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STATE OF CALIFORNIA
STATE WATER RIGHTS BOARD

In the Matter of Application 21867 of Robert W. Irvine to Appropriate from Little Bear Creek and an Unnamed Tributary in Placer County

Adopted 8-31-66

ORDER DENYING PETITION FOR RECONSIDERATION OF DECISION D 1254

Protestants William C. Melton and Louise D. Melton on August 26, 1966, filed with the Board a petition for reconsideration of Decision D 1254, adopted July 27, 1966, in which the Board approved Application 21867 of Robert W. Irvine.

The petition includes the general allegation that the evidence does not justify the findings of fact, but the petition points to no evidence in the record, and to no new or additional evidence, that would justify contrary or inconsistent findings of fact.

Among the Board's findings not specifically challenged by the protestants is the following:

> "9. Applicant's project involves only nonconsumptive use of water, except for a small amount of evaporation and seepage losses. These losses are much less than the water diverted but not placed to beneficial use by the Meltons, even disregarding their high ditch losses. Water unreasonably diverted or wasted cannot be regarded as part of a water right, according to the California Constitutional Amendment of 1928 (Article XIV, Sec. 3.).

If the applicant's project is built and operated as proposed, and if the Meltons eliminate their waste of water, the Meltons will have available to them more water in the future than they have today."

The petition is correct in pointing out that the effect of the quitclaim deed dated May 10, 1937, was to create a vested right in petitioners to all of the "right, title and interest which the Pacific Gas and Electric Company had in the water released". However, no evidence was presented by petitioners concerning the nature of the Company's interest, if any, in the released water. To the extent such water consisted of operational spill and seepage from the Company's works into the natural channel of Little Bear Creek without the intent or the means to recapture and use it, the Company had no right, title or interest which it could convey, and petitioners acquired nothing by the quitclaim deed. In a similar context, the leading case of Eddy v. Simpson, 3 Cal. 249 (1853), uses the following language at page 252:

"When the water of Grizzly Cannon and Bloody Run, left the possession of the defendants at Cherokee Corral, all right to, and interest in, that water was lost by the defendants. It might be made the property of whomsoever chose to possess it. Without the agency of the defendants, it found its way into Shady Creek, joining the waters then in the possession of the plaintiffs, and became a part of the body of water used and possessed by them."

Even if we assume that the Company did have some interest in the water mentioned in the deed, its right would be subject to forfeiture under the laws of California for failure to use the water for a period of five consecutive years, and

petitioners' right acquired from the Company would be subject to the same infirmity. Our decision recognized petitioners' right to the quantity of water which they have actually been placing to reasonable beneficial use without waste in recent years. They cannot successfully claim more than this no matter how or from whom their rights may have been acquired or how much water they or their predecessors may have once been entitled to use.

The Superior Court is the proper forum to decide as a matter of law whether the evidence in the record justifies the findings of fact, and whether the findings support the Board's decision and order. In the absence of additional evidence, no useful purpose would be served by a further hearing before the Board.

The petition for reconsideration is denied.

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

Dated: 8-31-66

/s/ Kent Silverthorne
Kent Silverthorne, Chairman

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

/s/ W. A. Alexander
W. A. Alexander