

STATE OF CALIFORNIA
STATE WATER RIGHTS BOARD

In the Matter of Application 21332
of Charles and Edna O. Frolli and
Jesse J. Iverson to Appropriate from
Reclamation District 2054 Drainage
Canal in Sutter County

Decision D 1241

ADOPTED MAR 2 1966

DECISION APPROVING APPLICATION

Application 21332 of Charles and Edna O. Frolli and Jesse J. Iverson having been filed; protests having been received; a public hearing having been held before the State Water Rights Board on August 12, 1965, conducted by Kent Silverthorne, Chairman; applicants and protestant having appeared and presented evidence; the evidence received at the hearing having been duly considered, the Board finds as follows:

1. Application 21332 is for a permit to appropriate 2.0 cubic feet per second (cfs) by direct diversion, from April 15 to June 30 and from September 1 to October 15 of each year, for the purpose of irrigation from Reclamation District 2054 Drainage Canal in Sutter County. The point of diversion is located within the SW $\frac{1}{4}$ of NW $\frac{1}{4}$ of Section 2, T16N, R2E, MDB&M.
2. The drainage canal originates approximately 5 miles above the applicants' point of diversion and flows into a main canal which was formerly the Snake River. The

water entering the main canal eventually reaches the Sacramento River through the Sutter By-Pass. The drainage canal is a part of a system of such works constructed by the protestant Reclamation District 2054 (hereinafter referred to as "the District"). During the summer months its flow consists of drain water from the irrigation of adjacent rice lands. Most of the water originates from the Feather River and is distributed through the Butte Water District. The flow of the drainage canal at the applicants' point of diversion varies in accordance with uses by the upper irrigators. On June 11, 1963, at the time of a field inspection, it was 24.3 cfs.

3. The applicants now hold License 3128 (Application 11354) to appropriate 4 cfs from the canal from April 15 to October 15 for the irrigation of the same 160 acres described as the place of use by Application 21332. They intend to lease the property for the raising of rice and the purpose of this application is to obtain authorization for a greater use of water to meet estimated water requirements furnished them by the Agricultural Extension Service of the University of California. The supply of drain water from the canal will be supplemented by water purchased from the Butte Water District. The project is complete except for the construction of a new diversion dam which is the subject of an agreement between the applicants and the District dated August 25, 1964, (Joint Exhibit No. 1).

4. The District through its brief (page 8) and in testimony of a District official contends that the application should be denied for reasons which are substantially as follows:

The source is artificially constructed and has not superseded the function of a natural waterway; applicants' dam is to be located on the District's right of way and would interfere with the maintenance of its drain ditches; there is no water in the drain now going to waste, as it is being placed to beneficial use by users located along the drain and a priority to its use by the applicant would cause trouble within the District; approval of the application would interfere with the District's right to run an irrigation project; an appropriation from the District's facilities would be contrary to public policy and nullify the law of irrigation districts.

These contentions will be discussed in the above order.

The first contention attempts to disinter a proposition laid to rest by the court in Modesto Properties Co. v. State Water Rights Board, 179 Cal.App. 2d 856, 4 Cal.Rptr. 226 (petition for hearing in the Supreme Court denied).

"It is abundantly clear from this case (referring to City of Pasadena v. Alhambra) and from the sections of the Water Code enumerated above, that the Board's power is not restricted to water flowing in natural channels Since we hold that the Legislature has granted the Board jurisdiction over artificial water courses, it is unnecessary to discuss the alternate ground for the Board's decision, i.e., that the Livingston Drain has become a natural channel in the eyes of the law."

Any problems that may have resulted from the location of applicants' new dam within the District's right of way have been avoided by the agreement between the District and the applicant of August 25, 1964. This agreement requires the dam to be constructed under the supervision of the District Engineer and in accordance with the District's specifications. Further, the District has reserved an unrestricted right to have the dam removed whenever in its opinion it becomes necessary (Exhibit A, Joint Exhibit No. 1).

The District contends that the water in the drain is not going to waste and present uses should be allowed to continue under some sort of surveillance by the District, undisturbed by the assertion of a right by one user against others based on a permit issued by the Board. However, this contention does not present a legal basis for denial of the application. The issue before the Board in this respect is whether unappropriated water exists in the drain to satisfy the applicants (Water Code Section 1375(d)). Unappropriated water occurs when the available supply exceeds that required to satisfy users under prior rights. It is fundamental that beneficial use of water without prior right is no bar to the approval of an application to appropriate the same water. There is no evidence of prior rights to the water in the drain held by either the District or the present users. Pursuing this same vein, the District construes the court's reference to the general policy of the State to conserve water in the Modesto Properties case as

limiting the decision to circumstances where water is being wasted. There is no room for such an interpretation in the unequivocal language of the court above cited. To enter into a quarrel over the court's reasoning and authority for its decision, which occupies a considerable portion of the District's brief, serves no purpose.

Approval of the application will not in any manner interfere with the District's right to operate an irrigation project as authorized by Water Code Sections 50910 et seq. Obviously, the District must obtain rights to any water that it may sell and distribute and cannot rely on the fact that it is a public body with available water within its boundaries.

The District's final ground for protest amounts to a request that the Board reject the application pursuant to Water Code Section 1253, as the proposed appropriation would not best conserve the public interest. It claims that an appropriation from its facilities would cause interference with the District's functions and somehow "nullify the law of irrigation districts." This decision is, of course, limited to the particular circumstances surrounding the proposed appropriation. The most significant facts, in respect to this last contention, are that (a) the District is not engaged in the functions of an irrigation district (RT 18), (b) it has no rights to the water in question which it holds in trust for its members, and (c) the District has granted access to its works.

5. There is unappropriated water available to supply the applicants and, subject to suitable conditions, such water may be diverted in the manner proposed without causing substantial injury to any lawful user of water.

6. The intended use is beneficial.

7. The land on which the applicants' dam is to be constructed is owned by a Mr. Harrington and is within a right of way held by the District. Although the applicants have received permission from the District to build the dam under an agreement and the applicants' predecessors have diverted from the same point for a number of years, there is a possibility that access may be questioned by the owner of the property. Therefore, it is considered proper to include a term in the permit stating that the issuance of the permit shall in no way be construed as conferring upon permittees a right of access to the point of diversion.

8. The drainage canal has hydraulic continuity with the Sacramento River. Joint studies by the Department of Water Resources and the Bureau of Reclamation are in progress to determine the availability of unappropriated water in the Sacramento River and Delta. The applicants expressed no objection to the inclusion of a permit term reserving jurisdiction as to the season of use under any permit so as to conform it with the results of the pending study.

9. It is not considered necessary to include a special term in the permit prohibiting the permittees from interfering with the functions of Reclamation District 2054. The District has an adequate remedy under its agreement with the applicants which provides that the permittees' proposed diversion works will exist at its sufferance. Further, permittees are responsible to the District for damages arising from injury to the District's works (Water Code Section 50140).

From the foregoing findings, the Board concludes that Application 21332 should be approved and that a permit should be issued to the applicants subject to the limitations and conditions set forth in the following Order.

ORDER

IT IS HEREBY ORDERED that Application 21332 be, and it is, approved, and that a permit be issued to the applicants subject to vested rights and to the following limitations and conditions:

1. The water appropriated shall be limited to the quantity which can be beneficially used and shall not exceed 2.0 cubic feet per second by direct diversion to be diverted from about April 15 to about June 30 and from about September 1 to about October 15 of each year.

The equivalent of such continuous flow allowance for any thirty-day period may be diverted in a shorter time if there be no interference with vested rights.

2. The maximum quantity herein stated may be reduced in the license if investigation warrants.

3. Actual construction work shall begin on or before September 1, 1966, and shall thereafter be prosecuted with reasonable diligence, and if not so commenced and prosecuted, this permit may be revoked.

4. Construction work shall be completed on or before December 1, 1968.

5. Complete application of the water to the proposed use shall be made on or before December 1, 1969.

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

7. All rights and privileges under this 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 interest of the public welfare to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of said water.

8. Permittees shall allow representatives of the State Water Rights Board and other parties, as may be authorized from time to time by said Board, reasonable access to project works to determine compliance with the terms of this permit.

9. The issuance of this permit shall in no way be construed as conferring upon permittees a right of access to the point of diversion.

10. The State Water Rights Board reserves jurisdiction over this permit for the purpose of conforming the season of diversion to later findings of the Board on prior applications involving water in the Sacramento River Basin and Delta. Action by the Board will be taken only after notice to interested parties and opportunity for hearing.

Adopted as the decision and order of the State Water Rights Board at a meeting duly called and held at Sacramento, California, on the day of 1966.

/s/ Kent Silverthorne
Kent Silverthorne, Chairman

/s/ Ralph J. McGill
Ralph J. McGill, Member

/s/ W. A. Alexander
W. A. Alexander, Member