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STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Application 24055 )  
of Jonathan A. and Marilyn R. Wilson )  
to appropriate from an unnamed drain )  
in Tehama County. )

Decision 1447

DECISION APPROVING APPLICATION

BY THE BOARD:

Jonathan and Marilyn Wilson having filed Application 24055 for a permit to appropriate unappropriated water; protests having been received; the applicants and protestants having stipulated to proceedings in lieu of hearing as provided for by Title 23, California Administrative Code, Section 737; an investigation having been made by the State Water Resources Control Board pursuant to said stipulation; the Board, having considered all available information, finds as follows:

Substance of Application

1. Application 24055 is for a permit to appropriate 0.375 cubic foot per second (cfs) by direct diversion from March 1 to October 31 of each year for irrigation purposes from an unnamed drain in Tehama County. The point of diversion is to be located within the SW $\frac{1}{4}$  of SE $\frac{1}{4}$  of projected Section 9, T25N, R3W, MDB&M.
2. The applicants propose to irrigate 30 acres of pasture from an unnamed drain which flows through their property.

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Water will be diverted at a sump on their property which is operated by the protestant El Camino Irrigation District. The applicants' diversion facility has not been constructed.

### Protestants

3. Protestant El Camino Irrigation District serves an area of approximately ten square miles which includes the land of the applicants. The District's water supply comes from wells and from the Corning Canal which is operated by the United States Bureau of Reclamation. The District also diverts water from a sump in the unnamed drain which is the source of water designated by Application 24055 and is the only portion of the District's water supply which is an issue in these proceedings.

4. Protestants Ras and Sadie Searcy hold License 4452 (Application 13254) to divert 0.15 cfs from the unnamed drain from March through October. Their point of diversion is approximately one mile downstream from the applicants. They contend there is not sufficient water in the unnamed drain to satisfy their needs under their prior right.

### Water Supply

5. The unnamed drain receives water from approximately 650 acres above the applicants' proposed point of diversion in addition to 250 acres between that point and the protestants Searcys' point of diversion. During the irrigation season the water in the sump where the applicants propose to divert is almost entirely drain water and water pumped from the District's well No. 35. There are

no records of the flows of the unnamed drain. From observation of the drain it appears unlikely that its flow would ever exceed one cfs. The District has furnished the Board with records of electric power consumed by the pump at its well No. 35 and the pump at the sump. From these records the quantity of water entering the sump from the unnamed drain can be calculated. During the years 1972 and 1973, 360.85 acre-feet (af) and 235.61 af, respectively, entered the sump from the unnamed drain.

There is sufficient water in the unnamed drain to satisfy the rights of protestants Searcy and the needs of the applicants.

#### Rights of the District

6. The field investigation found, and the District now agrees, that the water in the unnamed drain during the irrigation season is wastewater from the irrigation of lands lying outside the District. (Letter from District's counsel to Board dated September 25, 1972.) The sump is a short distance from the westerly boundary of the District. The District is not recapturing its own wastewater within its boundaries.

7. The District claims that it at one time held title to the land around the sump and had riparian rights to the water in the sump which rights were reserved at the time the District conveyed the property to Robert Grootveld by deed of March 14, 1944. Also, the District claims rights stemming from continuous use of water from the sump for "many years." As stated previously, water in the sump and the drain ditch which is not from one of the protestants wells is foreign wastewater from properties outside the District.

Riparian rights attach only to the natural flow in the watercourse and not to foreign wastewater (Bloss v. Rahilly, 16 Cal.2d 70, 104 P.2d 1049 (1940)). While the deed of March 14, 1944, from the District to Robert Grootveld reserved to the District all rights of every kind or nature of the water pertaining to said lands, if the District held no valid rights at the time of the conveyance it would not obtain them through a reservation in the deed.

8. Under Application 24685 the District has applied for a permit for use of water from the sump or drain. That application is junior in priority to the Wilson filing. While the District claims that it has used water for a number of years as a basis of right to continue its use, the only appropriative right the District could have would be one initiated prior to the effective date of the Water Commission Act (December 19, 1914). However, the District was not formed until the mid-20's as a part of an agricultural subdivision. Bulletin 21, Division of Engineering Irrigation, Department of Public Works (1929) describes the source of water for the District as coming from wells. There is no mention of water from any drains. The sump itself was constructed under and by virtue of easement rights reserved in the deed of March 14, 1944 (District's letter of November 2, 1973).

9. It is not the policy of the Board to accept protests based on claimed prescriptive rights where the water claimed is subject to permit procedure and use of such water is initiated after December 19, 1914. However, apart from the Board's policy in the matter, prescriptive rights do not generally attach to wastewaters. So long as the user of the wastewater takes it only after it has left the property of the original owner or user the rights of the latter are not being

invaded. Consequently, the courts have said that rights to the use of wastewater cannot be based upon prescription [Hunceker v. Lutz, 65 Cal.App. 640, 224 Pac. 1001 (1924) and Joerger v. Pacific Gas and Electric Company, 207 Cal. 8, 276 Pac. 1017 (1929)].

From the foregoing it is concluded that the District has no rights to water in the sump on the unnamed drain except water it pumps into the sump from its well No. 35.

#### Applicants' Access to Diversion Works

10. The sump is on the applicants' land. However, the District claims to own the sump and does not intend to grant access to the applicants. Board's Rule 749, California Administrative Code, Title 23, reads in part:

"...A dispute concerning applicant's title or right to occupy or use land or other property necessary for consummation of the proposed appropriation is not cause for denial of an application and a protest based solely upon such dispute title or right will ordinarily be rejected as not presenting an issue within the board's jurisdiction;...."

Further, the Applicants' failure to gain access to the existing sump will not in itself preclude an appropriation by them as separate diversion works could be constructed by them on their property.

Any permit issued pursuant to Application 24055 should contain a term stating that the permit shall not be construed as conferring upon a permittee right of access to the point of diversion.

Existence of Unappropriated Water

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

13. The intended use is beneficial.

14. All environmental reviews required in compliance with the California Environmental Quality Act of 1970 have been completed.

From the foregoing findings, the Board concludes that Application 24055 should be approved and that a permit should be issued to the applicants subject to the limitations and conditions set forth in the order following.

The records, documents, and other data relied upon in determining the matter are: Applications 24055 and 13254 (License 4452) and all relevant information on file therewith, particularly the report of field investigation made October 24, 1973.

ORDER

IT IS HEREBY ORDERED that Application 24055 be 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 0.375 cubic foot per second (cfs) by direct diversion from March 1 to October 31 of each year. So long as there is no interference with other rights, junior as well as senior, permittee may increase his rate of

diversion to a maximum of 1.0 cfs provided the total quantity diverted in a 30-day period does not exceed 23 acre-feet (af). The maximum amount diverted under this permit shall not exceed 113 af per year.

2. The amount authorized for appropriation may be reduced in the license if investigation warrants.

3. Actual construction work shall begin on or before nine months from date of permit and shall thereafter be prosecuted with reasonable diligence, and if not so commenced and prosecuted, this permit may be revoked.

4. Said construction work shall be completed on or before December 1, 1978.

5. Complete application of the water to the proposed use shall be made on or before December 1, 1979.

6. Progress reports shall be submitted promptly by permittee when requested by the State Water Resources Control Board until license is issued.

7. Pursuant to California Water Code Section 100 all rights and privileges under this permit and under any license issued pursuant thereto, including method of diversion, method of use, and quantity of water diverted, are subject to the continuing authority of the State Water Resources Control 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.

This continuing authority of the Board may be exercised by imposing specific requirements over and above those contained in this permit with a view to minimizing waste of water and to meeting the reasonable water requirements of permittee without unreasonable draft on the source. Permittee may be required to implement such programs as (1) reusing or reclaiming the water allocated; (2) restricting diversions so as to eliminate agricultural tailwater or to reduce return flow; (3) suppressing evaporation losses from water surfaces; (4) controlling phreatophytic growth; and (5) installing, maintaining, and operating efficient water measuring devices to assure compliance with the quantity limitations of this permit and to determine accurately water use as against reasonable water requirements for the authorized project. No action will be taken pursuant to this paragraph unless the Board determines, after notice to affected parties and opportunity for hearing, that such specific requirements are physically and financially feasible and are appropriate to the particular situation.

8. The quantity of water diverted under this permit and under any license issued pursuant thereto is subject to modification by the State Water Resources Control Board if, after notice to the permittee and an opportunity for hearing, the Board finds that such modification is necessary to meet water quality objectives in water quality control plans which have been or hereafter may be established or modified pursuant to Division 7 of the Water Code. No action will be taken pursuant to this paragraph unless the Board finds that (1) adequate waste discharge requirements have been prescribed and are

in effect with respect to all waste discharges which have any substantial effect upon water quality in the area involved, and (2) the water quality objectives cannot be achieved solely through the control of waste discharges.

9. Permittee shall allow representatives of the State Water Resources Control 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.

10. To the extent that water available for use under this permit is wastewater from upstream irrigation, this permit shall not be construed as giving any assurance that such supply will continue.

11. This permit shall not be construed as conferring upon the permittee right of access to the point of diversion.

12. No water shall be diverted under this permit until permittee has installed a device, satisfactory to the State Water Resources Control Board, which is capable of measuring the flow required to satisfy prior downstream rights, particularly those covered by License 4452 (Application 13254). Such measuring device shall be properly maintained.

13. During the period between June 15 and September 1 when hydraulic continuity exists between permittee's diversion point and the Sacramento River, permittee shall not divert water but shall open his diversion works and allow the water to flow downstream.

Dated: March 20, 1975

W. W. ADAMS  
W. W. Adams, Chairman

W. DON MAUGHAN  
W. Don Maughan, Vice Chairman

ROY E. DODSON  
Roy E. Dodson, Member

MRS. CARL H. (JEAN) AUER  
Mrs. Carl H. (Jean) Auer, Member