STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Application 25144 North Canyon Lake Association Applicant Richard E. Winkelman, et al Protestants and Application 25843 Richard E. Winkelman and Juanita M. Ward Applicants North Canyon Lake Association Protestants Application 25844 Gary W. Jackson and Jeannie M. Jackson Applicants North Canyon Lake Association Protestants Application 25845 Owen J. Masters and Pamela R. Masters Applicants North Canyon Lake Association Protestants	DECISION: 1578 SOURCE: North Canyon Creek COUNTY: El Dorado

DECISION DEFERRING ACTION ON APPLICATIONS 25144, 25843, 25844, AND 25845

By L. L. Mitchell:

North Canyon Lake Association (applicant, hereinafter referred to as the Association), Richard E. Winkelman and Juanita M. Ward, Gary W. Jackson and Jeannie M. Jackson, Owen J. Masters and Pamela R. Masters (applicants, hereinafter referred to as the Ranchers), having filed Applications 25144, 25843, 25844, and 25845, respectively, for permits to appropriate unappropriated water;

protests having been received; a public hearing having been commenced on August 24, 1978 and continued to August 9, 1979; applicants and protestants having appeared and presented evidence, the evidence received at the hearing having been duly considered; the Board finds as follows:

Substance of the Applications:

1. Application 25144 is for 40 acre-feet per annum (afa) by storage from North Canyon Creek tributary to the South Fork American River. The point of diversion is in the NW¼ of SE¼ of Section 36, T11N, R11E, MDB&M. The diversion season is November 1 to May 30 for diversion to storage. The reservoir will be used for recreation, fire protection, and fish and wildlife refuge. From May 1 to November 30 the Association plans to withdraw 20 acre-feet from the reservoir for irrigation purposes. The area of irrigation consists of 10 acres. The record indicates that Applications 25843, 25844, and 25845 (The Rancher's applications) may be considered as one application.. The applicants for these three permits do not seek conflicting uses; rather, they seek joint use of the water and in fact they will accept one permit issued to them jointly. (RT 231:21 to 232:5; footnote 1, page 5, Rancher's closing brief.) Each Application is for 44 acre-feet annually by storage from the same diversion point as in Application 25144 from November 1 to May 30. The uses are irrigation, domestic (25843 only), frost protection (25844, 25845 only), and industrial -- (winery, 25845 only).

2. Applications 25144, 25843, 25844 and 25845 were filed to cover use of Larsen Reservoir. Larsen Reservoir was created by an earthen dam constructed in about 1916 or 1917 by a predecessor in interest to both the Association and two of the Ranchers. The reservoir as rebuilt in 1959 had a storage capacity of about 40 acre-feet. Recent actions allegedly taken

by a predecessor in interest to the Ranchers, one Calvin Abel, increased the capacity. The Association filed suit to enjoin this action in the Superior Court of California, El Dorado County, No. 24244. In a judgement filed April 30, 1981, the Court enjoined the defendant from increasing the capacity of the reservoir and required remedial measures to reduce its capacity to 40 acre-feet.

3. The North Canyon Lake Association consists of six land-owners who collectively own all of the land surrounding the reservoir. At least three of the members have homes on this property.

4. The dam itself is on property owned by a member of the Association. One of the Ranchers, however, (Jackson) has an easement allowing access to the dam to use, repair or replace it and all existing pipelines, fixtures and appurtenances, (Ranchers Exhibit 9; RT 121:2-21, 198:7-19).

Background:

5. In the past, water impounded in Larsen Reservoir has been used to supplement a direct diversion from "Johnson's Ditch" (North Canyon Creek) for irrigation and other uses. Three lawsuits have previously been filed over the rights to the waters of North Canyon Creek (No. 2587, Superior Court of California, El Dorado County (1924); No. 3607, Superior Court of California, El Dorado County (1931) and No. 6548, Superior Court of California, El Dorado County (1952). In the most recent case it was determined that the predecessors in interest to the Ranchers and the Association (as discussed more fully under "Protests" below) had a right to a total of 63 miner's inches of water from "Johnson's Ditch". In addition, the decision determined that the predecessors in interest to one Thorsen (an interested party in the Board's proceedings) had a right of three inches.

6. In the 1960's the land surrounding Larsen Reservoir was parcelled into eight lots by Calvin Abel and his brother Laurence. These were then separately sold to the six members of the Association. Each of the eight lots included land underlying the reservoir to the center of the reservoir. Protestant Abel did not retain ownership of the reservoir site. The dam is on land owned by members of the Association, John R. Morgan and Athlena Ruth Morgan. Calvin Abel, however, reserved an easement to the dam for the benefit of the property now owned by applicant Jackson (one of the Ranchers) to use, repair or replace the dam and all existing pipelines, fixtures, and appurtenances, (Exhibit 9; RT 121:2-21, 198:7-19). There is confusion as to what the members of the Association knew concerning rights to the water in the reservoir at the time they acquired their parcels, (RT 55:6 to 56:2, 63:9 to 65:21, 184:16 to 185:4.)

7. At least one problem of siltation has occurred in recent times at Larsen Reservoir. The problem was caused or greatly exacerbated by industrial activities at a mill owned by an upstream lumber company (RT 157:16 to 158:19, 181:1-26). The silt and debris were removed by the lumber company at a cost of about $50,000. Other reservoirs in the area have major, frequent siltation problems (RT 159:19 to 160:11).

8. Recently the Ranchers have acted to allow Larsen Reservoir to drain as much as possible during the non-irrigation season to reduce the problem of siltation. There is conflicting testimony as to the efficiency of this procedure for siltation reduction at Larsen Reservoir. The procedure does, however, minimize potential harm from flooding and spillway erosion that would result from keeping the reservoir full during the non-irrigation season, (RT 163:4 to 164:19).

Protests

9. Application 25144 was protested by Ranchers Richard E. Winkelman and Juanita M. Ward, who also filed Application 25843. A protest against approval of Application 25144 also was filed by Calvin Abel. The protests allege injury to rights founded on prior usage, title to which was quieted in the decision in case No. 6548, Superior Court of California, El Dorado County, April 30, 1952. These rights in themselves are not in issue and are not contested by the Association. The protests instead claim a lack of unappropriated water in excess of these rights.

10. The applications of all of the Ranchers, 25843-5, are protested by the Association. The protests allege priority of application and that the proposed appropriation will have an adverse environmental impact and will not best conserve the public interest.

Availability of Unappropriated Water:

11. From October through May impoundment of North Canyon Creek would generally not interfere with the 66 miner's inches of direct flow allocated under the Superior Court judgment discussed above. From June through September, however, because of potential decreased stream flow, impoundment may interfere with these rights, (RT 135:1-4, 178:13-23, 204:23 to 205:5). During this time, if the stream flow is less than 66 miner's inches then there is no water available for appropriation or impoundment. To not interfere with prior rights, the amount of outflow from the reservoir at that time must equal the amount of inflow.

12. The Ranchers claim to have acquired rights to the impounded water as well as to the direct flow, thereby appropriating all available

water in the section of North Canyon Creek in issue. For reasons given below, this claim is erroneous.

13. The Ranchers claim to have a right to the waters of Larsen Reservoir through prescription. They claim to have used the water openly, notoriously, continuously, adversely and under a claim of right for over 50 years. Regardless of the veracity of this contention, the California Supreme Court, in People v. Shirokow, 26 Cal. 3d 301; 162 Cal. Rptr. 30 (1980) held that the provisions of the Water Commission Act which became § 1200 et seq. of the Water Code precluded acquisition of prescriptive rights as against the state. That case is directly on point here, requiring the finding that the Ranchers do not have a valid prescriptive right to the impounded water. Further, this decision is consistent with the Board's longstanding regulation, Section 719.5, Article 12, Subchapter 2, Chapter 3, California Administrative Code, which does not recognize an unadjudicated claim to a prescriptive right as the basis of a protest. Therefore, the Ranchers can not advance a prescriptive rights theory to avoid their failure to comply with the statutory appropriation system.

14. The Ranchers next argue that the statutory appropriation system did not become the exclusive means to acquire appropriative rights until the 1923 amendment of the Water Commission Act which ultimately became § 1225 of the Water Code as enacted. This section provides that the statutory method of perfecting an appropriative water right is the sole method of perfecting such a right. The Ranchers argue that the language in the original Water Commission Act which became effective in 1914 is permissive or optional in its authorization of the appropriation system. Specifically, they point to Section 17 of the Act (now § 1252 of the Water Code) which states, "Any person...may apply for...a permit for any unappropriated water." (Emphasis added). The Ranchers then

argue that the permissive nature of the original act, especially in light of the explicitly exclusive language in the 1923 amendment, requires an interpretation of Section 17 of the original Water Commission Act as recognizing the possible acquisition of appropriative rights by non-statutory means up to 1923.

15. This argument fails however because of the language in the Shirokow decision and other decisions of the California Supreme Court. In Shirokow, at page 309, the court explicitly recognized only two means to acquire water rights besides the statutory appropriation procedures: riparian rights and appropriations perfected "prior to December 19, 1914, the effective date of the statute." Thus the court specifically determined 1914 as the date after which prescriptive rights to unappropriated water and the common law method of appropriation would no longer be recognized.

16. Further, in Crane v. Stevinson, 5 Cal. 2d 387, 398, 54 P. 2d 1100, 1105 (1936), the court, after finding that the evidence failed to disclose an actual appropriation, went on to state that:

> "Since the effective date (year 1913) (sic) of the Water Commission Act, an intending appropriator has been required to file his application...(otherwise) the appropriation made by him must have been actually complete some time prior to the 1913 (sic) date." (Emphasis added).

This decision does not directly address the question of when the statutory means of appropriation became exclusive, but nonetheless the language is clear in denoting 1914 as the effective date after which appropriative rights can be acquired only through the provisions of the Act. (The Court's mistaken reference to 1913 as the effective date of the Act is a minor oversight with no bearing here. The true effective date is December 19, 1914.)

17. Besides these Supreme Court decisions, application of a well accepted principle of statutory interpretation further militates for the conclusion that the date of exclusivity is 1914. The principle involved is that each component of the law must be construed in the context of the entire statutory system of which it is a part. This means of statutory construction was approved in Shirokow, supra at 307. Applying this principle to Section 17 we must look at the Section in the context of the provision of the Water Commission Act. Section 38 of the original Water Commission Act (the predecessor of Section 1052 of the Water Code) declared any diversion or use of water subject to its provisions other than as authorized in the Act to be a trespass. This is a strong, direct statement that, commencing with the 1914 effective date of the Water Commission Act, only appropriations perfected pursuant to the statutory system would be accepted. Section 38 specifically prohibited diversion "other than as it is in this act authorized", and the act in turn only authorized appropriations according to the statutory system. Hence the original act prohibited appropriations other than according to the statutory system beginning in 1914.

18. Further, Section 1202 of the Water Code declares unappropriated water to include,

> "(b) All water appropriated prior to December 19, 1914 which has not been in process, from the date of the initial act of appropriation, of being put, with due diligence in proportion to the magnitude of the work necessary to utilize it properly for the purpose of the appropriation, or which has not been put, or which has ceased to be put to some useful or beneficial purpose."
>
> "(c) All water appropriated pursuant to the Water Commission Act or this code which has ceased to be put to the useful or beneficial purpose for which it was appropriated and is not or has not been

> in the process of being put, from the date of the initial act of appropriation, to the useful or beneficial purpose for which it was appropriated, with due diligence in proportion to the magnitude of the work necessary properly to utilize it for the purpose of the appropriation." (Emphasis added).

Essentially sub-sections (b) and (c) of this section require diligent use of water or else others may appropriate the water. If the Rancher's interpretation of the original Water Commission Act is correct, however, (that is, that one could legally appropriate water without complying with the Water Commission Act between 1914 and 1923) then this proscription against lack of diligence does not apply to water which was non-statutorily appropriated between 1914 and 1923. In other words, since these sub-sections only apply to pre-1914 appropriated water or water which was statutorily appropriated, then if 1923 is the date of exclusivity, the water which was non-statutorily appropriated between 1914 and 1923 need not be diligently used according to this section. This patently undesirable result is only avoided by construing 1914 as the date of exclusivity.

19. Besides their arguments regarding prescription and non-statutory pre-1923 appropriation, the Ranchers also argue that the prior judicial determinations of their right to 63 miner's inches necessarily include the right to impound and use the waters of Larsen Reservoir. The prior determinations, however are generally silent with respect to the reservoir. Only the appellate decision in the second suit (appellate decision dated 1934) mentioned the reservoir, and there the court specifically stated that it was only concerned with the rights to the natural flow of the stream. The court explicitly rejected the notion that it was deciding any rights to

"store winter water" (Hand v. Carlson 138 Cal. App. 202, 31 P. 2d 1084 at 1087). In general then, the decisions refer only to the water that had been directly appropriated from "Johnson's Ditch" (North Canyon Creek) long before the dam was erected. These decisions simply recognize direct diversion rights. The right to divert a direct flow does not include the right to impound and re-divert water since this quantitatively and qualitatively alters the exercise of the original right to a substantial extent. Specifically, here the construction of the dam drastically changes the means by which control is exercised over North Canyon Creek. It provides a surplus of water beyond the normal creek flow during the irrigation season. This surplus is a new "pool" of water which is not included in the original water rights. Hence, the right to use this water must have an independent basis, and inasmuch as the right involves a post-1914 appropriation, then it must be gained according to the statutory scheme.

20. Finally, the Ranchers claim a right to store water in the reservoir because the deed severing the land on which the dam sits from other land owned at that time by Calvin Abel (a portion of which is now owned by the Jacksons, members of the Ranchers) reserved, "...the waters and water rights of the reservoir...as more specifically set forth in that certain Judgment entered July 18, 1952 entitled Myrtle M. Hallifax vs. John A. Winkleman..." The Ranchers claim that this proves that the 1952 court judgment, previously discussed in this Decision covered rights to store water in Larsen Reservoir and that these storage rights were reserved for the benefit of property now owned by members of the Ranchers. The problem with this argument is that it assumes the grantor held the right to store water to begin with as a result of the 1952 court judgment. This is not so. That the grantor held such a right is simply an erroneous presumption, as has previously been dis-

cussed in detail, and water rights do not come into existence because of erroneous presumptions between grantors and grantees.

21. In summary, the Ranchers do not have an existing right to the water impounded at Larsen Reservoir. The mere maintenance of an illegal diversion for a number of years provides no basis of right. This water is available for appropriation subject to the prior judicially determined right to a combined direct diversion of 66 miner's inches or the instantaneous amount of stream flow, whichever is less.

Rights of Access

22. Since water is available for appropriation, the question then becomes which applicants, the Association or the Ranchers, should be given rights to impound water in Larsen Reservoir. The Association's application was filed prior to the Ranchers' applications. This, however, does not mandate that the Association be given a permit merely because water is available for appropriation. The Board has the right and the duty to evaluate competing applications to determine which, if any, should be granted in the public interest. (Water Code Sections 1253, 1255 and 1257; 38 Opinions of the Attorney General 182, 184.) In this particular case, however, we do not reach the issue of the relative merit of the various applications at this time because of complex issues of land ownership and the right to use of land.

23. The Morgans, members of the Association, own the site of the dam in fee. The land beneath the reservoir is also owned in fee by the members of the Association. However, it appears based upon the record before the Board that the Jacksons (Applicant 25844), members of the Ranchers, have an easement to enter certain lands belonging to members of the Association to operate and maintain Larsen Reservoir. A 1965 deed from Calvin Abel to Laurence Abel (Rancher's Exhibit 9) conveyed the property on the North side of Larsen Reservoir including all or a substantial part of the embankment and the land

under the north half of the reservoir. That deed reserved for the benefit of another parcel then owned by Calvin Abel the right to enter the lands conveyed by the deed "for the purpose of using, repairing and replacing...(the) reservoir and all existing pipelines, fixtures and appurtenances thereto." (Ranchers Exhibit 9). The Jacksons currently own the parcel of property for the benefit of which this easement was reserved. There is no indication in the record that any of the other Ranchers have such an easement. However, counsel for the Ranchers argues that in addition to the above discussed easement of record, the Ranchers have an easement by implied reservation or by prescription. The Board is not equipped and has refused in the past to decide issues regarding ownership of land or interests in land. Another issue regarding ownership of land or interests in land which is relevant to the Board's ability to decide to whom a water right permit should be granted is the issue as to whether the association might make some use of the reservoir which would not unduly interfere with the Jackson's easement and any other easements which the Ranchers may have. It is a general rule of real property law that the owner of a servient tenement may make any use of property which does not unduly interfere with the easement burdening that property. The Association has applied for wintertime storage in the reservoir, for example, and it is conceivable that they might be able to use the reservoir for wintertime storage without unduly interfering with the Rancher's use of the reservoir as a source of water for irrigation in the summer. The question of whether wintertime storage would unduly interfere with the Rancher's exercise of whatever easements they may have as well as the other legal questions discussed above are complex matters involving the application of laws relating to land ownership which the Board is not equipped to decide.

24. The Board has two regulations dealing with the relationship between water rights and land ownership which may be relevant in this case. These are Title 23, California Administrative Code, Chapter 3, Subchapter 2, Sections 747 and 749. Section 747 reads as follows:

> 747. Right of Access Over Lands Not Owned by Applicant. When it appears that in order to complete the appropriation it will be necessary for the applicant to occupy property or to use existing works not owned by him, it will generally be sufficient for the applicant to state in writing that the consent of the owner has been obtained, provided there is no denial. When it appears that the owner will not consent, the Board may require satisfactory evidence of the applicant's ability through condemnation proceedings or otherwise to secure the necessary right of access before the application will be approved. For good cause shown, the Board may allow reasonable time for applicant to negotiate with the owner for the necessary right of access.

This section applies to the situation in which it is clear that an applicant does not have the necessary ownership interest in property to complete the appropriation. Normally the Board would deny an application if an applicant clearly did not have and was unable to acquire the interest in land necessary to complete the appropriation of water applied for. The issues of ownership of the necessary interest in land are by no means clear in this case, however, so this regulation is inapplicable.

25. Section 749 of the Board's regulations reads as follows:

> 749. Right of Access Over Lands Where Title is Disputed. The Board will not undertake to determine title to land or the right to occupy or use land or other property. 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 disputed title or right will ordinarily be rejected as not presenting an issue within the Board's jurisdiction; provided that the Board may temporarily defer action on an application pending judicial determination of applicant's title or right to occupy or use property when in the board's judgment such action is justified.

As the regulation states, the Board will grant an application if a dispute over title or the right to use land is the only basis for a protest. However, the regulation recognizes that there may be times when it is appropriate for the Board to defer action pending a judicial determination of the dispute over land. This is one such instance. The typical situation in which the Board grants a permit in spite of a continuing dispute over access rights is the situation in which there is only one application; not the situation we have in this case where we have competing applications. A judicial determination as to rights in land may preclude the exercise of a water right granted by the Board. When the Board grants one of several competing applications it normally would deny the remaining applications. Under these circumstances if the applicant whose application is approved by the Board then fails in an attempt to get a judicial determination that he has the necessary rights in land the competing applicants are free to reapply for the water involved but have lost their original priority. For these reasons it would be most equitable for the Board to defer a decision on the competing applications in this case either until the applicants reach agreement on the rights to use of the dam and reservoir site or until a final judicial determination of these rights has been made.

26. The Ranchers are currently impounding water with no valid water right. Normally, the Board would refer such a diversion to the Attorney General for appropriate enforcement action. However, since the Ranchers are attempting to legitimize their storage of water through their applications the Board will defer action to refer the matter to the Attorney General for a reasonable period of time in order to allow the settlement or judicial determination necessary to clarify the interests in land that are central to the dispute over use of Larsen Reservoir.

27. However, pending applications cannot be maintained indefinitely, nor can the Board tolerate the continued use of stored water by the Ranchers without a valid right for an indefinite period of time. Therefore, the Order adopted as a part of this Decision provides that if the matter of rights to the use of land is not resolved within three years from the date of the decision all of the applications in question will be denied. If all applications are denied in this manner, the Chief of the Division of Water Rights is directed to refer the matter of illegal diversion of water by the Ranchers to the Attorney General's office for appropriate enforcement action.

ORDER

IT IS HEREBY ORDERED that action on Applications 25144, 25843, 25844, and 25845 be deferred until the applicants reach an agreement regarding the rights to use the dam and reservoir site or until a final judicial determination of these rights has been made.

IT IS FURTHER ORDERED that all of the applications in question be denied unless for good cause shown an extension is granted by the Board, if:

(a) No settlement regarding the rights to the use of land has been entered into and no lawsuit seeking clarification of these rights has been filed within one year from the date of final action on this decision by the Board.

(b) No settlement regarding rights to the use of land has been entered into and no final judicial determination of these rights has been handed down within three years from the date of final action on this decision by the Board.

(c) In the event that this decision is judicially stayed, the Board reserves jurisdiction to reexamine the schedule imposed in subparagraphs (a) and (b), above.

IT IS FURTHER ORDERED that if the Applications of the Ranchers are denied and if the Ranchers continue to store water in Larsen Reservoir, the Chief of the Division of Water Rights is directed to refer the matter of such illegal diversions to the Attorney General for appropriate enforcement action.

Dated: September 17, 1981

L. L. Mitchell, Vice-Chairman

Carla M. Bard, Chairwoman

Jill B. Dunlap, Member

ABSENT

F. K. Aljibury, Member