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

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In the Matter of Applications 2897, 2898, 2899 and 2900 of C. H. Widemann to Appropriate from Scott Creek, Tributary to the Pacific Ocean in Santa Cruz County for Agricultural and Domestic Purposes.

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DECISION A. 2897, 2898, 2899, 2900 D 294

Decided August 24, 1931

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APPEARANCES AT HEARING HELD JULY 22, 1927

For Applicant	
C. H. Widemann	No appearance
For Protestants	
Fish and Game Commission of California	No appearance
Board of Supervisors of Santa Cruz County	" "
Emilio Gianone, et al.	" "
William Purdy	" "

EXAMINER: Spencer Burroughs, Attorney for Division of Water Rights, for Edward Hyatt, Jr., Chief of Division of Water Rights.

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OPINION

GENERAL DESCRIPTION OF PROJECTS

Under these four applications filed June 22, 1922, it is proposed to divert water from Scott Creek in Santa Cruz County without storage from about April 1st to about December 1st of each season for irrigation and domestic purposes on tracts of land lying within the boundaries of the Rancho Aqua Puerca and Las Trancos in Santa Cruz County. The essential features of the applications are as follows:

App.No.	Amount	Point of Diversion	Area to be Irrigated
2897	1.785 c.f.s.	NE¼ NE¼ Sec.19, T10S, R3W, M.D.M.	463 acres
2898	0.610 "	NE¼ SE¼ Sec.19, T10S, R3W, "	75 "
2899	2.690 "	NE¼ SE¼ Sec.18, T10S, R3W, "	215 "
2900	0.310 "	NE¼ SE¼ Sec.18, T10S, R3W, "	25 "
	5.395 c.f.s., total		

The applications were protested by the following:

1. Fish and Game Commission of California
2. Board of Supervisors, Santa Cruz County
3. Emilio A. Gianone, Joseph L. Gianone, Emma Gianone and Virginia Gianone
4. William Purdy

PROTESTS

The California Fish and Game Commission and the Board of Supervisors of Santa Cruz County protest the approval of the applications on the ground that any diversion made by the applicant would materially affect, if not destroy, the run of Steelhead trout in Scott Creek on which the Commission has established an egg collecting station which has been in use by the County of Santa Cruz and the State Fish and Game Commission for a period of eighteen years.

Emilio A. Gianone, et al. claim the ownership of 1891.405 acres of land which are riparian to Scott Creek and allege in effect that if the applications are approved there would not be sufficient water to satisfy their irrigation, stock watering or domestic demands. They claim that they have used the waters of Scott Creek for more than thirty years last past.

William Purdy claims the ownership of riparian lands lying within Section 6, T 10 S, R 3 W, and Sections 25 and 36, T 9 S, R 4 W, M.D.B. & M. and alleges in effect that as all that portion of the waters of Scott Creek which is appurtenant to this land is necessary for use thereon, any diversion which applicant may make under his applications would interfere with

the rights which he and his predecessors in interest have enjoyed for more than thirty years last past.

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

Applications 2897, 2898, 2899 and 2900 of C. H. Widemann were completed in accordance with the Water Commission Act and the requirements of the Rules and Regulations adopted pursuant thereto and being protested were set for public hearing in accordance with Section 1a of the Water Commission Act on July 22, 1927, at 10:30 o'clock A.M. in Room 109 State Building, San Francisco, California. Of this hearing applicant and protestants were duly notified.

DISCUSSION OF PROTESTS

These applications were filed in June, 1922, by C. H. Widemann to appropriate a total of 5.39 cubic feet per second from Scott Creek in Santa Cruz County for domestic and irrigation usage upon lands riparian and non-riparian to said creek. The diversion points are upon the lands of the applicant, who owns all land bordering on Scott Creek from the uppermost point of diversion under his said applications to and including the creek's point of entry into the Pacific Ocean. There are therefore no lower riparian owners involved and there are no protestants claiming as lower appropriators.

Protestants are (1) those claiming priority of right as upper riparian owners and users and (2) the Division of Fish and Game of the Department of Natural Resources and the Board of Supervisors of Santa Cruz County. Those protestants claiming interference as upper proprietors and users are clearly without a valid cause of complaint. Applicant's lower diversions will work no injury either in fact or in law. The opinion in the case of

San Joaquin and Kings River Canal and Irrigation Co. v. Worswick, 187 Cal. 674, 203 Pac. 999 is conclusive upon these protestants. The following is quoted from said opinion:

> "It is necessary, therefore, to determine whether or not the decisions of our courts have established the proposition that an appropriation from a stream for use upon lands in private ownership, and made by means of a dam situated upon land in private ownership, gives to the appropriator a right to the water appropriated which is superior to the right of riparian owners above to the use of water from the stream upon the riparian land. There are no decisions in this state which declare or recognize this doctrine. On the contrary, it has always been held that the rights of the riparian owner of such land above are superior to those of the diverter or appropriator below. The law as established and recognized by the decisions of this state, in every case in which it has been considered, is declared to be that the rights of a riparian owner in the waters of the abutting stream are not affected by any interference with the waters of the stream, made on privately owned land after they pass below the boundaries of such riparian land. Such use below, no matter how long continued, or what may be the nature of the claim of right thereto by the user thereof, in no manner affects the riparian rights pertaining to the land above the place of use and point of diversion. Thus in Hargrave v. Cook, 108 Cal. 77, 41 Pac. 19, 30 L. R. A. 390, the court said:
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> "'With any use or diversion of the water after it has passed his land the upper riparian proprietor, having no ownership in and no longer any rights to it, would have no concern. ********* None of his rights would or could be impaired thereby, and without such an impairment he would be without injury, and, consequently, without cause for complaint or redress. "His right extends no further than the boundary of his own estate. He cannot complain of the mere facts of the diversion of the water course either above or below him, if, within the limits of his own property, it is allowed to follow its accustomed channel."'
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> "And further, speaking of the effect of these facts on the law of prescription, the court proceeds to say:
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> "'Before one can acquire a right to the doing of an act in which another so acquiesces, the act itself must amount to an invasion of that other's rights, and the doing must either have been so long continued as that a prescriptive claim can be supported upon the theory that the acquiescence presupposes a grant, or under such circumstances as will raise an estoppel against the objecting party. But, as the upper riparian proprietor's right to object to any use or diversion of the water below ceased when it had flowed past his boundary, any such use could not work an invasion of his rights, and he was not called upon to protest against it.'

"The same doctrine has been declared in Hanson v. McCue, 42 Cal. 310, 10 Am. Rep. 299; Bathgate v. Irvine, 126 Cal. 140, 58 Pac. 442, 77 Am. St. Rep. 158; Cave v. Tyler, 133 Cal. 567, 65 Pac. 1089; Hudson v. Dailey, 156 Cal. 627, 105 Pac. 748; Perry v. Calkins, 159 Cal. 177, 113 Pac. 136; Miller & Lux v. Enterprise, etc., Co., 169 Cal. 423, 147 Pac. 567; and Holmes v. May, 199 Pac. 327.

"The proposition is settled by these decisions, and it should be adhered to as a rule of property, even if we were doubtful of its soundness in logic, reason, and justice. But we have no such doubt. The rule that such diversions do not affect the upper riparian rights follows logically from the well-settled rule stated in the above-cited cases, and in every other case on the subject of prescription, that—

"'In order to establish a right by prescription the acts by which it is sought to establish it must operate as an invasion of the right of the party against whom it is set up. The enjoyment relied upon must be of such a character as to afford ground for an action by the other party.' Anaheim W. Co. v. Semi Tropic W. Co., 64 Cal. 192, 30 Pac. 625."

Coming now to the protest of the Division of Fish and Game, and the County of Santa Cruz applicant vigorously contends that the law as declared in the Worswick Case, supra, is applicable and that said Division's protest is, therefore, to be disregarded. However, the usage made by the Division of Fish and Game is so closely related to the maintenance of the flow from the place of use downstream to the ocean as to make it appear that protestant is an appropriator who is in fact as dependent upon the maintenance of flow from its place of use as it is upon the maintenance of flow from above to its place of use. Obviously the Worswick case and the cases therein relied upon proceeded upon the premise that lower diversions could not in fact work injury to upper users. Herein, however, we are faced with an apparently exceptional situation and one wherein apparently lower diversions may destroy the vested right of an upper user.

The Division of Fish and Game owns and operates an egg-taking station upon Scott Creek above the lands of applicant and by means of a dam

and fish trap and other works at this station, diverts and uses the water of said creek as necessary to enable the taking of steelhead trout and the collection of eggs therefrom. These eggs are developed at the Brookdale hatchery of said Division which is located upon a tributary of Scott Creek and the young fry are planted in other streams along the coast except for a sufficient number, which are returned to Scott Creek to perpetuate the run in said creek. It appears that a minimum flow of thirty cubic feet per second from April 1st to May 1st is essential in order to permit the adult steelhead to ascend from the ocean to their spawning grounds near the egg-taking station and that a minimum flow of two second feet from May 1st to December 1st is necessary in order to permit the small fry to descend to the ocean. The Division is willing to withdraw its protests if applicant will agree to take water only insofar as his diversions can be made without reducing the flow below the minimum quantities stated.

In reality the Division's protest is based upon an interference with the passage of fish to and from its egg-taking station by reason of proposed diversions between the station and the ocean with a resultant destruction of the fish run and the usefulness of the station. Upon analysis this protest is, therefore, not based upon a depletion of supply insofar as water available for diversion and use at the station is concerned but upon an interference with an asserted right of way for the passage of fish upstream to the station and downstream from the station.

In view of authorities holding that use of water for the propogation of fish constitutes a beneficial use for which water may be appropriated, it appears that the Division of Fish and Game must be accorded the status of a prior appropriator with a point of diversion and a place of use at the egg-

taking station (2 Kinney on Irrigation and Water Rights, 2nd Ed., page 1205, Par. 700; Smith Canal Co. v. Colorado Ice etc. Co., 82 Pac. 940; Ex parte Elam, 6 Cal. App. 233, 91 Pac. 811; State v. Barker, (Utah) 108 Pac. 352). As such an appropriator the Division is clearly entitled to protection against depletion of supply of water by the diversions of subsequent appropriators or proposed diversions by would be appropriators. The question here involved, however does not relate to adequacy of a water supply at the point of diversion but to an interference with maintenance of a stream flow below which is necessary for the passage of fish. In other words does an appropriator of water for fish propagation also acquire a right to an appropriation of an entire stream flow or a flow far in excess of the quantity actually utilized for propagation upon the ground that such a flow is necessary to convey fish to and from its place of use?

The statement of the above question calls to mind the decision in the case of Antioch v. Williams, 188 Cal. 451, 205 Pac. 688 wherein the Town of Antioch as a diverter, user, and appropriator of less than one cubic foot per second contended that it had acquired the right to a flow of over 3000 cubic feet per second of the waters of the Sacramento River for the purpose of repelling a tidal invasion of salt water from Suisun Bay. While it is true that the court declared this case to be unprecedented in character, recognized that the conditions involved had never been considered in any decision, stated the question to be open for the adoption of such a rule as it might deem just, and decided against the claim of Antioch on account of its unreasonableness and the detrimental consequences that would result from its establishment, the case in question is parallel insofar as the claim herein

is for water in excess of that beneficially used and as incident to the maintenance of the benefit obtained by usage. Likewise, parallel in this respect is the case of Schodde v. Twin Falls L. & W. Co., 32 Sup. Ct. Rep. 479 wherein plaintiff diverted by water wheels which were rendered useless by the back water from defendant's dam. Said the court:

> "It is unquestioned that what he has actually diverted and used upon his land, he has appropriated, but can it be said that all the water he uses or needs to operate his wheels is an appropriation? As before suggested there is neither statutory nor judicial authority that such a use is an appropriation. Such a use also lacks one of the essential attributes of an appropriation— it is not reasonable."

Also, in point upon this question as to the limit of the right by appropriation is the case of Natoma Water & Min. Co. v. Hancock, 101 Cal. 42, 35 Pac. 334, wherein the prior appropriator was held to have no cause of complaint because his means of diversion became insufficient due to diversions from above and was advised to improve his means of diversion. In other words a flow necessary to elevate the surface of the stream so that water would flow into plaintiff's ditch was not acquired by plaintiff but the excess over that required for plaintiff's actual diversion was held open to appropriation by the defendant.

Although not unmindful of the recent case of Herminghaus et al., v. Southern California Edison Co., 200 Cal. 81, 252 Pac. 607, wherein the ruling of the Natoma Case, supra, was not applied against a riparian plaintiff, nevertheless, the above cases illustrate that the claim of right of way for fish passage is not within a claim of water right but is extraneous to that claim and obviously it is not as closely related as is a flow essential to elevate water and cause it to overflow the lands of a riparian owner or reach a height sufficient to flow into an appropriator's ditch.

Further considering the point in issue, to wit; whether or not the Division of Fish and Game has a legal right to the maintenance of a stream intact for fish passage as against a would be appropriator, there are no provisions in the Water Commission Act which provide a dedication of water for fish passage or in any wise indicate that waters shall be withheld from appropriation in order to supply fish with a medium of travel.

The Division of Fish and Game is authorized to protect fish as provided in Section 642 of the Political Code which enumerates its powers and duties but nothing therein contained confers unlimited power to protect fish or authorizes the nullification of the Water Commission Act or declares fish protection to be the prime consideration in the event of its conflict with other provisions of law. Indeed that section states that the Division of Fish and Game shall see "that the laws for the protection and preservation of *****fishes*****are strictly enforced." Thus the legislature seems to have limited the Division of Fish and Game to powers and duties enumerated in this section and in other sections such as 626 to 637½ of the Penal Code. In this connection Sections 636c and 637 provide the alternatives afforded the Division of Fish and Game in the event that it is deemed that fishways cannot be constructed which will serve the purpose of fish travel over or around a dam. The alternatives are to require erection of a fish hatchery or the planting of fish and not to prohibit the building of a dam or the appropriation of water thereby. Certainly such provisions of law do not declare and are not tantamount to declarations that the maintenance of rights of way for fish migration shall be of paramount importance and that appropriations of water to beneficial uses shall be subject thereto and shall be denied if they interfere therewith.

On the other hand the history of the appropriative doctrine in California is such as to cause the belief that the right to appropriate unappropriated water is not to be denied except as clearly and definitely provided by legislative mandate and the rule of law that "It is not to be presumed that the legislature in the enactment of statutes, or the people in the adoption of laws, intend to overturn long established legal principles, unless such intention is made to clearly appear by express declaration or by necessary implication" seems to apply. (Follette v. Pacific Light and Power Corporation, 189 Cal. 193, 208 Pac. 295; In re Garcelon, 104 Cal. 570, 584; Boyd v. U. S., 116 U. S. 616, Abbey v. Board of Directors, 58 Cal. App. 757, 761.)

In cases wherein the right of appropriation has been affected the legislature has specifically provided therefor as in the case of Section 2a of the California Irrigation District Act, Stats. 1917, p. 755 and Initiative Measure No. 11, Statutes of 1925, p. XCIII.

In view of the very doubtful authority of the Fish and Game Commission to prohibit appropriations for the protection of fish right of ways and of the Division of Water Resources to deny or restrict would be appropriators on account of interference therewith, it is believed that protestant should be left to take such independent action as it may have authority to take in protecting fish rights of way in the event that there develops an actual interference which cannot be readily adjusted.

Nor does it appear that the Division of Fish and Game occupies the status of an appropriator of the stream for fish transportation. Under the requirements declared necessary to constitute an appropriation, contained in such cases as Robinson v. Schoenfeld, 218 Pac. 1041; Lake Shore Duck Club v. Lake View Duck Club, 166 Pac. 311; Town of Antioch v. Williams Irr. Dist., 188

Cal. 451, 205 p. 688; and Schodde v. Twin Falls L. & W. Co. 32 Sup. Ct. Rep. 479, the mere planting of fish in a stream certainly does not constitute a sufficient exclusive possession and control of the water therein to constitute an appropriation thereof, and we can find no cases wherein any such act has been held an appropriation (a taking) of water for beneficial use. The Division of Fish and Game has not diverted or controlled the waters in question or applied them to use and said waters have continued to flow as in a course of nature they have been wont to do from time immemorial.

In support of its claim as an appropriator the Division of Fish and Game relies upon Section 25½ of Art. IV of the constitution which provides that the legislature may divide the state into fish and game districts and enact laws for the protection of fish and game therein. But no laws of the legislature under this constitutional authority are set forth which authorize the reservation of streams from appropriation for the purpose of affording fish protection and propagation and wherein this legislative authorization declares any such power to exist in the discretion of the Division of Fish and Game is not apparent. In fact the "obvious purpose of this amendment was to remove the former restriction of Article 4, #25, subd. 33 *****it increases the legislative discretion by authorizing local laws on the subject." (Paladini v. Superior Court, 178 Cal. 372, 173 Pac. 588; Ex parte Marincovich, 48 Cal. App. 482, 192 Pac. 156.)

Finally the Division of Fish and Game urges that an appropriation of water from this stream is against public policy and constitutes a nuisance in that it will destroy the property of the people in fish.

A sufficient answer to all of these contentions is that historically the doctrine of free appropriation of unappropriated waters is not ante-dated

by fish protection provisions and no statutes or constitutional provisions of this state have been pointed to or found which may be reasonably construed as even implying that water appropriations are to be denied in favor of fish protection. Certainly it would require an explicit legislative mandate to justify the Division of Water Resources in denying an application to appropriate on the ground that fish would be interfered with by reason of a depletion of water. Nor is the Division of Water Resources inclined to attempt decisions as to whether fish protection is of paramount public concern. Such a decision as to public policy and welfare is properly a matter for legislative decision and until such time as a definite legislative pronouncement is made, the Division considers itself without authority to deny applications on the basis of interference with fish life.

As to the quotation from Sec. 1 of Chap. 889 of the Statutes of 1921, the subject matter of the act of which that section is a portion is too foreign to the subject of fish protection to render it pertinent to the present inquiry. In fact it is an act to foster investigations to facilitate diversions and appropriations of water and not to restrict or limit them and to that extent is opposed to the contentions of protestant Division of Fish and Game.

If any constitutional and statutory provisions are in point the following should also be taken into consideration:

> Sec. 1, Art. XIV of the constitution: "The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state, in the manner to be prescribed by law *****"

Sec. 17 of the Water Commission Act - "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 *******"

Sec. 15 "*****It is hereby declared to be the established policy of this state that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation. In acting upon applications to appropriate water the Commission shall be guided by the above declaration of policy ***."

In the case of Ex parte Elam, supra, the court said:

"The legislature has the right to determine what uses are superior in kind and to protect the same and it is within its province to determine that certain uses of this public property are of a higher character and superior in right to other uses."

In the case of Tulare Water Company v. State Water Commission, 187 Cal. 533, 202 Pac. 874, the Supreme Court says:

"The Commission surely does not possess and could not be invested with power to arbitrarily deny an application made in conformity to the law for the appropriation of water that was subject to appropriation.

"The purpose of the act is clearly to permit any person or corporation desiring to make any of the enumerated beneficial uses of waters of the state, not otherwise utilized, to avail itself of this right of appropriation.

"Under the law in force prior to the adoption of this act (Civ. Code. Secs. 1410-1422) no permission was required for the appropriation of waters of the state. All that was required to create a preferential right to such water was to actually appropriate it to some authorized beneficial use, or to make a water filing to be followed with due diligence by an actual user.

"The obvious aim of the Water Commission Act was not to abolish, but to regulate and administer, this privilege."

Nor is the appropriation of water per se a nuisance.

As the protest of the Board of Supervisors is in effect the same as that of the Fish and Game Commission the above discussion is applicable to its protest.

CONCLUSION

From the above it is the opinion of this office that the proposed diversion of the applicant can in no way interfere with the rights of those claiming priority of right as upper riparian owners and users. The applicant being a downstream appropriator would not be in a position either physically or legally to interfere with the water supply at the diversion points of upstream users.

It is also the opinion of this office that the Division of Water Resources has not the authority to deny appropriations upon the basis that fish life will be imperiled by depletion of supply and that the Division of Fish and Game has not appropriated the flow of the stream in question from its egg-taking station to the ocean. If a police power has been vested in the Division of Fish and Game which authorizes it to enjoin such diversions of water for beneficial uses as it deems inimical to fish life the issuance of permits to appropriate by the Division of Water Resources will not prevent the exercise of such an authority by said Division.

ORDER

Applications 2897, 2898, 2899 and 2900 for permits to appropriate water having been filed with the Division of Water Resources as above stated, protests having been filed, a public hearing having been held, briefs having been filed and the Division of Water Resources now being fully informed in the premises:

IT IS HEREBY ORDERED that Applications 2897, 2898, 2899 and 2900 be approved and that permits be granted subject to such of the usual terms and conditions as may be appropriate.

WITNESS my hand and the seal of the Department of Public Works of the State of California, this 24 day of August, 1931.

EDWARD HYATT, State Engineer

BY Harold Conkling
Deputy

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O R D E R

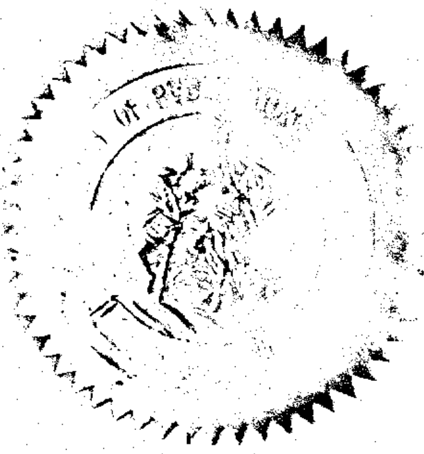
Application 6181 for a permit to appropriate water having been filed with the Division of Water Resources, a protest having been filed, a public hearing having been held and the Division of Water Resources now being fully informed in the premises:

IT IS HEREBY ORDERED that Application 6181 be approved and that a permit be granted to the applicant subject to the usual terms and conditions as may be appropriate.

WITNESS my hand and the seal of the Department of Public Works of the State of California, this 10 day of Aug 1931.

EDWARD HYATT, State Engineer

By Harold Conkling
Deputy.



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