

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

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In the matter of Applications 9092, 9093, 9094 and 9095 of
United States of America, Fish and Wild Life Service of the
Department of the Interior to appropriate from Logan Creek
and North Fork of Logan Creek in Glenn County for the
Irrigation of Lands for a Migratory Waterfowl Refuge.

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DECISION A. 9092, 9093, 9094, 9095 D 491

Decision *September 17, 1942*

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APPEARANCES AT HEARING HELD AT SACRAMENTO, OCTOBER 1, 1940

For Applicant

U. S. A. Fish and Wild Life Service of the
Department of the Interior

Joseph E. Taylor and
Albert L. Johnson

For Protestant

Glenn Colusa Irrigation District

Hankins & Hankins
by J. J. Hankins

EXAMINER: 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 PROJECTS

The United States of America, acting through the Fish and Wild Life
Service of the Department of the Interior, seeks permits to appropriate the
waters of Logan and North Fork of Logan Creek for use on lands owned by the
United States comprising a migratory bird refuge, now named and designated

as Sacramento National Wild Life Refuge. Accordingly, Applications 9092, 9093, 9094 and 9095 were filed with the Division of Water Resources on August 24, 1937.

Under Application 9092 it is proposed to appropriate 12 c.f.s. from North Fork of Logan Creek for the irrigation of 855 acres in Sections 11, 12 and 13, T 18 N, R 3 W, M.D.B.&M.

Under Application 9093 it is proposed to appropriate 23 c.f.s. from North Fork of Logan Creek for the irrigation of 1750 acres in Sections 11, 12, 13, 14, 15, 23 and 24, T 18 N, R 3 W, M.D.B.&M.

Under Application 9094 it is proposed to appropriate 17 c.f.s. from Logan Creek for the irrigation of 1350 acres within Sections 23, 24, 25, 26 and 35, T 18 N, R 3 W, M.D.B.&M.

Under Application 9095 it is proposed to appropriate 8 c.f.s. from Logan Creek for the irrigation of 620 acres within Sections 25 and 36, T 18 N, R 3 W, M.D.B.&M.

It is proposed to irrigate the lands named as the places of use in the several applications, for the production of grain, grasses and rice as feed for migratory waterfowl. The season of diversion named in each application is throughout the entire year and the system of diversion proposed is similar to that commonly practised in the irrigation of rice fields. Surplus water after use for irrigation will be drained from the cropped areas and recovered in ponds located in low places within the waterfowl refuge in order to provide resting places for the birds.

PROTEST

A protest, identical in substance, was filed in the matter of each application, by the Glenn-Colusa Irrigation District. The district claims an appropriative right initiated prior to the effective date of the Water

Commission Act, and also rights initiated under Applications 1554 and 1624 which were filed with the Division on December 3, 1919, and January 14, 1920, respectively, to appropriate water from the Sacramento River at a point about 25 miles northerly from the proposed project of the applicant. Use has been, and is being made pursuant to permits duly issued. Water under these rights is pumped by the district from the Sacramento River and carried through its system of canals and laterals to the district area and there used for irrigation purposes. After use on district lands, seepage, drainage and spill; that is, return flow from such use, finds its way into the sources from which applicant proposes to appropriate. Mingled therewith is an undetermined amount of natural flow of said creeks. This appears inappreciable in amount except during the run-off period, but water of this character is not in dispute. The controversy relates to the status of return flow in the named creeks within the game refuge lands.

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

Applications 9092, 9093, 9094 and 9095 were completed in accordance with the Water Commission Act and the requirements of the Rules and Regulations of the Division of Water Resources and being protested were set for public hearing in accordance with Section 1a of the Water Commission Act on Tuesday, October 1, 1940, at 10:00 o'clock A.M. in Room 401 Public Works Building, Sacramento, California.

GENERAL DISCUSSION

The Glenn-Colusa Irrigation District was organized in 1919 pursuant to the California Irrigation District Act, and as then established, contained within its territorial boundaries the lands now owned by the United States. The district boundaries now comprise some 122,000 acres lying west of the

Sacramento River in the counties of Glenn and Colusa. The lands now comprising the federal migratory water fowl refuge, and which it is proposed to serve under the pending applications comprise some 11,000 acres originally owned by the Spaulding Company, a private corporation, and for many years known as the Spaulding Ranch. These lands lie within the easterly border of the district territory. There has never been any application made pursuant to the California Irrigation District Act, either prior or subsequent to the acquisition of these lands by the United States, to exclude them, or any part thereof, from the district. The general slope of all these lands is easterly towards the Sacramento River.

Logan Creek and the North Fork of Logan Creek have their sources in the low foothills of the Coast Range Mountains approximately 5 or 6 miles westerly of the main canal of the Glenn-Colusa Irrigation District and the only time that these streams have any natural flow in them is during and immediately following precipitation in the form of rain, there being no springs or melting snows to contribute to the natural flow. Except therefore, during the rainy season, the only supply to the named streams consists of drainage and seepage from irrigated lands within the district boundaries adjoining the refuge lands. This is water which is originally diverted by the district from the Sacramento River and is claimed by the district so long as it remains within its boundaries.

These streams traverse the district lands in a general southeasterly direction, having their confluence within the refuge lands. The combined flow then passes the westerly boundary of the district and does not again enter the district boundaries, but joins with Hunter Creek and shortly dissipates in the Colusa trough. It is proposed by the applications to divert from these streams at various points within the confines of the

refuge for the irrigation of rice, grain and grasses, and for creating ponds to preserve and protect, and for the benefit of migratory birds, particularly ducks and geese.

For many years these lands, while owned by the Spaulding Company, were irrigated by means of the district water system, but were eventually acquired by the district through sales for delinquent irrigation district assessments. Also liens for delinquent taxes accrued against the property in favor of the counties of Glenn and Colusa. At this stage the United States brought condemnation proceedings against the property naming as defendants, among others, the Spaulding Company, the counties of Glenn and Colusa, and the Glenn-Colusa Irrigation District. In 1937 a final judgment was entered vesting title to the property in the United States.

The Sacramento Migratory Waterfowl Refuge was established by Executive Order of February 27, 1937 (No. 7562) pursuant to authority vested in the President by the Migratory Bird Conservation Act (45 Stat. 1222), amended June 15, 1935 (49 Stat. 381), 16 U.S.C.A. 715, et seq. The administration of the refuge was vested in the Bureau of Biological Survey of the U. S. Department of Agriculture, but on July 1, 1939, the functions of this bureau were transferred to the Department of the Interior, and on July 1, 1940, to the Fish and Wild Life Service of the Department of the Interior. The name of the refuge was recently changed by Executive Order to Sacramento National Wild life Refuge.

The record shows that there is an undetermined amount of natural flow in these streams following local seasonal runoff, but water from such sources is not in dispute. The flow during the balance of the year gives rise to the controversy. It is conceded by both parties that such flow is derived from the Sacramento River, a source foreign to the natural flow of Logan Creek and its north fork. It is also conceded that the flows in

controversy of these creeks occurring within the bounds of the refuge is, to quote from protestant's brief "water which has been spilled or allowed to seep or drain from lands within the district", and it may be added, from lands adjoining the refuge.

In the briefs much space is devoted to subjects and arguments which either have no basis in the record, or should properly be made to and entertained by the Legislature of this State, or the Congress of the United States and to responsible officials of the Department of the Interior of the United States. It would serve no purpose to discuss these matters and would unduly extend the present consideration. Analyzing therefore, only the points made which it is deemed merit attention, the opposing arguments may be summarized as follows:

The Position of the Applicant

1. There is water in the creeks at the proposed points of diversion which is subject to appropriation.
2. The applicant is a distinct entity separate and apart from all jurisdiction and control of the Glenn-Colusa Irrigation District, and is entitled to appropriate the waters in these streams at any available point within the refuge.
3. The use proposed is a beneficial use.
4. The irrigation district, having lost all control or power of recapture of the waters flowing in these streams at the proposed points of diversion, has no interest on which to base a valid protest.

The Position of the Protestant

1. Applicant's lands are within the Glenn-Colusa Irrigation District and have never been excluded therefrom. The applicant has therefore no standing to make or maintain the applications.

2. The water in the creeks sought to be appropriated, from its very nature as return flow from the use of foreign water imported by the district, is personal property owned by the district and is not subject to appropriation until it passes the game refuge boundaries.

3. The Division of Water Resources has no power or jurisdiction to grant the permits inasmuch as the waters sought to be appropriated have, by force of Section 56 of the California Irrigation District Act, been given, dedicated and set apart to the district.

4. The granting of the permits is prohibited by and contrary to public policy.

5. The use proposed is not a beneficial use.

From these opposing contentions, the issues for decision appear to be as follows:

1. Whether the applicant is authorized to make and maintain the applications.

2. Whether there is unappropriated water at the proposed points of diversion subject to appropriation.

3. Whether the Division has jurisdiction over the water involved.

4. Whether the use proposed is an authorized beneficial use.

Federal Law

It is evident that to properly determine these various points requires a careful evaluation of the effect of the judgment in condemnation vesting title to the refuge lands in the United States, and also the application of relevant State and Federal law to the facts. Consideration will first be given to the field of Federal law pursuant to which the refuge was established and the lands acquired, and the consequences flowing therefrom. It appears these lands were acquired by the United States pursuant to the

Migratory Bird Conservation Act. 16 U.S.C.A. Sec. 715, et seq. This legislation is a component part of, and supplementary to the Migratory Bird Treaty Act. 16 U.S.C.A. 703, et seq. The latter act is declared to be for the purpose of carrying into effect the terms of a treaty between the United States and Great Britain for the protection of migratory birds, and also a treaty between the United States and Mexico for the same and other purposes. In brief, it is by the act made unlawful to take, kill or possess any migratory birds except in accordance with regulations adopted by the Secretary of the Interior and approved by the President. It appears such regulations, which are detailed and extensive, have been adopted. The right of the several states is preserved to make and enforce laws which are not inconsistent with such treaties or with the acts, or which give further protection to migratory birds.

In State of Missouri v. Holland, 252 U.S. 416, 40 S. Ct. 382, 64 L. Ed. 641, 11 A.L.R. 984, it was directly held that the treaty with Great Britain (the first concluded) was a valid exercise of the treaty making power delegated to the Congress by the states in and by the terms of the Federal Constitution, and that the Migratory Bird Treaty Act was duly authorized pursuant to such power and for the purpose of implementing and making the same effective. The force and effect of the decision is therefore that under the treaty making power, treaties may be made which affect rights otherwise exclusively under the control of the states, and this exercise of the treaty making power together with acts implementing the same, are paramount to the laws of the state which are inconsistent therewith.

It will be necessary to give more detailed consideration to the Migratory Bird Conservation Act. It does not appear that there is any reported federal court decision directly passing upon the validity of this act. However, inasmuch as it appears merely supplementary to the former act, it

should stand upon the identical footing. The preamble or title of the Migratory Bird Conservation Act provides in part as follows: "An Act to more effectively meet the obligations of the United States under the migratory bird treaty act. . ." etc.

Section 715a creates the Migratory Bird Conservation Commission consisting of the three secretaries of Interior, Commerce and Agriculture, two members of the Senate and two members of the House, to pass upon "any area of land, water, or land and water" recommended by the Secretary of the Interior for purchase or rental under the act, and to fix the price at which the same may be purchased or rented. Provision is made for ex officio representation on this body by the appropriate official of each state for the purpose of considering and voting on all questions relating to acquisition in his particular state.

Section 715d authorizes the Secretary of the Interior to purchase or rent such areas as may be approved by the Commission at prices fixed by it, and to acquire by gift or devise, for use as inviolate sanctuaries for migratory birds, such areas as he shall determine to be suitable for such purposes.

Section 715e provides that the acquisition of such areas by the United States shall in no case be defeated by reason of rights of way, easements and reservations which from their nature will in the opinion of the Secretary of the Interior in no manner interfere with the use of the areas so encumbered, for the purposes of the act, but that such rights of way, easements and reservations, shall be subject to rules and regulations prescribed by the Secretary of the Interior for the occupation, use, operation, protection and administration of such areas as inviolate sanctuaries for migratory birds; and that it shall be expressed in the deed or lease that

the use, occupation, and operation of such rights of way, easements and reservations shall be subordinate and subject to such rules and regulations as are set out in such deed or lease or, if deemed necessary by the Secretary of the Interior, to such rules and regulations as may be prescribed by him from time to time.

Section 715f provides as follows: "No deed or instrument of conveyance shall be accepted by the Secretary of the Interior under . . . this (act) unless the state in which the area lies shall have consented by law to the acquisition by the United States of lands in that state."

Section 715g provides as follows: "The jurisdiction of the State; both civil and criminal, over persons upon areas acquired under . . . this (act) shall not be affected or changed by reason of their acquisition and administration by the United States as migratory bird reservations, except so far as the punishment of offenses against the United States is concerned."

Section 715h provides as follows: "Nothing in sections . . . of this (act) is intended to interfere with the operation of the game laws of the several states applying to migratory game birds insofar as they do not permit what is forbidden by federal law."

Section 715i among other matters, prohibits the entry on any property of the United States acquired under the act for any purpose except in accordance with regulations of the Secretary of the Interior, provided entry in accordance with such regulations is permitted for the purpose of fishing in accordance with the law of the state in which the area is located.

Section 715m provides that violation of, or failure to comply with any provisions of the act shall constitute a misdemeanor punishable by fine of not less than \$10 nor more than \$500 or imprisonment on not more than six months, or by both such fine and imprisonment.

Section 715p provides that when any state shall, by suitable

legislation, make provision adequately to enforce the provisions of the act and all regulations adopted thereunder, and the Secretary of the Interior shall so certify "then and thereafter that said State may cooperate with the Secretary of the Interior in the enforcement of such sections and the regulations thereunder."

State Legislation

Chapter 5, Division 3 of the Fish and Game Code as amended to date, was in effect at the time title to the game refuge lands vested in the United States. So far as material to the matter with which we are here concerned, that chapter comprises the following:

Section 375: "The people of the State of California, through their legislative authority, accept the provisions and benefits of the act of Congress known as the 'Migratory Bird Conservation Act,' approved February 18, 1929. They consent to the acquisition by the United States by purchase, lease, gift or devise of such areas of land, water, or land and water, within the State of California, as the United States or its properly constituted officers or agents may deem necessary for migratory bird reservations in carrying out the provisions of said act of Congress."

Section 375.5: "The property acquired by the United States under the provisions of section 375 shall be released and exempt from all State, county and municipal and irrigation and other district taxes and assessments or other charges which may be imposed under the laws or authority of this State as soon as title thereto is acquired."

Section 376: "This State reserves such full and complete jurisdiction and authority over all such Federal migratory bird reservations as are not incompatible with the administration, maintenance, protection and control thereof by the United States under the terms of said act of Congress."

Section 377: "All persons within such reservations shall have all rights, privileges and immunities under the laws of this State in so far as the same are compatible with the administration, maintenance, protection and control of such areas by the United States under the terms of said act of Congress."

Section 379: "The president of the Fish and Game Commission may be a member ex officio of the Migratory Bird Conservation Commission created by said act of Congress."

The major portion of the foregoing undoubtedly was enacted in response to the requirement of the federal legislation, the substance of which has been set forth, of consent on the part of the State Legislature to the acquisition of land and water within the state, and such consent is therein expressed with the stated qualifications. No reference is contained therein to federal acquisition by condemnation. However, the consent of the Legislature to the acquisition through condemnation proceedings by the United States, of property within the state for any and all lawful federal purposes had been expressed many years prior thereto. In this connection, Section 1238 C.C.P. provides in part as follows: "Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses:

"1. Federal Activities. Fortifications, magazines, arsenals, navy yards, navy and army stations, light houses, range and beacon lights, coast surveys, and all other public uses authorized by the Government of the United States. . ."
(Emphasis added.)

In reference to territorial jurisdiction of the state with respect to any lands acquired by the United States, Section 33 of the Political Code provides as follows:

"Sovereignty and jurisdiction of this state extends to all places within its boundaries as established by the Constitution, but the extent of this jurisdiction over places that have been or may be ceded to, purchased or condemned by the United States, is qualified by the terms of such cession or the laws under which such purchase or condemnation has been or may be made."

The Judgment in Condemnation

Having surveyed federal and state legislation applicable to the situation, it is now necessary to consider the judgment in condemnation which vested title to these refuge lands in the United States. Some reference has been made to these proceedings which it will not be necessary to repeat, but it is now required to consider the provisions of the judgment in more

detail. It is, of course, evident that condemnation proceedings are strictly in rem, being directly against the property rather than against the person of the owners. A copy of the findings of fact and conclusions of law entered in the cause, were introduced as an exhibit at the hearing and the "reservations and exceptions" discussed at the hearing, appear in paragraph 13 of the findings of fact, which paragraph reads as follows:

"That the fair market value of the estate, right, claim and interest of said defendant Glenn-Colusa Irrigation District, exclusive of the exceptions and reservations immediately hereinafter set forth, and just compensation therefor, was at the time of the filing of the complaint herein, ever since has been and now is the sum of \$55,000 and the payment of said sum to said district will fully compensate said district for said estate, interest, right or claim in and to said premises.

"The said exceptions and reservations are as follows: Any right to require the said Glenn-Colusa Irrigation District to supply water to said premises without compensation and any right of plaintiff to the use of the pumping plant and/or system of works of said Glenn-Colusa Irrigation District for the purpose of supplying said premises with water are not included in said estate, right, claim and/or interest and are excepted therefrom; the right of lands within the Glenn-Colusa Irrigation District which in the past have drained surface and/or underground waters over, in and/or through said lands hereinbefore described, shall continue and are reserved therefrom, and the right of any and all lands within the boundaries of the said Glenn-Colusa Irrigation District which, because of their natural slope would naturally drain over, in and/or through said described lands sought to be condemned, shall continue and are excepted therefrom; the right of said defendant Glenn-Colusa Irrigation District to the use of all natural and artificial drains now existing on, in or through said premises shall continue and are excepted therefrom and the right (without assuming the duty) of said Glenn-Colusa Irrigation District, its agents, servants and employees to go upon said hereinbefore described premises at any and all times for the purpose of cleaning, maintaining and/or keeping in repair such drains for a distance easterly of one mile from the westerly boundary of said described lands is reserved to said Glenn-Colusa Irrigation District and excepted therefrom and for such drainage purposes the said Glenn-Colusa Irrigation District shall be entitled to the use of the soil in any such drain and the use of any soil along the banks thereof within fifty feet of either side of such drain measured from the center thereof for necessary dumping, excavation or borrowing."

A copy of the judgment in condemnation was not introduced at the

hearing but the records of the Clerk of the United States District Court in and for the Northern Division, Northern District of California, have been consulted from which it appears that the judgment was entered under date of January 18, 1937 and carries the identical language of paragraph 13 of the findings of fact. Following that provision the property is described by legal subdivisions without exception or reservation of any kind whatsoever, and in the concluding portion of the judgment it is stated "That title to said property in fee simple absolute is vested in the United States of America."

Authority to Make and Maintain the Applications

The first issue for determination is whether the applicant is authorized to make and maintain the applications. The applicant contends the game refuge lands are owned by the United States and operated and maintained by an agency thereof, and that such game refuge is separate and apart from the irrigation district, not subject to the jurisdiction and control thereof, and the applicant is therefore entitled to make and maintain the applications. On the other hand the irrigation district vigorously contends that the refuge lands remain within the district, and are subject to the same measure of control, and entitled to the same share of water available to the district, as was the case when such lands were in private ownership prior to their acquisition by the district, with the sole exception that such lands are no longer subject to assessments for district purposes.

On analysis, this is the major point made by the district in support of its protest. All others, with exception of the contention the proposed use is not a beneficial use, depend thereon. If, therefore, this point be determined against the district and found without merit, all others, with the noted exception, would fall. The first subject for consideration is

therefore whether and to what extent the game refuge lands are subject to the jurisdiction and control of the irrigation district. Evidently the primary purpose of an irrigation district is to establish and maintain a dependable water supply for district lands, and to deliver the same thereto. District lands are entitled to their pro rata of the water supply available to the district, on the basis of the ratio which the last assessment levied upon such lands for district purposes, bears to the whole sum assessed upon all district lands. Section 18, California Irrigation District Act. Availability of water to the land, or the future prospect thereof, is the primary compensating benefit which is the basis of and warrant for the power of the district to levy assessments on the land for district purposes. It is also well settled that all rights and properties of an irrigation district are held in trust for the purposes for which the district was created. 26 Cal. Jur. 349, Sec. 560; Moody v. Provident Irr. Dist., 12 Cal. (2d) 389; Jordan v. Williams Irr. Dist., 13 Cal. App. (2d) 465. If, in the matter at hand, this trust includes within its scope the game refuge lands, this might well be decisive of the present controversy requiring a decision in favor of the district. At any rate such would vastly increase the difficulty and complexity of the problem involved.

Now by the terms of the judgment in condemnation whereby title to these game refuge lands was vested in the United States, there is no right in the United States on behalf of such lands to receive a water supply therefor from the district. The "reservations and exceptions" carried into the judgment, are three in number. The first reserves and excepts any right on behalf of the owner of the refuge lands to require the district to serve water without compensation. Presumably the purpose hereof was to relieve the district from an obligation which might otherwise subsist to serve water to the land without payment of water tolls by reason of the exemption of such lands from district assessments. Sec. 375.5 Fish and Game Code.

That this was in fact intended is made clear by the following "reservation and exception". This is the second and provides that there is reserved and excepted any right on the part of the United States to the use of the district's system for the purpose of supplying water on the refuge lands. This is made without any reference to compensation. The intent therefore appears on analysis of these two "reservations and exceptions", to relieve the district from any obligation to serve the refuge lands with water through the district system, and to relegate the subject of water delivery by the district to such lands for compensation, to a future accord between the new owner of the refuge lands, and the district board. Certainly it can not be said in the face of these provisions that the district remains obligated to deliver water to the game refuge lands, or that the United States has any right to demand such service either with or without an offer of compensation therefor. The third "reservation and exception" provides that the district retains certain limited drainage rights in and over the refuge lands.

Note will be taken the first two of these three rights reserved are negative in character. One denies to the United States the rights recited and the other negatives any corresponding obligation on the part of the district. Both are evidently correlative. Further, the game refuge lands, subsequent to the acquisition thereof by the United States, are no longer subject to assessments for district purposes. Section 375.5 Fish and Game Code. The latter also serves to destroy any basis of right on the part of the refuge lands to water service from the district system based on Section 18 of the California Irrigation District Act. The obligation of the district to serve the lands, the right of the lands to receive water from the district system, and the liability of the lands to contribute their share of the expenses of district activities, are all removed. In order to explore

the legal effect of this situation, let it be assumed mandamus were sought by the United States to compel the district to render water service, either with or without an offer to pay compensation therefor. It must be evident in the prevailing situation, the United States would not be in a position to successfully prosecute such an action. Neither is it believed the district can maintain its present position.

The same result must follow for a further reason. The district is clearly an agency of the state and jurisdiction and control by it over the game refuge is evidently incompatible with the federal jurisdiction and control. In Jennings v. U.S.F. and D. Co., 294 U.S. 216, 225, 226, 55 S. Ct. 394, 398, 79 L. Ed. 869, 99 A.L.R. 1248, the court says: "The power of the nation within the field of its legitimate exercise overrides in case of conflict the power of the states." In United States v. .8677 acre of Land (D.C.S.C.), 42 F.S. 91, the question in controversy was whether the federal statutes relied on authorized the United States to condemn lands owned by the state and dedicated to a prior public use. In answering the question in the affirmative, the court said in part:

"Furthermore, whenever the constitutional powers of the Federal Government and those of the State come into conflict, the latter must yield. Florida v. Mellon, 273 U.S. 12, 47 S. Ct. 265, 71 L. Ed. 511. The fact that land is owned by a state is no barrier to its condemnation by the United States; a State cannot prevent the exercise of eminent domain of the Federal Government; and the fact that the condemnation of the State's property will interfere with the State's own program for development and conservation is likewise of no avail, that program must bow before the superior power of the Congress. Oklahoma v. Guy F. Atkinson Co., 313 U.S. 508, 61 S. Ct. 1050, 85 L. Ed. 1487."

In United States v. Pink, 62 S. Ct. 552, 566 the court says:

"But state law must yield when it is inconsistent with or impairs the policy or provisions of a treaty or of international compact or agreement". The federal constitution provides that Congress shall have power to make all

needful rules and regulations respecting the territory or other property of the United States, and the exercise of this power by the United States cannot be restricted by state laws (65 C.J. 1259) when such lands are acquired or administered pursuant to a valid constitutional power. Hunt v. United States, 278 U.S. 96, 49 S. Ct. 38, 73 L. Ed. 200.

The principle is applicable irrespective of the basis of the exercise of the power of the state. Within the proper sphere of federal action it is supreme. 26 R.C.L. 1418, Sec. 5. For example, in Arizona v. California, 283 U.S. 423, 51 S. Ct. 522, 75 L. Ed. 1154, the court says: "The United States may perform its functions without conforming to the police regulations of a state." Nor may a distinction be drawn between proprietary and governmental powers of the United States. "As that government derives its authority wholly from powers delegated to it by the Constitution, its every action within its constitutional power is governmental action. . ." Graves v. New York, 306 U.S. 466, 59 S. Ct. 595.

It now becomes necessary to look to the legislation, Federal and State, heretofore surveyed, to ascertain the intent thereof with respect to jurisdiction and control over properties acquired by the United States for game refuge purposes. According to Section 33 of the Political Code, whether the sovereignty and jurisdiction of the State extends thereover, depends upon the terms "of the law under which such purchase or condemnation has been . . . made." Sections 715g and 715h of Title 16 U.S.C.A., are deemed of primary importance in this connection, and will first be given consideration. The first provides:

"Jurisdiction of the State both civil and criminal, over persons upon areas acquired . . . shall not be affected or changed by reason of their acquisition and administration by the United States as migratory bird reservations, except so far as the punishment of offenses against the United States is concerned."
(Emphasis supplied.)

The state jurisdiction over persons by express provision remains unchanged, with the noted exceptions, but nothing is said in this relation with respect to jurisdiction over the property. In conformity hereto, Section 715h provides that nothing in the act is intended to interfere with State game laws, to the extent they create no conflict with Federal jurisdiction and control. Also in conformity to this concept of exclusive Federal jurisdiction over the territory of such Federal game refuges, Section 715i prohibits the entry on any such game refuge for any purpose except in accordance with regulations adopted by the Secretary of the Interior. This portion of the section alone is here cited, as it confers powers broader than the balance and includes within its scope all the remainder of the section. If no such regulations have been adopted (and if adopted the terms thereof are unknown), this section amounts to an absolute prohibition of entry on such lands for any purpose whatsoever. There are no reservations or exceptions of any kind attached to the power to adopt regulations other than such as are inherent in the power itself, that is, they must be in conformity to the act and for the purpose of making it effective. It is clear such unrestricted rule-making power is necessarily incompatible with any jurisdiction or control by the district over the property of such Federal game refuge. Section 715m follows, establishing a severe penalty for any violation of, or failure to comply with the provisions of the act.

Section 715f provides that "no deed or instrument of conveyance shall be accepted by the Secretary of the Interior" for the purposes of the act "unless the State in which the area lies shall have consented by law to the acquisition by the United States of lands in that State." This consent has been supplied, so far as concerns acquisition by condemnation, by the quoted section of the Code of Civil Procedure. Chapter 5 of the Fish and Game

Code does not in terms refer to acquisition by this means, nor does Section 715f of Title 16, U.S.C.A. Section 375 of the Fish and Game Code expressly accepts "the provisions and benefits of the Act of Congress known as the 'Migratory Bird Conservation Act'" and Section 376 "reserves such full and complete jurisdiction and authority over all such Federal migratory bird reservations as are not incompatible with the administration, maintenance, protection and control thereof by the United States under the terms of said act of Congress", subject, of course to the express exemption of any such Federal game refuge lands by the preceding sections from all taxes and assessments, including irrigation district assessments. This manifestly is merely the equivalent of stating that to the extent there is any conflict between state and federal jurisdiction, the former is controlling.

Section 715p (16 U.S.C.A.) is the only portion of the congressional legislation having any relation whatever to exercise of jurisdiction by the State over the game refuge property, but this relation appears highly significant. It provides that when any state shall, by suitable legislation, make provision adequately to enforce the provisions of the act and all regulations adopted thereunder, and the Secretary of the Interior shall so certify "then and thereafter that said State may cooperate with the Secretary of the Interior in the enforcement of such sections and the regulations thereunder." Apparently this condition prerequisite to exercise of state jurisdiction limited to enforcement of the federal legislation, has not been complied with.

The State legislation is therefore by its terms expressly subordinate to the applicable federal legislation, to the extent there may be a conflict. The sole remaining question is therefore whether there is any conflict. If such there be, it necessarily must be resolved in favor of the federal legislation. This follows not only from the applicable federal statutes, decisions of the Supreme Court of the United States passing upon the force and effect of

Federal legislation of this very character upon State legislation in conflict therewith, but also by the State statutes accepting and consenting to the federal statutes.

The judgment in condemnation vests title to the game refuge lands in the United States in fee simple absolute and the Federal legislation is silent with respect to any power or jurisdiction over the property by the district. The inferences are all to the contrary. While it is true there is here no express cession of exclusive jurisdiction, it appears that so far as concerns the irrigation district in this controversy, it is the intent of both state and federal law that the federal jurisdiction should prevail. Transfer by the state of jurisdiction over local territory to the federal government although not unequivocally declared (Commonwealth v. King (Ky.), 68 S. W. (2d) 45), may arise by implication (Curry v. State (Tex.), 12 S. W. (2d) 796). This principle is approved by the Supreme Court of the United States in Cloverleaf Butter Co. v. Patterson, 62 S. Ct. 491, 496, saying: "The rule is clear that state action may be excluded by clear implication or inconsistency", and in accord, in Western Union Tel. Co. v. Beasley (Ala.), 87 So. 858, 861, the court says:

"In determining whether a federal statute has superseded a state law, the entire scope and purpose of the statute in question must be considered; and that which needs to be implied within its statutory scope and intent is of no less force than that which is expressed in the act. When so considered, if the federal statute, in its chosen field of operation 'will be "frustrated" and its provisions "refused their natural effect" the state law must yield to the superior authority of the federal law within the sphere of its delegated and assumed authority'; and if the state law 'has such indirect and incidental effect on the enforcement or the abeyance of such federal statute, the state law can have no validity.'" Cf. 59 C.J. 34-36.

But the district, and amicus curiae on its behalf, earnestly contend that as the game refuge lands are within the formal boundaries of the district, and the California Irrigation District Act provides a remedy

for excluding lands from the district on petition therefor, that the failure to resort to that remedy is decisive that the game refuge lands remain district lands, subject to its jurisdiction and control.

This argument is based on the premise that when the federal government acquires land within an irrigation district, if it desires to avoid continuation of jurisdiction and control by the district over such lands, it must submit itself, and the lands to the discretionary power and jurisdiction of the district. It would naturally follow that if the petition were to be denied, that the decision would be final and conclusive and the United States would be without further remedy.

The argument is not impressive. The defect consists in the assumption that the formal record maintained by the district, is determinative. The question does not appear to devolve upon any such superficial consideration, but rather the intent of state and federal law, and the effect of the judgment in condemnation. The solution of the controversy does not depend upon any nice formulation of theories but in its last analysis depends upon the answer to the question, to what extent, if any, does the district have jurisdiction and control over the game refuge property. It appears it has none which may be enforced. Even though a petition for exclusion had been filed by the United States and had been granted, such would add nothing to the situation now prevailing. Jurisdiction and control over the game refuge is by act of Congress vested in the Secretary of the Interior and is of such character as to leave nothing in the hands of the district.

Further, this argument advanced on the part of the district is based on the assumption that the provisions of the California Irrigation District Act, including the provisions thereof relating to petitions for exclusion, apply to the United States. This assumption is believed unwarranted. While there does not appear to be direct precedent, there is ample authority for

the position here taken, if such be considered necessary. The present situation is believed to be in legal effect the same as though these game refuge lands were public lands of the United States at the time the game refuge was established thereon.

In Nevada National Bank v. Poso Irrigation Dist., 140 Cal. 344, it was held that in the absence of express consent of Congress, the inclusion of such lands in an irrigation district and the levy of assessments thereon were without authority and void. This case was followed in Woody v. Security etc. Bank, 137 Cal. App. 29. At page 35 the court says: "Appellants contend that Section 3805a of the Political Code (Stats. 1905, p. 90) furnished a way for respondents to remove the assessment from the land and having failed to do so they can not now complain of the assessment and sale." Doubtless there as here it was contended the statutory remedy was exclusive but the court held the statute inapplicable as to such federal lands. It would appear we are forced to the same conclusion here and that the statutory remedy relied on as exclusive, is in fact inapplicable.

The argument assumes the responsible agency of the United States would be authorized to petition the district for exclusion of the refuge lands. The accuracy of this assumption may be doubted. This results from the fundamental principle of federal law that no officer or agent of the United States is authorized to submit the property or rights of the United States to the jurisdiction of any court, without express authority of Congress. Stanley v. Schwalby, 162 U. S. 255, 270, 16 S. Ct. 754, 760, 40 L. Ed. 960; Minnesota v. United States, 305 U. S. 382, 59 S. Ct. 292, 295; Royal Indemnity Co. v. United States, 313 U. S. 289, 61 S. Ct. 995, 997. Evidently there is no such authority here. With the same or greater force, there would be no authority for a federal officer to submit to the irrigation district, an agency of the state, the discretionary power to act upon any such petition. Nor, in event such

procedure were to be followed, and the petition granted, is it believed there would be thereby accomplished any change in the situation over that now obtaining. Neither before nor after would the district have any power, jurisdiction or control over government operations within the confines of the refuge.

In United States v. Johnston (D.C. West Va.), 38 F. S. 4, the United States was granted an injunction prohibiting the owner of adjoining land from permitting his stock to graze upon a national forest reserve thereby trespassing upon the lands of the United States in violation of regulations duly adopted by the Secretary of Agriculture pursuant to federal laws enacted for the protection of the forest. There, as here, the responsible federal officer was authorized to promulgate regulations with respect to use and control of the federal territory, and violation of the laws and regulations was made a penal offense. The defendants attempted to justify the trespass on the ground that there was no fence between the forest reserve and their private lands to prevent their stock from grazing across the line; that they were willing to build their part of such a fence as required by the laws of the State of West Virginia but that it would not be just to require them, under the state law, to build the whole of the fence at their sole expense and that therefore "It is taking their property without compensation when they are not permitted to use their lands in the manner desired by them and in which they are entitled to use them, under the laws of the State of West Virginia." In answer to this the court said:

"Under the Constitution of the United States, when certain conditions are complied with, which has been done in this case, the Government of the United States is entitled to own lands and the laws of the United States alone apply to such ownership, and there is no law passed by Congress requiring the plaintiff to fence its lands.

"The plaintiff, as a sovereign, has a right to make its own rules and regulations as to the use and control of its

own lands, and however hard and unjust it may seem to be to the citizens owning lands adjoining those of the plaintiff, they must comply with those rules and regulations . . .

"In the case of Shannon v. United States, 9 Cir., 160 F. 870, it was specifically held, in a case arising in the State of Montana, that the Federal Constitution delegated to Congress the general power absolutely and without limitation to dispose of and make all needful rules and regulations concerning the public domain independent of the locality of the land, whether situated in a state or territory, the exercise of which power can not be restrained in any degree by state legislation.

"In this case it was further held that public lands in the State of Montana were not subject to the stock and fence laws of the state which were only applicable to lands subject to the state's dominion . . .

"Later the district court for the northern district of Georgia held in the case of United States v. Gurley, 279 F. 874, as follows:

". . . 'Under Const. Art. 4, Sec. 3, vesting Congress with power to "make all needful rules and regulations respecting the territory or other property belonging to the United States," regulations prescribed by Congress, or by a department under its authority, respecting a national forest reservation within a state, whether on the public domain or on lands acquired for the purpose, are paramount, and where such regulations prohibit the general grazing of livestock on lands of the reservation, they exclude from operation as to such lands a state statute providing that the owner of animals shall not be liable for their trespass on lands not enclosed by a lawful fence.'"

In Guy F. Atkinson Co. v. State of Oklahoma, 61 S. Ct. 1040, an attack was made on the power of the Secretary of War to construct and operate the Denison Dam on the Red River. The objections to the exercise of federal power were based, among others, on the ground that local state agencies such as school districts, townships and counties, would be inundated and obliterated, in whole or in part. The court rejected the attack as unfounded, pointing out that the federal power, if constitutionally valid, under our dual system of state and federal jurisdictions, was necessarily paramount to

state jurisdiction where the two come into conflict, saying, "Whenever the constitutional powers of the federal government and those of the state come into conflict, the latter must yield".

And so it is here, the federal law applicable to the refuge lands vests jurisdiction and control thereof in the Secretary of the Interior to the exclusion of State law applicable thereto. It is wholly evident that if there were any conflict between the federal jurisdiction and control, and any power and jurisdiction on the part of the irrigation district, the latter would have no application to these refuge lands. Such federal law is as fully effective and binding upon the district as are the laws of the state. As is said by the court in State of Indiana v. Killigrew, 117 F. 2d 863, 867, quoting from a decision of the United States Supreme Court: "The laws of the United States are laws in the several states, and just as much binding on the citizens and courts thereof as the State laws are."

The irrigation district does not appear to have any effective vestige of jurisdiction or control over these lands. To the extent it is claimed by the district it has other than a naked, technical claim, to which no sanctions of any kind attach or from which no legal consequences could possibly follow, it is believed such claim is unfounded. The purposes and objects of the Federal act appear grounded on a valid, constitutional power of the Congress and as such are paramount to State law or rules and regulations pursuant thereto, to the extent there is any conflict, but none can be perceived. If there were such, it would in any event be necessary to resolve it in favor of the United States. The Federal legislation authorizes the United States to acquire land, water, or land and water, and is therefore entitled to acquire rights to the use of water.

Even though, for purposes of argument, it be assumed the refuge lands are geographically within the limits of the irrigation district they

are not necessarily legally so. That depends on the legal effect of the situation. The facts bear a strong resemblance to those appearing in *Milner etc. Irr. Dist. v. Eagen (Id.)*, 286 Pac. 608. It appears the defendant occupied land within the geographical limits of an irrigation district, which land he was purchasing from the state. Apparently title to the land was retained by the state, and it was conceded that for this reason no assessment could be levied by the district on the land for water furnished. The defendant used water furnished by the district for a number of years, and voluntarily paid the charges assessed therefor, then refused to receive further service or to make any further payments. The district then brought suit to recover from the defendant for his use of waste water draining from adjoining district lands across the land occupied by the defendant which the latter had used for irrigation. The court states the controlling question to be as follows:

"Can an irrigation district compel a party, whose land is geographically within but legally without such irrigation district, to pay for water used by such party, which water has wasted onto his land from the district's canal and from the land of members of said district, and is not delivered directly from the irrigation works of said district, and when the district does not claim any rights in such water by reason of any intent or attempt to recapture the same?"

The court answers the question in the negative on the dual ground that waste water flowing from the land of the appropriator onto the land of another is abandoned and may be used by the latter without obligation to the appropriator; and that there was no basis for recovery on implied contract.

And so here, although possibly still geographically within the district, the game refuge lands are in legal effect no part thereof. It is concluded that for present purposes it is immaterial that these game refuge lands have never formally been excluded

from the district. The sole purpose of such exclusion would be to accomplish the same results as have been effected here. If such lands were to be formally excluded, nothing would be added to the situation now prevailing. Control over these lands by the United States appears exclusive of any power, jurisdiction or control on the part of the irrigation district. This conclusion is strongly fortified, not impeached, by the reservations and exceptions carried into the judgment in condemnation by which title to these lands is vested in the United States in fee simple absolute.

The Issue as to Water Subject to Appropriation

The next issue for determination is whether there is unappropriated water at the proposed points of diversion subject to appropriation. As has been noted, an undetermined proportion of the flow of the creeks involved, is natural flow, but any and all flows of this character are doubtless small in amount and are not in dispute. Consideration will therefore be confined to return flow. Some argument is advanced by the district to the effect the streams are not natural watercourses, but is not pressed with much confidence, and in view of the evidence afforded by the record, it is not believed this point merits comment. The applicant contends the district has deliberately abandoned such return flow and has lost control thereof. It therefore contends such return flow is abandoned, unused water which it is entitled to take and use pursuant to an appropriation in accordance with the provisions of the Water Commission Act.

The protestant claims, and supports the same by a number of arguments, that from the nature of the flow—seepage, drainage and spill derived from foreign flow imported by the district—such is not "unappropriated water" and it is not within the power of the applicant to apply for, nor within the power of the Division to grant the applications to appropriate the same. The arguments advanced to support this claim may be segregated into the following:

1. Until the water passes out of the refuge boundaries, it is still within the confines of the irrigation district and, under the law of this state, is the personal property of the district, has not been abandoned, and remains subject to its power of control. Such being its status, to grant the applications would in effect be taking property of the district and delivering it to the applicant.

2. All water within an irrigation district of whatever character, is within the control of the district, exclusive of any jurisdiction of the Division of Water Resources.

3. By reason that the water sought to be appropriated is water within the territorial boundaries of the district, and also by reason of the status thereof as return water derived from foreign flow, granting the applications would be an unwarranted interference with the internal affairs of an irrigation district and as such, contrary to public policy.

These points will be considered in the order of statement. Based on the premise it has demonstrated that the refuge lands constitute for all purposes important to the controversy, district lands, the point is then made that so long as the water sought to be appropriated is physically on any part of such lands, it constitutes the personal property of the district and is not subject to appropriation. While the premise is unfounded and therefore the argument based thereon must for that reason alone also fall, careful consideration has been given to the argument advanced.

The point is first made that appropriated water is the personal property of the appropriator until used or abandoned, and a number of authorities are cited to this effect. That it is the rule in some jurisdictions appropriated water is considered as personal property, is not denied, nor that a like rule has been approved in a few California decisions. However,

it would appear this principle has been departed from, if not expressly over-ruled, and that an appropriative right to the use of water, for irrigation at any rate, except under certain special circumstances, is not considered as personal property, but as an interest in real property.

In the early case of Heyneman v. Blake, 19 Cal. 579, 594, the court unequivocally stated as follows: "Water, when collected in reservoirs or pipes, and thus separated from the original source of supply is personal property, and is as much the subject of sale—an article of commerce as ordinary goods and merchandise." However, later decisions appear to have over-ruled this principle so far as applied to water impounded in reservoirs or diverted into canals, ditches or even pipe lines for irrigation and other uses. Stanislaus Water Co. v. Bachman, 152 Cal. 716, 725-727, 15 L.R.A. (N.S.) 359; Copeland v. Fairview etc. Co., 165 Cal. 148, 153, 154; Fawkes v. Reynolds, 190 Cal. 204, 211; Relovich v. Stuart, 211 Cal. 422, 428; Schimmel v. Martin, 190 Cal. 429. Other decisions to similar effect might be cited.

As indicative of the extent to which our courts have departed from the concept of an appropriative right as personalty, may be cited the rulings respecting the status of a right merely initiated, but not completed. These rulings are summarized with ample supporting authority in 26 Cal. Jur. 77: "The conditional right to the future use of water obtained by the initiation of an appropriation, either statutory or otherwise, is a property right, and, being incidental and appurtenant to land, it is real property. And this incomplete right, although not a title until the completion of the work for diversion of the water and application thereof to a beneficial purpose, is an interest in realty—in fact, a vested interest." Again, in the same volume at page 51 it is stated: "A right to running water has been defined to be a corporeal right or hereditament, a right running with the land, and

a corporeal privilege bestowed upon the occupier or appropriator of the soil. As such it has none of the characteristics of personalty." Emphasis supplied. "An appropriative right is a corporeal hereditament and constitutes an interest in realty." Wright v. Best (Cal.), 121 P. (2d) 702, 711. As illustration of the special circumstances referred to, may be cited Lewis v. Scanzighini, 130 Cal. App. 722 where it was held that under the peculiar circumstances there prevailing, water sold for industrial use, was personal property.

For many years in this state the status of water diverted by an appropriator from one watershed to another, used there, and after use discharged into a stream in the second watershed, was in doubt. This followed from the anomalous rule announced with respect thereto in E. C. Horst Co. v. New Blue Point Min. Co., 177 Cal. 631 to the effect foreign water is like wild animals, subject to seizure by the first person physically able to do so. However, in Crane v. Stevinson, 5 Cal. (2d) 387, it was directly held that flows of this character are subject to appropriation pursuant to the Water Commission Act which affords the exclusive means of acquiring such rights subsequent to its effective date. Speaking with reference to return flow derived from foreign water, the court says:

"In view of the later definition of State policy in relation to the conservation and use of water, as expressed in the Water Commission Act, and in the recent constitutional amendment (Art. XIV, Sec. 3) on that subject, there should remain no present doubt that the so-called foreign waters are now subject to appropriation under the laws of this state. The fact that where such waters have been brought into a stream as the result of abandonment by another appropriator there is no way to compel him to continue such abandonment, necessarily affects the value of the subsequent appropriative right, but does not affect the existence of the right, subject to the limitation caused by the nature of the water supply in question."

Stevens v. Oakdale Irr. Dist., 13 Cal. (2d) 343, involved the identical character of water. The issue arose between an irrigation district which had originally imported foreign water, applied it on district lands, and for

many years allowed the return flow to drain off the district lands into a stream which, after passing the district boundaries, became available to the plaintiff who sought to appropriate the flow in accordance with the provisions of the Water Commission Act. He was granted a permit and after extensive expenditures and use of the water for many years, without objection on the part of the district, the latter constructed a sump in the streambed within the district boundaries and proceeded to pump the water for re-use on district lands.

The difference, therefore, between the present situation and that obtaining in the Stevens case is primarily that the lands of the appropriator there, never were within the district boundaries. It is herein held that the legal effect of the present situation is identical with that before the court in the Stevens case. The district has parted with control over the water in dispute so long as it continues to flow onto the lands of the intending appropriator, but the district may at any time decrease or discontinue the flow (1) by decreasing or discontinuing the importation or (2) by recapturing and re-using the return flow before it passes beyond its physical control. This is in substance the ruling in the Stevens case wherein the court says (13 Cal. (2d) p. 352):

"To summarize, one who produces a flow of foreign water for beneficial use and thereafter permits it to drain down a natural stream channel, is ordinarily under no duty to lower claimants to continue importing the supply or to continue maintaining the volume of discharge into the second stream at any fixed rate. The rule may have exceptions, as perhaps where the artificial condition has become inherently permanent and there has been a dedication to the public use or where the drainage is stopped wantonly to harm a lower party, without other object. But as a general proposition, an irrigation district, after importing water from one river, passing it through irrigation works, and discharging it into a natural creek bed in the second watershed, may change the flow of water imported or the volume of water discharged from its works into the second stream, or stop the flow entirely, so long as this is done above the point where the water leaves the works of the district or the boundaries of its land. An exception to the rule is not

created by the fact that the district may act upon the water a second time while in its possession, by retaking it at a point of drainage for further beneficial application."

Particular note should be taken the court holds the point of recapture may be made "above the point where the water leaves the works of the district or the boundaries of its land." Naturally the meaning desired to be conveyed is, the recapture may be made while the water is still within the physical control of the district. Here, after the water crosses the game refuge boundary, it is no longer within such control. The water may for beneficial use on district lands, be recaptured and re-used, whether or not the pending applications be granted. The following remarks of the court in the Stevens case (page 352) are applicable here: "In the present case the recapture of the water from the stream channel by defendant district upon its own land (and it may be added, where it has a right to go for that purpose) . . . neither adds to or detracts from plaintiff's claim to the artificial flow."

But the recapture must be made on lands whereon the district has right of entry for that purpose. The issue as to rights to flows of this character as between a landowner within an irrigation district, and the district itself, has never been passed upon by our courts of last resort. But it is apprehended, the right of the district to recapture the flow on the property of the landowner would not be sustained unless the district had acquired right of entry for that purpose. Here it may be the district has a right of entry on the game refuge lands, limited, however, exclusively to maintenance of drains and for no other purpose. On the other hand, from the peculiar wording of the judgment in condemnation by which the applicant acquired the refuge lands, it might be argued that such was merely a right on the part of the district for which compensation was not adjudicated.

However that may be, title in fee simple absolute to the lands is vested in the United States and the district evidently has no right of entry on the game refuge for the purpose of recapturing the flow of the streams and, if it proposes such, the same must be made before the flow reaches the game refuge lands. After allowing the flow to cross the boundary, may it maintain a protest against the proposed use? Obviously, if the owner were a private individual, the district might prescribe tolls for the water to the extent it were to be used and, in default of payment thereof, add them to the current assessment on the lands. Sec. 39f, California Irrigation District Act. But here, that remedy is not available. As an alternative, the district might discontinue the supply, and recourse to this remedy, it is conceded, may be had by the district subject only that the diversion is made for proper purposes and above the refuge lands. As to the latter, from the practical standpoint, the game refuge lands are no more amenable to the jurisdiction and control of the district than though they were and always had been outside the district boundaries. And it is the practical aspect of the situation which must control.

The district and amicus curiae both rely on the Stevens case as conclusive of the present controversy. It is contended that it was there held such return flow from the use of foreign flow is the personal property of the district at least so long as it remains within the boundaries of the district. Their argument then runs that inasmuch as the game refuge lands remain within and constitute a part of the district lands, this water flowing across the refuge lands, is the personal property of the district, has not been abandoned, and is therefore no more subject to appropriation without payment of compensation than would be rice belonging to the district stored in a warehouse. It is then concluded that if the applicant desires to use the water, appropriate tolls should be paid to the district for that privilege.

It is not here expressly stated that the applicant is under a legal duty to pay the district for use of the water arriving upon the refuge lands, but that is the inference, or rather it is implicit in the position taken. It may be conceded that the applicant is in a position to benefit by the return flow arriving upon its lands, but this gives rise to no legal obligation to the district. Again the case in this respect bears a strong analogy to the Idaho case (Milner etc. Irr. Dist. (Id.), 286 Pac. 608) heretofore cited in another connection. Under similar facts it will be recalled that there State owned land not subject to irrigation district assessments, was held to be "geographically within but legally without" the district lands and the court rejected a claim advanced by the irrigation district based on implied contract, saying:

"Nor can the district recover on an implied contract for rendering a service. Respondent expressly rejected its offer to serve him. ... The benefit herein is to be attributed, not to the district, but to the law of gravitation, and perhaps an oversupply to users on higher ground."

This decision appears eminently sound and applicable with peculiar force to the facts in hand. Exactly as in that case, the game refuge lands although geographically within, are in legal effect without the district, and although the applicant is enabled to benefit by the return flow from the district lands arriving on the game refuge lands, the applicant is not for that reason under any obligation whatever to the district; and in turn the district, exactly as in the cited case, may, at any/^{time} it sees fit, recapture and reuse the water before it leaves the control of the district.

As is well said of the Stevens case by amicus curiae, "the facts in that case were almost exactly like the facts in this case" (brief, page 15). In fact, the sole distinctions between the facts of that case and the instant matter are that there, the point of diversion of the subsequent appropriator claiming the right to take and use the water, was situated on the stream some miles below the point where it crossed the district boundary, while here, the points of diversion are within the formal district boundaries; and that there was in that case no controversy between the district and the subsequent claimant as to right of entry by the district. It was there held the water might be appropriated, but the right thereby acquired was subject to the right of the district to recapture and reuse the water within the district "so long as this is done above the point where the water leaves the works of the district or the boundaries of its land." 13 Cal. (2d) at page 352. Emphasis added.

In that case the district proposed to apply the water to beneficial use, here it does not. There, no question whatever was involved concerning the power of control over the water as between the district and the owner of any particular land claimed to be within the district. However, it would appear the court by the quoted statement in the alternative had in mind a future case such as this. Manifestly the court had clearly in mind the controlling element is not that the appropriator releases such right of recapture necessarily in all cases by permitting the water to flow past the boundary, but by reason of permitting the water to pass from the control of the appropriator.

The court states the position of the district to be that the status of the imported water is not changed "by the mere fact that the producer, upon his own property within the second watershed, uses the channel of a natural watercourse as a temporary conduit or drain, retaking the water

therefrom for further beneficial application within his boundaries." No point was presented in that case concerning the power of the district to retake the water within its boundaries and the court does not mention it for the obvious reason no such question was involved in the case.

The discussion of the court with respect to these two points-- the power of control over the water, and its status as realty or personalty-- must be constantly borne in mind in reading the opinion. For example, at page 349 in quoting with approval from Mr. Wiel's article on 'Mingling of Waters, the court is discussing "the restricted point of the effect of the negative act of the producer of a foreign flow in failing to keep up the addition to the second stream." The court is here considering the limitation upon any right which may be acquired by the subsequent appropriator of foreign water released from the control of the first appropriator and importer. The quotation from Mr. Wiel's article which follows this clearly demonstrates this viewpoint. Absent any element of prescription which might be brought to the aid of the second appropriator, his rights continue subject to recapture by the first appropriator "at a point above where it leaves his control." (p. 349.)

The discussion which follows also thoroughly covers the point of abandonment much stressed by the district and particularly the amicus curiae. The latter states that the water is the personal property of the district and continues so until used or abandoned, and as the district has not used the water nor has it evidenced any intent to abandon the same, it is not subject to use by others. This, it is believed, is an erroneous application of the decision. The court nowhere in its opinion declares that a right by appropriation to the continued use of water for irrigation is personal property, irrespective of whether that water is used within the watershed of the stream from which diverted, or in another watershed. Any

such rule, as has been indicated, would be at variance with the settled view of our Supreme Court. In California, a right by appropriation for irrigation is not personal property but an interest in real property. It would be anomalous indeed by the diversion of the water from one watershed to another, the water were to be converted from the status of realty to personalty. The Stevens case is not construed as so holding. The remarks of the court relating to the water as personalty, must be related solely to the situation existing at any particular moment of time, not to the right to continuance of flow. See Lindblom v. Round Valley W. Co., 178 Cal. 450 at page 456 where this distinction is made. This distinction is also clearly made in the Stevens case. The court says (page 350):

"The distinction must be observed between abandonment by one who creates an artificial flow, of his water right (the right to divert and use the water of the first stream) and abandonment of used water itself (the very body or corpus thereof) after it has been imported into the second watershed."

The water at any moment of time within the possession and control of the appropriator in proper circumstances may well partake of the nature of personalty, but this right, the right to use water at any moment of time within the control of an appropriator is not the thing of prime value; that is not a water right. That which has the high value is the right to continually replenish that supply—the right to have the water continue to flow—this is a water right. One may abandon particles of water by releasing the same from his works and permitting the same to pass beyond his control without affecting in any manner his water right. By so doing he abandons or relinquishes such water as he releases and permits to pass out of his control without the intent to recapture, but he does not thereby abandon his water right. In the following discussion the court clearly recognizes this distinction.

The fact that by reason of the right of the subsequent appropriator being constantly subject to recapture of the water by the first appropriator prior to its leaving his control, the second "appropriator merely secures the corpus of the water thus escaping as personalty," does not militate against the principle that this qualified right to the use of the water is in like measure with all other appropriative rights to the use of water for irrigation, an interest in real property. Such water as personalty has reference to the "abandonment" from time to time of water particles, it may be said. Unless the case is interpreted in this manner, it is not in accord with another well settled principle. Under the appropriation doctrine can be acquired "only the use of the water and not the ownership in the corpus thereof." Scott v. Fruit Growers Supply Co., 202 Cal. 47, 55, and the same principle is applicable under the riparian doctrine. Hargrave v. Cook, 108 Cal. 72, 77. These principles are fundamental and no longer require extended citation of authority.

Only by the interpretation here advanced may the apparent recognition in the Stevens case of a right to the use of water as personalty, be reconciled with the weight of its own prior decisions on the subject. So considered and applied, the water, as it passes from control of the appropriator, at any particular moment of time, is "abandoned", relinquished would be the better word, in favor of any one who may be able to make use of it. It is not abandoned or relinquished realty, but personalty. It thereupon rejoins the "negative community" and becomes the subject of further appropriation. The water that has escaped from control of the first appropriator "is again neither his nor anyone's." (13 Cal. 2d. page 349.)

The essential ruling of the case is that recapture may be made until the water passes beyond physical control. However, if for purposes of argument, it be assumed this is not the criterion intended by the court, there remains only that such recapture may be made until the water crosses the boundary of the district. This is the interpretation placed on the

decision by the writer of a note on this case appearing in 28 C.L.R. 114 cited by amicus curiae. In order that this interpretation might support the application made of it on the part of the district, it would be necessary to hold that the game refuge lands are in legal effect district lands. It has been concluded that the legal effect of the situation is that the refuge should not be so considered. But in order to test the soundness of the position, which is urged with great earnestness on behalf of the District, let us briefly explore this point.

All rights and properties of an irrigation district are by law held in trust for the use and benefit of lands within the district. 26 Cal. Jur. 349, Sec. 560; Moody v. Provident Irr. Dist., 12 Cal. 2d. 389; Jordan v. Williams Irr. Dist., 13 Cal. App. 2d. 465. This is now a fundamental principle of irrigation district law. However, it is not debatable that so far as concerns the United States, this trust no longer includes these lands. Possibly the federal and state legislation applicable to the situation would alone have been sufficient to accomplish that result. But when there is added the explicit "reservations and exceptions", carried into the judgment in condemnation whereby the United States acquired these lands, in terms relieving the district of any obligation to serve water to the lands, and depriving the United States of any and all rights to the water system of the district for the purpose of supplying the premises with water, the interpretation contended for clearly becomes without force—the reason for the rule has ceased. So, in any event, application to the situation at hand, of the principle of the Stevens case, requires a decision of the determinative issues here in favor of the United States.

In the present case there is no question of abandonment of any water right. Nevertheless, the district continues to abandon each and every particle

of water that is allowed to pass into the game refuge lands. In accordance with the principles declared in the Stevens case, the district may exercise its right of recapture of that water "at any time or in any manner", "at a point above where it leaves (its) control." This point, as it has been seen, for purposes of the present controversy, is the boundary between the game refuge lands and the remaining lands of the district.

The Issue as to Dedication of the Water to the District

The district next contends there is no water available to the applicant which it may apply for, or which the Division may grant to the applicant and that this follows by force of Section 56 of the California Irrigation District Act. It apparently is contended that this section gives, dedicates and sets apart to the district all water within its boundaries irrespective of whether the district can make any present beneficial use thereof. If this contention were sound, it would remove from the jurisdiction of the Division of Water Resources all power and authority to act on an application to divert water from any stream within the confines of an irrigation district. Such a revolutionary doctrine certainly should not be approved unless under the force of compelling necessity.

It is contended on behalf of the district the provision first appeared in the so-called Wright Act (predecessor of the present California Irrigation District Act), Stats. and Amdts. 1887, p. 29. Section 38, page 43, after authorizing the construction of district works across any stream, water-course, street, highway, etc., provides as follows: "The right of way is hereby given, dedicated and set apart, to locate, construct, and maintain said works over and through any of the lands which are now, or may be the property of this State; and also there is given, dedicated, and set apart, for the uses and purposes aforesaid, all waters and water rights belonging to this State within the district."

What are "the uses and purposes aforesaid" for which this purported dedication is made? Applying the rule of the last antecedent, such would be for the purpose of construction of works "over and through any of the lands which are now, or may be the property of this State." So construed, the provision would have no application to the matter under review, no State lands being involved. If it be assumed to have the broad application contended for, so far as concerns water within an irrigation district, it would eliminate the jurisdiction vested in the Division of Water Resources in and by the Water Commission Act and as well it would appear to conflict with the evident policy of Article 14, Section 3 of the Constitution. Can this provision of Section 56 of the California Irrigation District Act have greater vitality than the former doctrine of riparian rights?

In Peabody v. City of Vallejo, 2 Cal. (2d) 351, it was held that the formerly firmly entrenched doctrine of riparian rights must yield to the constitutional provision. Surely this purported dedication must do no less. The district is not claiming by virtue of the dedication a right to make beneficial use of the water, but denies that right to another. In this connection it should be remembered that our law does not recognize the ownership of running water, but merely a right of use--a usufructuary right therein and thereto--a right to make beneficial use thereof. The district concededly will retain that right, but it desires to prohibit use thereof by others.

Section 56 of the California Irrigation District Act does not appear to have been construed by our courts of last resort. In State v. Marin Municipal Water District, 17 Cal. (2d) 699, the court had under consideration a section of the Municipal Water District Act which closely follows the wording of Section 56 except it omits the provision relating to water rights with which we are here concerned. The situation portrayed in State v. Dolese Bros. Co. (Kan.), 102 P. (2d) 95 bears a strong analogy to the situation

under review. There, an act of the legislature granted broad powers to drainage districts, among other matters, to establish protection from floods. After a long legislative history, many of these broad powers were vested in a division of water resources, which was authorized to adopt plans for flood control. Such plans were adopted which conflicted with plans adopted by a drainage district. Concerning this conflict the court (102 P. (2d) 103) says:

"The legislature has taken effective steps to bring the general subject of flood control under a common head so that a comprehensive plan may be evolved for the entire length of a stream within the state. The plans of any drainage district must yield to the general plan when the two conflict."

The most that can possibly be said of Section 56 of the California Irrigation District Act, it is believed, is that it was intended thereby to a limited extent to place administration of the waters of the State in the hands of irrigation districts. There was at the date of the original enactment of the provision, and for many years thereafter, no other administrative control over the use of water in this State. This provision might have served, if put into effect (which it never was) until the enactment of an improved substitute. The Water Commission Act now occupies the field to the exclusion of all statutory provisions in conflict therewith. Sec. 44, Water Commission Act. It appears utterly impossible to reconcile this purported dedication with the provisions of the latter act unless the former be construed merely as confirmatory of any and all rights otherwise acquired for district purposes. So construed, there would be no conflict, but little vitality would be accorded to the provision.

To the extent the purported dedication militates against exercise of the broad jurisdiction vested in and by the Water Commission Act, it is believed it has been repealed. In opposition hereto it could only be contended the district had acquired a vested right by virtue of the dedication. According to this argument, the right so acquired would be as arbitrary and

unyielding, and as contrary to the public interest as was ever the former doctrine of riparian rights. The argument of the district in this behalf is believed without merit. In any event, if the purported dedication has any present vitality, at most it could but give the district the right to recapture and reapply the water to beneficial use at any time in the future. Even though the applications were granted, under the principles herein approved, the district will retain that right—it can claim no more.

The further argument is advanced on the part of the district that it would be contrary to public policy to grant the applications as an unwarranted interference with the internal affairs of the district. This, it is believed, necessarily falls of its own weight following disposition of other arguments advanced by the district. Public policy is declared by the people of the State speaking through constitution and statutes in accord therewith. That sovereign power has spoken and the objections to granting the applications have no sound basis in the public policy declared thereby.

The Issue as to Beneficial Use of the Water

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The fourth and last issue necessary for decision of the matter at hand, is the contention by the district the use proposed by the applicant is not a beneficial use of water. This is based on Ex parte Elam, 6 Cal. App. 233 and In re Maas, 219 Cal. 422. In the former case, after recognizing as lawful the maintenance of privately owned and maintained duck ponds, the court says in part, "It will scarcely be contended that this is a use of water which is beneficial to the land", and "no surface owner possesses the right to extract the subterranean water in excess of a reasonable and beneficial use upon the land from which it is extracted." In that case the court upheld the validity of a statute as a valid exercise of the police power so limiting the use of water from artesian wells.

The subsequent case (In re Maas) followed and applied the former

decision. The latter case differed primarily in that a county ordinance limited in a similar manner the use of pumped water. Speaking of the ordinance the court says: "It has for its purpose the conservation of subterranean waters, a legitimate field for the exercise of the police power. (Ex parte Nam, supra.) It is purely local in character and operation, for it seeks to prevent the undue waste of the percolating waters within the County of Orange, thereby conserving said waters and materially benefiting the public welfare. The ordinance does no violence to any general law of the State to which our attention has been directed." (Emphasis supplied.)

It was directly held supplying of water to duck ponds by pumping from underground sources in order to create ponds owned and operated by a private gun club, was not such a beneficial use of water as was required by the ordinance. The ordinance expressly authorized the use of the water for irrigation, domestic use, and for the propagation of fish. It may be assumed that at the date of the decision there was no general law of the state expressly authorizing the use of water for the purpose of maintenance of publicly owned and operated game refuges, or if there were such that it was not called to the attention of the court. This situation is now materially different.

Chapter 5, Sec. 375 of the Fish and Game Code expressly accepts the Federal legislation here involved and authorizes the Federal Government for the purposes thereof to acquire "areas of land, water, or land and water". Further, Chapter 4 of the Fish and Game Code authorizes the acquisition and operation by State agencies, acting independently of the United States, of similar refuges and in subdivision (d) of Section 325, for such purposes authorizes the acquisition of water rights. No distinction is made therein between the propagation and protection by such means of "birds, mammals and fish." Cf. Sec. 325. Evidently in the face of such legislation it could not be said use of water for the purposes of such game refuges is not a

beneficial use of water. To the extent the rule of the cited decisions is applied to the use of water for the necessary purposes of maintenance of publicly owned and operated game refuges, such is not now the law.

A further question was not raised in the briefs filed in the matter of the pending applications, but it appears it will be necessary to pass thereon in disposing of the matter. The question is whether such use of water as proposed, is or may be made subordinate to uses declared higher by statute. Section 15 of the Water Commission Act provides in part as follows:

"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."

The United States is applying for permits to appropriate water pursuant to the Water Commission Act and rules and regulations pursuant thereto, and has thereby expressly submitted itself to the operation of State law. It is mandatory that the use proposed be recognized as a beneficial use, but it is equally imperative to apply this "established policy" and to condition permits to accord therewith when the circumstances, in the discretion of the enforcement agency, so require.

SUMMARY AND CONCLUSIONS

Aside from an inconsequential and intermittent natural flow in Logan Creek and the North Fork of Logan Creek during the winter and early spring months, the water which the applicant seeks to appropriate is derived from water brought into the Glenn-Colusa Irrigation District from the Sacramento River and applied therein for irrigation purposes, and is returned to the streams within the Sacramento National Wild Life Refuge as waste and seepage. The streams in their course through the refuge are natural water courses and the water therein being no longer within the control of the district, is unappropriated water subject to appropriation pursuant to the Water Commission Act, but remains subject to discontinuance of the importation from the Sacramento River, and also subject to the right of recapture and reuse by the district for lawful purposes prior to the water escaping from its control.

The game refuge lands, by reason of applicable federal and state legislation and the terms of the judgment vesting federal title thereto, except for certain limited use of the streams as drains, do not appear to be to any extent subject to the jurisdiction and control of the district, but on the contrary, are under the jurisdiction and control of the Secretary of the Interior, acting under congressional statutes which constitute a valid exercise of the treaty-making power of Congress. As such, that federal legislation and rules and regulations pursuant thereto, are exclusive of any jurisdiction and control over these lands by the irrigation district.

By reason, therefore, of such status of the game refuge lands, and of the status of the water sought to be appropriated, as drainage and seepage derived from foreign flow, it is the considered opinion of this office that the applicant is entitled to make and maintain the pending applications and

and to receive permits to appropriate such waters, subject to the indicated limitations.

It is also the considered opinion that under the circumstances here obtaining, the use proposed is a beneficial use. However, it is not considered that such use should have equality with or interfere with uses declared higher by statute, or even to enjoy equality with such uses initiated either prior or subsequent. It is considered a duty imposed by statute and a proper and reasonable function of the Division to impose terms and conditions in order to develop, conserve and utilize in the public interest the water sought to be appropriated, and to that end to restrict and limit use under permits in such a manner as to accomplish such objectives. While the use to which the applicant proposes to apply the water is useful and beneficial, such use should be so restricted as to eliminate interference with existing or future higher uses, and to this end a special term or condition should be incorporated in each permit. Also each permit should contain a special term advising the holder of inherent limitations upon continuity of supply.

O R D E R

Applications 9092, 9093, 9094 and 9095 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 submitted and the Division of Water Resources now being fully informed in the premises:

IT IS HEREBY ORDERED that Applications 9092, 9093, 9094 and 9095 be approved and that permits be issued to the applicant subject to such of the usual terms and conditions as may be appropriate and subject also to the following special terms, to wit:

1. This permit is issued subject to the express condition that diversions hereunder for the purpose contemplated may be regulated by the Division of Water Resources as by it deemed necessary to prevent interference with rights heretofore or hereafter acquired for higher uses.
2. This permit is issued subject to the further express condition that any and all right to the continued use of water hereunder, to the extent such water is derived from a source foreign to Logan Creek and the North Fork of Logan Creek, is subject to discontinuance of the importation from such foreign source, and is also subject to recapture and reuse for lawful purposes before the same arrives upon and within the Sacramento National Wild Life Refuge.

WITNESS my hand and the seal of the Department of Public Works
of the State of California, this *17* day of *Sept.*, 1942.

EDWARD HYATT, STATE ENGINEER

By

Harold Conkeling

