

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

c0o

In the Matter of Application 10030 of Sutter Basin Improvement Company to Appropriate from West Borrow Pit of Sutter By Pass in Sutter County for Irrigation Purposes

c0o

Decision A. 10030 D 473

Decided *March 10, 1941*

APPEARANCES AT HEARING HELD AT SACRAMENTO, JANUARY 30, 1941.

For Applicant

Sutter Basin Improvement Company

Arthur C. Huston

For Protestant

Northern California Land Company

Ray Manwell

EXAMINER: Mark S. Edson, Senior Hydraulic Engineer, for Harold Conkling, Deputy State Engineer in Charge of Water Rights, Division of Water Resources, Department of Public Works, State of California.

O P I N I O N

General Description of Project

Application 10030 was filed by the Sutter Basin Improvement Company on October 8, 1940 for 21.05 cubic feet per second of water to be diverted from the West Borrow Pit of Sutter By-Pass, throughout the entire year for the irrigation of 842.13 acres of rice on Lots 106, 107, 108, 129, 130, 131, 132, 153, 154, 155, 156, 157, 158, 159, 177, 178, 179, 180, 181, 182, 183, 184, 202 and 203 of North Basin Tract, map recorded in Book 5, page 23 of Surveys, Sutter County Records, being within Sections 5, 8, 9, 16 and 17, T 14 N, R 2 E, M.D.B.M. The point of diversion is described as being within the SE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Section 5, T 14 N, R 2 E, M.D.B.M.

Protest

The Northern California Land Company, a corporation, claims a right to the water which applicant seeks to appropriate which is based upon the ownership of riparian lands. It appears that in 1924 an agreement was entered into with the State Reclamation Board whereby in return for certain lands necessary for by-pass purposes a weir was constructed in the west borrow pit for the purpose of impounding water on the By-Pass side of the levee and since 1925 water has been used for the flooding of lands for the irrigation of "legal tender" a wild grass used for hay. Protestant claims that approximately 450 acres have been irrigated and alleges in effect that should Application 10030 be approved its rights to the water would be seriously affected.

Hearing Set in Accordance with Section 1a of the Water Commission Act

Application 10030 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 a public hearing in accordance with Section 1a of the Water Commission Act on January 30, 1941 at 10:00 o'clock A.M. in Room 401 Public Works Building, Sacramento, California. Of this hearing applicant and protestant were duly notified.

General Discussion

The position of the protestant company is clearly set forth in a letter addressed to this office under date of December 4, 1940 in which it states that it claims title to the water which it has been using on the following grounds.

(1) The State Reclamation Board on or about 1923 or 1924 created the Sutter By-Pass and the borrow pit which carries the water in question, and that as a consideration to the Northern California Land Company for borrowing purposes agreed with that Company that it should have the use of said water, that

the State Reclamation Board is the owner of the water and had a right to enter into such an agreement.

(2) The Northern California Land Company is the owner of the water based upon prescriptive rights in that it has used the water for more than five years continuously.

(3) That the rights of the Northern California Land Company in and to said water is riparian in nature antedating the creation of the Sutter By-Pass by the State Reclamation Board.

(4) If the so-called waters are to be classed as developed waters for the reasons stated in the first provision herein together with appropriation, use, ^{and} occupancy, the protestant company is entitled to the first right to said waters.

Protestant company also stated that without the necessity of making an exhaustive search as to the questions involved it would have no objection to the approval of Application 10030 provided that it was approved subject to the Company's right.

At the hearing held in connection with Application 10030 a copy of the resolution passed at a meeting of the Reclamation Board held April 22, 1924 together with a resolution and order passed by the Board on May 27, 1924 was introduced which indicated that in exchange for certain lands conveyed to the State Reclamation Board for drainage and reclamation purposes the Board agreed among other things to construct a weir (or dam) in the borrow pit of the west levee of the Sutter By-Pass by means of which the protestant company could flood and sub-irrigate its lands within the by-pass. No right to the use of the water itself was granted by the Board to the protestant company nor has any authority been vested in the Board to grant such a right.

No appropriative right has been initiated by the protestant company subsequent to December 19, 1914, the effective date of the Water Commission Act, nor has any claim been made by the protestant company to any appropriative right initiated prior to that date.

As to the prescriptive right claimed by protestant company it may be said that as it takes water from the borrow pit at a point downstream from the proposed point of diversion of the applicant company it is apparently not in a position to acquire such a right as against the applicant company.

There may be some merit in the claim of the protestant company to a riparian right but as the natural flow through its property has been cut off by the east levee of Sutter By-Pass and as the Sutter By-Pass has not yet been adjudged a natural channel there is considerable doubt as to the extent of any riparian right that protestant company may claim. Furthermore the record clearly indicates that a large portion of the water which applicant company proposes to appropriate is foreign water which is drained from irrigated land above and which has its origin in the Sacramento River and Butte Slough.

There is apparently some uncertainty on the part of the protestant company as to the extent of its rights and accordingly it has agreed that Application 10030 may be approved subject to whatever rights it may have.

We are reasonably certain that there are waters which may be appropriated under Application 10030 to which the protestant company has no right and since each and every permit issued by the Division is issued expressly subject to vested rights it is the opinion of this office that Application 10030 be approved subject to such of the usual terms and conditions as may be appropriate.

ORDER

Application 10030 to appropriate water having been filed with the Division of Water Resources as above stated, 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 10030 be approved and that a permit be issued 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 10 day of *March* 1941.

EDWARD HYATT, State Engineer

By HEROLD CONKLING
Deputy

(Seal)

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