplated is the fact that as soon as Coldwell, Mallon and Blevins were authorized to proceed they purchased the pumps for the river installation along with the rest of the materials and equipment necessary, construction work to the trough was then rushed to completion and that source was used during the season of 1920.

The emergency for a water supply having thus been met at a great expense and in great haste and coincident with the legal organization of the district, it is not surprising that the directors then took time to consider the further necessities of the district and were not inclined to act hastily and in advance of that careful consideration of ways and means which an urgent necessity had not previously allowed. Also following closely upon the season of 1920, the financial debacle in the rice industry made the cost of a supply a much more serious problem than it had appeared previously. Thus the construction to the river was deferred but not abandoned according to the testimony at the hearing which is supported by the fact that the materials then owned by the trustees and held by them for use in the construction of a river diversion were not disposed of until after a consolidation and supply from the Glenn-Colusa system was agreed upon and not until actual consolidation was in fact effected. Also during the seasons of 1920 and 1921 waters from the river were pumped by others for the Williams district and paid for by that District. Thus while negotiations were being conducted with the view of securing river water by another method or means, the Williams District retained its original plan to divert from the river and another and better means or method having been arranged its successor in interest at once applied for permission to change the point of diversion and it was not until then that the trustees disposed of some of the equipment they had held in readiness from the beginning for use in the installation of the original diversion which was planned from the river. Also in furtherance of the river plan a right of way was secured from the river and also surveys made for the line of the canal from the original point of diversion from the river. In view of all these circumstances it is believed that the Williams District was diligent, active and bona fide throughout in its endeavor to divert river water and took all the steps to accomplish that purpose which could reasonably have

been expected. As to the scope or quantity of the diversion from the river for which a permit was sustained in good standing, the original intent to take all from the river has been called to attention and the permit issued is in terms which authorize the taking of the total quantity allowed from the river.

The point is made, however, by protestants that the Williams District allowed the time for completion of the river diversion and usage therefrom to expire without having secured an extension of that time from the Division of Water Rights. Such is the case and while it is true that an extension should have been applied for, such an omission is not deemed fatal. The water commission act obviously does not automatically divest a permittee for a failure to apply for an extension of time. Such a failure may result in a revocation of the permit if the Division of Water Rights gives notice of a hearing and after a hearing decides that good cause for an extension does not exist and that the permit should be revoked. (Section 18 of the Water Commission Act) The facts just reviewed are such, however, that the Division would undoubtedly have granted an extension had it been applied for and were such that the Division did not deem revocation proceedings proper and did not take such proceedings.

Section 20a of the Water Commission Act is relied upon by protestants as sufficient to accomplish an automatic revocation for a failure to apply for an extension of time. That section, if it so provides is contradictory of Section 18 and certainly should not be so interpreted unless such an interpretation is unavoidable. We deem such an interpretation as contended for not only avoidable but even contrary to the obvious application of Section 20a which is to a case wherein construction and usage has been completed, a license has been granted based upon such completion and actual usage, and

then the licensee has failed to use water for three consecutive years. An application of this section to the instant case would constitute a confusion of the time allowed for consummation of a use by diligent endeavor and the time provided for forfeiture of an acquired right by non use. The consummation of a right in very many cases takes and has taken a great deal longer than three years after issuance of a permit. A reasonable time for the consummation of an appropriative right cannot be arbitrarily fixed and much longer periods than lapsed in the present case have been allowed heretofore by the Division.

The Division is therefore of opinion that petitioner and its predecessors in interest have maintained the validity of these applications and permits for the river diversion and have exercised that diligence required under all the facts and circumstances involved and having applied for permission to change the diversion point specified, Section 16 of the water commission act applies and governs and should now be considered. This section expressly provides that changes may be applied for and secured by a permittee. The granting of such permission is contingent upon no injury to any legal user from the source involved.

RIGHT OF GLENN-COLUSA IRRIGATION DISTRICT TO  
CHANGE THE DIVERSION POINT UNDER THESE  
APPLICATIONS AND PERMITS

The question of injury to others is the controlling factor in determining whether the change petitioned for is allowable and it appears that the meaning to be given "injury" as intended by this section is of utmost importance. Protestants contend that any lowering of the water level at their pumps is an injury within the meaning of Section 16 of the Water Commission Act.

Section 16 allows a change in diversion point upon a finding "that such change\*\*\*\*\*will not operate to the injury of any legal user of such

waters." Protestants herein allege no injury by reason of depletion of supply, that is, it is not contended that the change proposed will deprive them of an adequate flow at their diversion points. The injury which they advance is merely a lowering of the river level necessitating a slightly higher pumping lift, perhaps a few inches. The question then is whether such an alleged injury is an injury within the contemplation of Section 16. It may well be that the injury therein contemplated was an injury to the water supply rather than to the means or method of taking. Such a limitation to the scope of "injury" as intended in this section is supported by the fact that the Supreme Court of this state held a prior appropriator had no legal redress against a subsequent appropriator whose taking merely lowered the water level at the prior appropriator's diversion works.

In any event the "injury" which will necessitate denial of a change must be a legal injury, in other words, an injury which will give a cause of action for damages or injunction. The right to change has been long recognized in the decisions of our courts as a very important element in the value of an appropriative water right and it is unreasonable to suppose that the legislature ever intended to curtail a right so valuable and well recognized if indeed it could lawfully do so. Hence it is believed that in enacting Section 16 the Legislature merely declared the previous rule of law governing changes which had been established by court decisions.

It is at once apparent that the Princeton-Codora\*Glenn Irrigation District's allegation of injury does not state a cause of action and is insufficient. Said district is a prior appropriator, its supply will remain adequate and no allegation to the contrary is made. Its alleged injury is but a slightly lowered water level or increased pumping lift. The case of Natoma Water etc., Co. v. Hancock, 101 Cal. 42, 48, 50, 52, 31 Pac. 112, 35 Pac. 334 is directly in point. In that case plaintiff was a prior appro-

priator and had been diverting by a dam and canal for forty years when defend-  
and began to provide a new and additional appropriation of water from above.  
Defendant's usage threatened to lower the level of water at plaintiff's dam  
and thereby necessitate the raising of plaintiff's dam either earlier than  
usual <sup>or</sup> in some years when otherwise a raising of the dam would not be nec-  
essary. In order for plaintiff to get a full head it was necessary for  
the water to flow over the crest of its dam in a depth of at least ten  
inches. In other words the top portion of the canal took out of the stream  
<sup>elevation</sup> above the crest of the dam and due to floods it was not possible to  
permanently raise the dam without endangering the canal. Although the court  
did not consider the alternative procedure of lowering the intake of the  
canal, <sup>which</sup> that may have been infeasible due either to the slight gradient of  
the canal or the elevation necessary to utilize its waters. Thus in years  
of very low flow the plaintiff raised its dam by adding a false crest of  
lumber or riprap and gunnysacks.

The plaintiff was thus contending for a right to have water flow  
down to it sufficient to not only supply its full head but to maintain the  
stream level at a height at least ten inches above the crest of its dam. The  
Supreme Court reversed the trial court and held that all plaintiff was entitled  
to way sufficient water to give it a full head and that plaintiff must change  
its diversion methods or practices as might be necessary to get that full head.  
Said the court:

"As to the necessary lowering of your head of water by  
the diversion of the surplus, that will no doubt cause you some  
inconvenience and trouble which you have heretofore escaped, but  
it is damum absque injuria. There is but a limited supply of  
water in this state available for irrigation and other useful  
purposes, and a paramount public policy requires a careful econ-  
omy of that supply. So long as there is but a single appropriator  
of water on a stream it matters not how imperfect or wasteful  
may be the means by which he diverts the quantity of water to  
which he is entitled. No one else is affected and there is no  
ground for complaint.

"But when subsequent appropriators divert the entire surplus at points above him he is required to use all reasonable diligence to husband what is left, and if by such diligence and the use of ordinary means of diversion he can obtain all that he is entitled to he cannot complain on account of the trouble and expense which it may involve.

\*\*\*\*\*While the right of the prior appropriator is carefully protected, he is compelled to exercise it with due regard to the rights of others and the paramount interests of the public. The quantity of his lawful appropriation cannot be diminished, but he must return the surplus to the stream without unnecessary waste, and he must use reasonable diligence and reasonably efficient appliances in making his diversion in order that the surplus may not be rendered unavailable to those who are entitled to it. Upon the same principle it must be held that a prior appropriator whose means of diversion become insufficient for his purposes by reason of their inherent defects, when the surplus is diverted from above him, must take the usual and reasonable measures to perfect such means."

On the other hand the alleged injury of the Parrot Investment Company and the Phelans although precisely the same in character is based upon claim of riparian right as distinguished from appropriative right and is therefore supported by counsel as a damage which is actionable and which constitutes an injury within the provisions of Section 16 of the Water Commission Act. Counsel cites cases culminating with the recent decision in the case of Herminghaus et al. v. Southern California Edison Company, 200 Cal. 81, 252 Pac. 607 and contends that these decisions establish the right of the riparian owner to enjoin any interference by an appropriator. In the latter case the right of a lower riparian owner to insist upon the full flow of the San Joaquin River was upheld. The full flow in that case operated to raise the water to a level which would cause it to flow out into high water sloughs and over top the banks and overflow the lands of plaintiff. Inasmuch as plaintiff was held entitled to this natural irrigation and the full flow necessary to cause said irrigation by overflow, counsel are enabled to base a strong argument upon this case to the effect that protestants are entitled to an undiminished flow of the Sacramento River in order to maintain its water level at their pumps.

But, whether or not the Supreme Court would apply the doctrine of the *Herminghaus* case to the present case and hold that a riparian owner is entitled to stream flow for the sole purpose of supporting inviolate an artificial means of diversion as well as for the sole purpose of supporting inviolate a natural irrigation by overflow, need not be determined in view of Sec. 3 of Article XIV of the Constitution of California since enacted and which provides as follows:

"Sec. 3. It is hereby declared that because of the conditions prevailing in this state the general welfare requires that the water resources of the state be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this state is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attached to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained."

In view of the foregoing constitutional amendment, adopted by vote of the people at the last general election, it is believed that the protestants have no right to insist upon maintenance of water level for the sole purpose of facilitating pumping but must defer to the public policy and welfare declared in the above quoted amendment.

It is therefore concluded that protestants have failed to allege an injury within the meaning of Section 16 of the Water Commission Act and that permission to change point of diversion should be granted.

O R D E R

Permits having been heretofore issued in approval of Applications 1554, 1624 and 1655 petitions having been filed for the purpose of changing the points of diversion under said permits, protests against the approval of said petitions 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 the aforesaid petitions under date of October 8, 1925 for change in points of diversion under Applications 1554, 1624 and 1655, Permits 796, 797 and 798 be granted.

Dated at Sacramento, California this ~~21~~ 21 day of Sept, 1929.

EDWARD HYATT  
STATE ENGINEER

BY Harold Conkling  
Deputy

SEB:CM