

Ms. Page

STATE OF CALIFORNIA
STATE WATER RIGHTS BOARD

IN THE MATTER OF APPLICATION 16329)
BY CHARLES L. HARNEY)

Decision No. 878

Decided: November 13, 1957

Appearances at Hearing Conducted at Merced on February 19, 1957, by John B. Evans, Member, and on March 11, 12, 13 and 14, 1957, by Henry Holsinger, Chairman, John B. Evans, Member, and W. P. Rowe, Member, State Water Rights Board:

For the Applicant:

Charles L. Harney

H. K. Landram
Attorney

For the Protestants:

Modesto Properties Co.

Leo J. Beigenzahn,
Attorney

U. S. Bureau of Reclamation
(as an interested party)

John K. Bennett,
Assistant Regional Solicitor,
Department of the Interior

DECISION

Substance of the Application

Application 16329, filed April 21, 1955, is for a permit to appropriate 60 cubic feet per second to be diverted the year around from Livingston Drain for the irrigation of 3,474 acres of general crops and incidental stockwatering purposes. Diversion is to be effected by gravity by means of checks placed in the drain at points of diversion Nos. 1, 3 and 4, and by pumping from a sump at a maximum rate of 1 cubic foot per second at point of

diversion No. 2. The locations of the points of diversion are as follows:

Diversion Point No. 1 - SE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Section 21, T7S, R11E

Diversion Point No. 2 - SE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Section 21, T7S, R11E

Diversion Point No. 3 - SE $\frac{1}{4}$ of SW $\frac{1}{4}$ of Section 21, T7S, R11E

Diversion Point No. 4 - SE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Section 20, T7S, R11E

Protests and Answers

Modesto Properties Company bases its protest against Application 16329 upon an agreement entered into in 1918 by County of Merced and Bloss Land and Cattle Company which provided, in part, that in return for a flowage easement (Livingston Drain) across the Bloss property, the County of Merced gave Bloss the exclusive right to use all the water flowing in Livingston Drain. In view of this agreement and because Modesto Properties Company is the successor to a portion of the Bloss property, it claims the waters sought under Application 16329 are not subject to appropriation. It also claims that the drain is an artificial channel and waters in it are not subject to appropriation.

In reply to the protest of Modesto Properties Company, applicant Harney alleges that the water flowing in Livingston Drain within the Bloss flowage easement or right of way wastes into Bear Creek and San Joaquin River and is subject to appropriation. It is also claimed that, although artificial in origin, the drain has by public use and acceptance become the equivalent of a natural watercourse.

Hearing Held in Accordance with the Water Code

Application 16329 was completed in accordance with the provisions of the Water Code and applicable administrative rules and regulations of the State Water Rights Board (hereinafter referred to as the "Board") and were set for public hearing under the provisions of the California Administrative Code, Title 23, Waters, before the Board to commence on Tuesday, February 19, 1957, at ten o'clock a.m., in Merced, California. Of the hearing the applicant and protestant were duly notified. The hearing extended through February 19 and March 11, 12, 13 and 14, 1957. The application was consolidated for hearing with Applications 15627, 15628, 15891, 15958, 16083, 16393, 16604 and 16909.

Hearing Testimony

In 1916, a drainage district, known as "Drainage Improvement District No. 1," was formed by the Board of Supervisors of Merced County for the purpose of constructing a suitable system of ditches or drains for certain lands within Townships 6 and 7 South, Range 11 East, MDB&M (Modesto Exhibits 1 and 2). In 1918, an agreement (Modesto Exhibit 3) was executed by the Bloss Land and Cattle Company (predecessor in interest to both applicant and protestant) and the County of Merced by which Bloss granted to the county a right of way for a drain or ditch across the company's lands from a point on the east boundary

thereof and extending generally westerly and approximately one mile across Section 21, Township 7 South, to the westerly boundary of the East Side Canal which extended in a northwesterly direction through the Bloss land, together with the right to flow drainage waters from lands within the drainage district upon the Bloss land at the terminous of said right of way and into and along a ditch or ditches constructed or to be constructed by Bloss from said point to Bear Creek. As partial consideration for the right of way and flowage right, it was agreed that the county would not consent to the diversion from the drainage ditch of any water flowing therein and Bloss reserved the right to divert from the drainage ditch all water flowing therein for beneficial use upon its lands or other lands susceptible of irrigation therefrom. The agreement further recites that the county "does hereby sell, assign, and convey to the first party (Bloss) the right to use all water diverted into or ponded up in said drain across said strip of land," and that "this indenture is binding upon and accrues to the benefit of the parties, their successors and assigns."

Although there is no direct evidence in the record concerning the matter, it is apparently conceded by the parties that a drain known as Livingston Drain was constructed by Merced County in or about 1918 across and along the right of way described in the aforesaid agreement and that it has been subsequently maintained by Merced

Irrigation District to whom the county in 1922 transferred all of its lands and drainage works acquired and constructed for the benefit of lands in Drainage Improvement Districts Nos. 1 and 2 in said county (Modesto Exhibits 4, 5 and 6). There is evidence that several years prior to the hearing the portion of the drain easterly of East Side Canal was cleaned out by the Merced Irrigation District (R.T. page 391). It is also conceded that Livingston Drain was originally constructed as an artificial man-made channel. Harney Exhibit 15 shows the course of Livingston Drain through Sections 15 and 22 north and east of the former Bloss lands and through said lands in Section 21 to and under the East Side Canal. Livingston Drain is also shown on Harney Exhibit 15 as extending further through Sections 29, 30 and 31 across former Bloss lands to Bear Creek. The latter portion of the drain was apparently constructed and maintained by Bloss or its successors in interest and has served as a conduit to receive and convey drainage waters discharged into it from lands within Merced Irrigation District through the portion of Livingston Drain above the East Side Canal.

It was stipulated at the hearing that all lands now owned by Harney and Modesto as shown on Harney Exhibit 15 and Modesto Exhibit 11 were owned by Bloss at the time of execution of the 1918 agreement with Merced County (R.T. page 386).

Succession of title from Bloss to Modesto is shown by Modesto Exhibits 7, 8 and 9 consisting of deeds from Bloss to Louis Titus, from Titus to East Side Investment Company, and from East Side Investment Company to Modesto, the latter deed being dated December 15, 1923. Livingston Drain runs for a considerable distance through lands now owned by Harney in Section 21, then crosses a narrow strip of Modesto lands in Section 20 near the apex of a triangular portion of said lands immediately west of the East Side Canal, and then re-enters Harney lands in said Section 20. A ditch extends from Livingston Drain southerly through the Modesto lands shown on its Exhibit 11 which comprise approximately 1,940 acres (R.T. page 367). Water has been diverted from the drain through this ditch and used for flood irrigation (R.T. page 368). Such diversion and use was being made at least as early as 1929 and has been maintained to the present time (R.T. page 401). The capacity of the Modesto ditch is approximately 15 c.f.s. (R.T. page 370). Flow in the ditch during the irrigation season fluctuates considerably and it runs at capacity only for short periods of time (R.T. page 392). The company's water requirements for irrigation are about $2\frac{1}{2}$ acre-feet per acre, plus a continuous flow of 0.1 to 0.2 c.f.s. for stockwater (R.T. page 371). Livingston Drain is the company's only source of water for irrigation of grass for cattle feed (R.T. pages 375, 382, 392).

Water is also purchased by the company from the East Side Canal for duck shooting purposes after the close of the irrigation season (R.T. page 378).

The bottom of the Modesto Ditch at Livingston Drain is at least 12 to 14 inches higher than the bottom of Livingston Drain (R.T. page 393). Before silting in recent years, there was a difference in elevation of from 4 to 6 inches (R.T. page 407). There is no structure in Livingston Drain to divert water into the Modesto Ditch, and consequently water flows into the ditch only at such times as there is sufficient water in the drain to overflow into the ditch (R.T. page 397). At other times water continues down Livingston Drain onto the Harney lands.

During past years water in Livingston Drain has been used both on the Modesto and Harney lands pursuant to mutual agreement (R.T. page 405), although no agreement was reached as to the right of either party to a definite share of the water or the interest of either party therein (R.T. page 404). Occasional disputes between Modesto and Howard, predecessor to Harney, were resolved amicably (R.T. page 401) and there has been sufficient water to supply both (R.T. page 398). Modesto has based its claim of right to the use of flow in Livingston Drain upon the 1918 agreement between Bloss and the County of Merced (R.T. page 401). The basis for the claim of Harney and his predecessors does not appear in the record.

Harney exhibits 2, 4, 6, 7 and 8 depict flows in Livingston Drain computed from unpublished records of the United States Bureau of Reclamation and Merced Irrigation District. Flows for the years subsequent to 1952 were derived by totaling measured inflow to the drain from laterals of the Merced Irrigation District, subtracting from that total the amount pumped out of the drain by the district, estimated to be 5 c.f.s., and then adding 2 c.f.s., estimated to be the amount of ground-water flow or spill into the drain from local irrigation at points above the Harney land (R.T. pages 327-334). Mr. Howard Stoddard, engineer for Harney, expressed the opinion that the result derived from the foregoing mathematical computations is the most accurate available record of flows in Livingston Drain as it enters the Harney property (R.T. page 328). Exhibit 8 shows spot measurements of flow in Livingston Drain in the vicinity of the East Side Canal, taken during the years 1939-42, 1948-49 and 1952 (R.T. page 345). These figures are averaged for each month of record in Harney Exhibit 6. Measurements made on September 21, 1940 (Harney Exhibit 8) show that 2.2 c.f.s. were flowing into the Modesto Ditch and 13.7 c.f.s. down the drain to the Howard lands. On October 8, 1940, the division was 2.88 c.f.s. to Modesto and 11.87 to Howard.

It appears from this evidence that Harney and his predecessors have used, by common consent, the first 10 c.f.s. reaching the Modesto Ditch and that flows in

excess of this amount were divided between Harney and Modesto during the period of many years when there was mutual and incontrovertible use of the waters of Livingston Drain.

Leland K. Hill, civil engineer employed by the United States Bureau of Reclamation, testified (R.T. pages 426 through 466) concerning the water requirements in the Sacramento-San Joaquin Delta and for the operation by the United States of the Central Valley Project. Counsel for the bureau stated (R.T. page 243, line 3) that by reason of estoppel by deed, the bureau would not protest an application to appropriate water from a stream on the east side of the San Joaquin River for use on the Harney lands which were formerly owned by C. S. Howard.

Discussion

Modesto objects to the granting of a permit to Harney upon the grounds that (1) the Board has no jurisdiction to issue a permit because Livingston Drain is not a natural channel but is artificial, and (2) the successors in interest of Bloss have a contractual right to the use of all waters flowing in the drain and applicant's rights, if any, to this water must be derived from the contract. Consequently, Modesto contends, there is no unappropriated water in the drain subject to appropriation pursuant to the application.

1. The question whether the Board has jurisdiction to issue a permit to appropriate water from an artificial channel is one of importance not only to the proper disposition of this application but also as a precedent in acting upon similar applications to appropriate water from other artificial drains and channels throughout the State. The records of the Board disclose that no distinction has heretofore been made by the Board's predecessors in authority between natural and artificial channels and that the uniform practice for many years has been to accept jurisdiction in either instance. No precedent has been found for refusing to issue a permit upon the ground that the source of water is an artificial channel. The record of this proceeding shows that permits have heretofore been issued to appropriate water from a branch of Livingston Drain connecting with the East Side Canal (R.T. pages 412-414).

The question under review should be considered in light of the paramount policy of this State as expressed in both Constitution and statutes that all water be put to beneficial use and that waste and unreasonable use of water be prevented (See Cal. Constitution Art. XIV, Section 3; Water Code Section 100). The Legislature has further declared that all water within the State is the property of the people of the State, but the right to the use of water may be acquired by appropriation in the manner provided by law (Water Code

Section 102). Division 2 of the Water Code, which defines the Board's jurisdiction, is in furtherance of the policy contained in Section 3 of Article XIV of the Constitution (Water Code Section 1050).

Water Code Section 1201 is the sole basis for the contention that the jurisdiction of the Board to issue permits to appropriate water is limited to water flowing in natural channels. This section provides as follows:

1201. All water flowing in any natural channel, excepting so far as it has been or is being applied to useful and beneficial purposes upon, or in so far as it is or may be reasonably needed for useful and beneficial purposes upon lands riparian thereto, or otherwise appropriated, is hereby declared to be public water of the State and subject to appropriation in accordance with the provisions of this code.

The foregoing language is a codification of the second sentence of Section 11 of the Water Commission Act of 1913 (Stats. 1913, Ch. 586). Section 2 of the Water Code provides that:

2. The provisions of this code, in so far as they are substantially the same as existing statutory provisions relating to the same subject matter, shall be construed as restatements and continuations thereof, and not as new enactments.

Therefore, whenever interpretation of a code provision is required, the provisions of the Water Commission Act from which the code provision was derived should be examined. This procedure is particularly appropriate in this instance, since Section 1201 does not affirmatively restrict jurisdiction, but simply fails to confer authority over any unappropriated water except that flowing in a

natural channel. If accepted as an implied restriction and as the sole measure of authority, it would prevent the Board from exercising jurisdiction over unappropriated water in any surface source other than a flowing stream, such as a lake--a result contrary to the apparent intendment of other statutory provisions, hereinafter noted, as well as to administrative practice of long standing.

Section 15 of the Water Commission Act of 1913 empowered the State Water Commission to allow "...the appropriation of unappropriated water or of the use thereof, or of water or of the use thereof which may hereafter cease to be appropriated or which may hereafter be declared to be unappropriated, or which, having been used under claim of riparian proprietorship or appropriation finds its way back into a stream, lake or other body of water and also such water as is declared under section eleven of this act to be subject to appropriation."

The foregoing provisions constitute the basic definition of the Commission's jurisdiction to authorize use of water. Included in that jurisdiction was unappropriated water in general and also water which having been appropriated or used "finds its way back into a stream, lake or other body of water." It is apparent that no restriction was imposed with respect to water in an artificial channel.

It is to be noted that Section 15 makes reference to Section 11 of the Act by providing that in addition to

water described in Section 15 as being under the jurisdiction of the Commission, the Commission might also allow the appropriation of "such water as is declared under Section 11 of this act to be subject to appropriation."

Referring to Section 11, we find the first two sentences declare certain waters to be "unappropriated" or "subject to appropriation." The first sentence includes all water which has never been appropriated and water which, having been appropriated, has ceased to be beneficially used. The second sentence (predecessor of Water Code Section 1201) declares that waters flowing in a natural channel which are not subject to riparian rights or otherwise appropriated are subject to appropriation under the act.

The foregoing provisions of the Water Commission Act afford no rational basis for the contention that jurisdiction to allow the appropriation of water is limited to waters flowing in a natural channel. The only portion of the act referring to such waters with respect to the Commission's jurisdiction is the second sentence of Section 11 which, when read together with the other provisions pertaining to the same subject, obviously was not intended as the sole measure of jurisdiction. The provisions of Section 15 have been combined with the first sentence of Section 11 in Section 1202 of the Water Code.

Occasional statements to the effect that water in an artificial channel is not subject to appropriation are

based upon the concept that such water constitutes personal property and as such belongs to the appropriator from the natural stream (See Kinney on "Irrigation and Water Rights," 2nd Edition, Section 662). It is well established, however, that when water has been appropriated and abandoned without intent of recapture, property in it ceases. Such abandoned water is subject to appropriation by another and the fact that there is no way in which the appropriator can compel the importer to continue abandonment into the stream affects the value of the appropriative right but not its existence so long as the supply is available (Bloss v. Rahilly, 16 Cal. 2d. 70, Crane v. Stevinson, 5 Cal. 2d. 387, Stevens v. Oakdale Irrigation District, 13 Cal. 2d. 343). Whether the abandonment is into a natural or an artificial channel would not appear to affect the reasons for the rule.

It is concluded, therefore, that the Board has jurisdiction to issue permits to appropriate unappropriated waters from artificial channels in general and that, in particular, its jurisdiction extends to drainage water from irrigated lands. The water here involved is such drainage water.

It is further the finding of the Board that Livingston Drain was constructed as a permanent installation, that it has been maintained as such continuously for a period in excess of 35 years and that an extensive area through which the drain flows comprising lands formerly owned by Bloss has been allowed to adjust itself to the

presence and existence of the artificial watercourse, acting upon the supposition of its continuance. It follows that the drain's artificial origin should be disregarded and that it should be considered as a natural watercourse insofar as rights to the appropriation and use of water flowing therein are concerned (See Chowchilla Farms, Inc. v. Martin, 219 Cal. 1, Miller & Lux, Inc. v. Tulare Lake Basin Water Storage District, 219 Cal. 41, Clement v. State Reclamation Board, 35 Cal. 2d. 628).

2. Next to be considered is the contention of Modesto that none of the drainage water in Livingston Drain is subject to appropriation because the right to all such water was conveyed to Bloss and its successors by the County of Merced. Assuming the full force and effect of the 1918 agreement as stated by Modesto, it does not appear that the application of one of the successors to Bloss for a permit from the State to appropriate a portion of the water conveyed to Bloss should be denied. Modesto has advanced no claim nor submitted any evidence that it is entitled under the agreement to all the drainage water in question. At most, it is entitled to an equitable share thereof. Regardless of what that share might be, the evidence is conclusive that there are at times substantial flows in Livingston Drain which have not been beneficially used by Modesto and which are in excess of its reasonable requirements for beneficial use upon its lands. The evidence in the record shows that the maximum capacity of

the Modesto Ditch is 15 c.f.s. and that the 1,940 acres owned by the company require $2\frac{1}{2}$ acre-feet per acre during the irrigation season. This would equal a continuous flow of 11.5 c.f.s. Flows in excess of this amount occur at times throughout the irrigation season and are generally heaviest during August and September when irrigation requirements are the highest. Such excess water may be appropriated by others subject to a final determination of vested rights therein by a court of competent jurisdiction (Haun v. De Vours, 97 Cal. App. 2d. 841), and any water to which Modesto may establish a contractual right which is surplus to its present requirements is likewise subject to temporary appropriation by others (See Stevinson Water District v. Roduner, 36 Cal. 2d. 264, 270-271).

The water that may be purchased by and delivered to the Company through the East Side Canal is not subject to appropriation under Application 16329. However, this does not present any great problem, inasmuch as the company's diversion point on Livingston Drain is located upstream from point of diversion No. 4 under Application 16329. Applicant's other three points of diversion are located above the intersection of the canal and drain. This being the case, the company is in a position to intercept and divert purchased water into the ditch leading to its place of use before it reaches the applicant's downstream diversion point.

The supply of water which applicant proposes to

divert is drainage water from upstream irrigated land or from operational spill, and issuance of a permit will, of course, afford no assurance that the supply will continue to be available as in the past.

Summary and Conclusions

The Board finds that there is unappropriated water in the source designated in Application 16329 of Charles L. Harney available to supply applicant, which water may be appropriated to a substantial extent in the manner proposed in the application without substantial injury to any other lawful user of water, that the intended uses are beneficial and that said application should be approved subject to the usual terms and conditions.

O R D E R

Application 16329 for a permit to appropriate unappropriated water having been filed with the former Division of Water Resources, protests having been filed, jurisdiction of the administration of water rights including the subject application having been subsequently transferred to the State Water Rights Board and a public hearing having been held by the Board, and said Board now being fully informed in the premises:

IT IS HEREBY ORDERED that Application 16329 be, and the same is, hereby approved, and it is ordered that a permit be issued to the applicant subject to vested rights and to the following terms and conditions, to wit:

1. The amount of water to be appropriated shall be limited to the amount which can be beneficially used and shall not exceed ~~60 cubic feet per second~~, which amount may be diverted from about January 1 to about December 31 of each year.

2. The maximum amount herein stated may be reduced in license if investigation so warrants.

3. Construction work shall begin on or before June 1, 1958, and shall thereafter be prosecuted with reasonable diligence, and if not so commenced and prosecuted, the permit may be revoked.

4. Said construction work shall be completed on or before December 1, 1959.

5. Complete application of the water to the proposed use shall be made on or before December 1, 1960.

6. Progress reports shall be filed promptly by permittee on forms which will be provided annually by the State Water Rights Board until license is issued.

7. All rights and privileges under the permit including method of diversion, method of use and quantity of water diverted are subject to the continuing authority of the State Water Rights Board in accordance with law and in the interests of the public welfare to prevent waste, unreasonable use, unreasonable method of use or unreasonable method of diversion of said water, and to prevent unreasonable interference with vested rights.

Adopted as the decision and order of the State
Water Rights Board at a meeting duly called and held at
Sacramento, California, on this 13th day of November,
1957.

/s/ Henry Holsinger
Henry Holsinger, Chairman

John B. Evans, Member

/s/ W. P. Rowe
W. P. Rowe, Member