

Before the Division of Water Resources  
Department of Public Works  
State of California

oOo

In the Matter of Application 8884 of the City of Redding  
to Appropriate Water From the Sacramento River in  
Shasta County for Municipal Purposes.

oOo

DECISION A 8884 D 421

DECIDED *June 22, 1938*

oOo

Appearances at hearing held at Sacramento March 21, 1938.

For Applicant

City of Redding

Jesse W. Carter, City Attorney

For Protestants

California Water Service Company )  
Holly Sugar Corporation )  
River Farms Company of California )  
Meridian Farms Water Company )  
Scott F. Annis and R. S. Brown )

McCutchen, Olney, Mannon and  
Greene by Robert L. Lipman

Natomas Company )  
Elkhorn Mutual Water Company )  
Natomas Central Mutual Water Co. )  
Natomas Riverside Mutual Water Co. )  
Natomas Northern Mutual Water Co. )

G. F. Metteer, Attorney  
Horwood Gilabae, Engineer

M. & T. Incorporated )  
Parrott Investment Company )

No appearance

EXAMINER: Everett W. Bryan, Acting Deputy in Charge of Water Rights, Division  
of Water Resources, Department of Public Works, State of California.

oOo

O P I N I O N

General Description of Project

Application 8884 was filed with the Division of Water Resources on  
January 26, 1937 for the appropriation of an amount of water not to exceed

5 cubic feet per second, to be diverted throughout the entire year from the Sacramento River for municipal purposes within the City of Redding. Heretofore the city has been served by the California Water Service Company under an appropriative right initiated prior to the effective date of the Water Commission Act. It now seeks to establish its own water supply system and proposes to construct a pumping plant on the right or southerly bank of the Sacramento River at a point near the northwesterly corner of the city limits, below the existing pumping plant and to install its own distribution system which would duplicate the existing system of the private utility.

Protests against the approval of Application 8804 were filed by the following:

- (1) California Water Service Company
- (2) Holly Sugar Corporation
- (3) River Farms Company of California
- (4) Meridian Farms Water Company
- (5) Scott P. Ennis and E. S. Brown
- (6) Natomas Company
- (7) Elkhorn Mutual Water Company
- (8) Natomas Central Mutual Water Company
- (9) Natomas Riverside Mutual Water Company
- (10) Natomas Northern Mutual Water Company
- (11) M. & T. Incorporated
- (12) Parrott Investment Company

#### PROTESTS

The grounds of objection to the approval of Application 8804 urged by protestants may be briefly summarized as follows:

- (1) At periods of low stream flow in dry years the Sacramento River is already over appropriated and therefore no water is available for appropriation during these periods as Section 14 of the Water Commission Act expressly provides that as a prerequisite to the issuance of a permit "there must be unappropriated water available to supply the applicant."

(2) The proposed appropriation, together with others, will result in so lowering the water level of the river during periods of low flow that it will increase the cost of pumping by lower diverters and users of water and necessitate the remodeling, and possibly the removal of present pumping plants and other diversion works to new locations, in order to obtain the water supply to which present users are entitled.

(3) The summer flow of the Sacramento River is already inadequate to meet the minimum requirements for successful navigation as recommended by the War Department and therefore no further appropriations during the critical period should be allowed.

(4) The City of Redding is already adequately served with a municipal water supply by a private utility and to approve an application to appropriate water for a duplicate supply would result in needless economic waste as well as in an unreasonable and wasteful use of water and would therefore not be in the public interest.

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

Application 8884 was completed in accordance with the Water Commission Act and the Rules and Regulations of the Division of Water Resources, and being protested, was set for public hearing in accordance with Section 1a of the Water Commission Act on Monday, April 21, 1938, at 10:00 o'clock A.M. in Room 401, Public Works Building, Sacramento, California. Of this hearing applicant and protestants were duly notified.

### UNAPPROPRIATED WATER IN SACRAMENTO RIVER

Before considering the evidence with respect to whether or not there is unappropriated water in the Sacramento River sufficient to supply the applicant, consideration will be given to the position taken by the applicant that "it is outside the scope of the authority of the Division of Water Resources to determine that there is or is not unappropriated water"; that the courts alone and not the Division have authority to determine this issue because it involves a determination of property rights.

The same contention was presented in oral argument and in briefs before the Supreme Court by the petitioner in East Bay Municipal Utility District v. Department of Public Works, 1 Cal. (2d) 476, and was held by the court to be without merit. Section 1d of the Water Commission Act expressly provides, as a prerequisite to the issuance of a permit, "there must be unappropriated water available to supply the applicant." Section 1a of the act contemplates a hearing on protested applications prior to action thereon by the Division, which procedure was followed here.

Applicant fails to distinguish between the judicial determination by a court, to which finality attaches, and an administrative finding, such as is frequently required of various boards and officers in the performance of their statutory duties. The clear purport of all decisions construing the provisions of the Water Commission Act, properly interpreted, is that the commission (now the Division of Water Resources), is authorized in the first instance to determine whether, in any particular case, there is unappropriated water sufficient for the needs of the applicant. If the applicant or protestant is dissatisfied with such finding, upon appropriate and timely action in a court of competent jurisdiction, such objections may be heard by the court, and in such case, no finality attaches to such finding of the Division. These principles are no longer open to question.

It appears clear that during the late fall, winter and early spring months there is unappropriated water in the Sacramento River even in years of subnormal runoff. Opposition by protestants is focused upon the issuance of a permit to divert during periods of low flow.

It may be conceded, as contended by protestants, that during various recent years conditions of subnormal precipitation and stream flow have prevailed such as to cause uneasiness on the river and the issuance of warnings that unless diverters exercised strictest economy in their diversions and use regulation might become necessary. Inconveniences have resulted from time to time during these subnormal years to certain users on the upper river by reason of the necessity for them to lower their pump intakes because of the low water level in the river but there has at all times been sufficient water in the river to meet the requirements of all users above the Delta. No appropriation from the Sacramento River has yet been denied upon the ground of insufficient unappropriated water. In fact, testimony presented at the hearing indicated that during the very dry period of 1931 to 1935 there was at all times sufficient water at the intake of the protestant Holly Sugar Corporation located some 95 miles below applicant's proposed point of diversion, to satisfy that protestant's irrigation demands. (Transcript of Hearing, pp. 30, 31.) In this connection, it may be further stated that there is no record of any user on the Sacramento River above the Delta having found an insufficient flow in the river opposite his intake to satisfy his present demands.

There does not appear to be any necessity to attempt to protect future development by present appropriators or riparian owners. Ample protection for rights not presently exercised is afforded by declaratory judgment. Peabody v. City of Vallejo, 2 Cal. (2d) 351, Tulare Irrig. Dist. v. Lindsay-Strathmore Irrig. Dist., 3 Cal. (2d) 489, City of Lodi v. East Bay Municipal Utility Dist.

7 Cal. (2d) 316. The possibility that some time in the future, water may be required by prior appropriators and riparian owners who have not yet completed their development, is insufficient ground upon which to deny an appropriation for present use.

#### SALINITY INVASION

Distress has occurred it is true in the Delta. This distress has arisen out of three causes, namely: (1) Subnormal precipitation; (2) increased up-river diversions; and (3) the deepening and widening of channels in the lower delta by the War Department in the interests of flood control and navigation which has resulted in an increased tidal diffusion of salt water into these and inter-connected channels.

The salinity encroachment in the upper limits of the delta is not serious except in years of subnormal precipitation and runoff. In the lower delta it is of annual occurrence. There the fresh water of the Sacramento and San Joaquin rivers discharged into the salt water of Suisun Bay forms a natural barrier to the latter. As the fresh water discharge decreases, this barrier retreats upstream. While the summer flow of the lower river might be increased by limitation of upstream diversions to such an extent as to benefit the users of water in the upper delta, this same increment would have little or no beneficial effect in reducing salinity in the lower delta.

In any event, the effect on the delta interests of the use proposed by the applicant would not be measurable, and it appears that such effect as this additional small diversion might have will be temporary in nature only as active steps are being taken to provide a practical solution of the problem. After exhaustive investigation by this office and the U.S. Bureau of Reclamation, the conclusion has been reached that the most economical and effective method of control of salinity in the delta is to provide adequate storage

capacity on the upper river for the conservation of flood waters during the winter and early spring months and their release during the summer season. Appropriations have been made by Congress for this project and initial contracts have been let for construction. Shasta Dam near Kennett on the Sacramento River will, when completed, impound 4,500,000 acre-feet of water to be used for salinity control in the delta, for the irrigation of Sacramento and San Joaquin valley lands, including the delta, for navigation, for hydroelectric power, for flood control and for other purposes. If hereafter it be concluded that it is a responsibility of the upstream appropriators to protect the delta users against salinity invasions caused in part by their diversions, this project will afford a ready means of securing the necessary supply. It is not believed this ground of protest warrants the denial of the application.

INJURIES ARISING OUT OF LOWERING WATER  
LEVEL IN THE SACRAMENTO RIVER

The application is protested upon the ground that the proposed diversion would result in lowering the water level in the Sacramento River, thereby increasing the cost of pumping by diverters downstream; and on the further ground that the cumulative effect of this diversion, together with future diversions, will necessitate the remodeling of existing pumping plants or make it necessary to move some of these plants to other locations.

Protestants Parrott Investment Company and M. and T. Incorporated, make a rather thorough statement of these grounds of protest, but were not represented at the hearing and filed no briefs. The implications of their protests are to the effect that this appropriation would increase their annual pumping costs thirty to fifty per cent and might make it necessary to remodel or move their pumping plant, which is used jointly by the two protestants, to a new location at a cost of some sixty to one hundred thousand dollars.

The other protestants advanced this ground of protest only generally, and did not undertake to introduce any evidence with respect to damage, or to argue the matter in their briefs.

The named protestants state that after extensive investigation of the matter, their pumping plant was designed and located on the assumption that the average mean low water level during the three months, July, August and September, would not fall below the elevation of 111 feet. They state, however, that the low water level at their intake fell to an elevation of 109 feet in the summer seasons of 1935 and 1936 and to 106.5 in 1937 which made it impossible for them to operate all of their pumps and pumping was only possible on a strictly curtailed basis. The implication is that these unexpected low stages were the result of later appropriations on the stream, but no data were supplied in this connection and it may well be that other causes such as a lowered river channel were largely responsible for this change in water level.

The City Engineer of Redding testified at the hearing that in his judgment the diversion of 5 second feet by the City of Redding should not lower the water level more than 1/100 of a foot at points downstream. The engineer of protestant California Water Service Corporation admitted that a diversion in such an amount should not result in any measurable lowering of the water level at points downstream and we are of the opinion that he was correct in this conclusion.

Although it must be conceded, in view of the evidence presented, that the effect on protestants' rights of the approval of this application will be inappreciable, nevertheless protestants urge upon us that such approval together with like action on other applications of similar nature in the future, will in the aggregate undoubtedly have an appreciable and substantial effect on their rights to their detriment. It is evident that the filing of such



anticipated applications, the amount of water required, and other matters properly entering into a consideration of the effect thereof on protestants' rights are all matters of pure conjecture, and are not properly before us for consideration at this time.

We think that the inconvenience, if any, caused by lowering of the water level which might result from this appropriation is not unreasonable. As was said by the Supreme Court in Peabody v. City of Vallejo, 2 Cal. (2d) 351, at page 376, "The correct rule is stated with its appropriate limitations in the italicized words in the following language of the District Court of Appeal in Waterford Irrig. Dist. v Turlock Irr. Dist., 50 Cal. App. 213, at page 221 (194 Pac. 757): "The mere inconvenience, or even the matter of extra expense, within limits which are not unreasonable, to which a prior user may be subjected, will not avail to prevent a subsequent appropriator from utilizing his right." Although phrased in different language, the subsequent decisions of our Supreme Court in Tulare Irr. Dist. v Lindsay-Strathmore Irr. Dist., 3 Cal. (2d) 489, 574, and City of Lodi v. East Bay Mun. Utility Dist., 7 Cal. (2d) 316, 341, it is believed, follow the salutary principle so clearly declared in the Peabody case.

In passing it should again be observed that if any inconvenience should result to the protestants by the approval of this application, such will doubtless be of a temporary nature by reason that bids have already been received for construction of the Shasta Dam, and it is expected that the operation of this storage facility will so regulate the flow in the Sacramento River as to produce a higher level during the summer season than has generally prevailed heretofore.

#### INTERFERENCE WITH NAVIGATION

It is a matter of common knowledge that navigation on the Sacramento River above the City of Sacramento is frequently impaired during the summer

months by reason of insufficient depth of water. It is recognized that the rights of Congress to control navigable streams of the United States in the interest of navigation is paramount, and the War Department may order any or all diversions to cease which may interfere therewith. It appears highly significant, however, that the War Department has not as yet deemed it necessary to invoke this power. The Congress of the United States has in fact made provision for aid and improvement to navigation on the Sacramento River by authorizing and appropriating funds for the construction of Shasta Dam as referred to above. The federal government therefore appears to be the sole proper party to present this objection, and the protestants may not properly urge this protest as a ground for denial of the permit applied for in whole or in part.

PUBLIC INTEREST AND ITS RELATION TO  
DUPLICATION OF SUPPLIES

Protestants contend that public interest demands the denial of the permit as the proposed appropriation would involve a duplication of the present system and supply with which the City of Redding is being served by a private utility. Such duplication would result, so they say, not only in a waste of water but also in economic loss to consumers and investors alike.

The City of Redding is now served with a municipal water supply from the Sacramento River by protestant California Water Service Corporation under an appropriative right to divert from the Sacramento River initiated prior to the effective date of the Water Commission Act. Apparently dissatisfied with rates and service, efforts were made by the City to acquire the physical properties and water rights of the private utility. The parties, however, were unable to come to terms and the City has filed Application 8884

to initiate a right to divert water from the Sacramento River at a point a short distance downstream from the existing intake of the private utility.

The City proposes to install its own diversion works and to parallel the distribution system of the private utility, actively competing with the latter for business. It is not believed that it was intended or is desirable that this office should, under the provisions of Section 15 of the Water Commission Act, intrude itself in such a conflict and undertake to decide that in view of the public interest involved an application to appropriate for a duplicating system must be denied.

We can see no merit in the argument of the protestants that in view of the provisions of Section 3, Article XIV of the State Constitution, the application should be denied because of the waste of water which would result if the people of Redding were served by duplicate systems, as might be the case if this application is approved. Each consumer will be supplied by one or the other of the two agencies and we see no reason why he would be more wasteful in his use under one system than the other.

The protestants having failed to present sufficient evidence to support their various contentions, and their points and arguments in support of such protests having been given due consideration and found to be without merit, it is concluded that Application 8884 should be approved.

#### O R D E R

Application 8884 for a permit 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 and the Division now being fully informed in the premises:

IT IS HEREBY ORDERED THAT Application 8884 be approved and that a permit be granted to the applicant 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 22 day of *June*, 1938.

EDWARD HYATT, STATE ENGINEER

By HAROLD CONKLING  
Deputy

(Seal)  
R