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Dec 23 10 53 AM '71

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BY Betty C. Thomas
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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SISKIYOU

A. J. SYLVA,

Plaintiff,

-vs-

NO. 24482

WILLIAM J. GUARDIA, et al.,

Defendants. /

OPINION AND DECISION

The court will consider first the issue as to whether or not defendants had the right to change their point of diversion. The law appears to be clear that they have a right to change the place of diversion to a point higher up the stream provided the rights of others are not injuriously affected thereby.

It is the court's opinion that the plaintiffs nor anyone else is injuriously affected by this upstream change of the place of diversion. In contrast thereto if the court required defendant to return to the original point of diversion the defendant would suffer rather significant damages. The court finds no forfeiture of this right as a consequence of the 1955 agreement and adopts the defendant's reasoning as set forth in his brief as being correct on that issue.

The court finds the 1951 agreement to be bona fide and in addition finds that the plaintiffs acquired an easement to the Thomason Ditch under a claim of right and that they have

1 been in actual, open, visible, continuous, uninterrupted possession
2 and use of the same for the requisite time. Along with this
3 easement the plaintiffs have the right to use the Guardia Road
4 from the County Road to the point of diversion plus the right to
5 do such maintenance as is required for the proper use of the
6 ditch, gully, and the policing of the diversion, such rights to
7 be exercised in a reasonable manner so as not to increase
8 injuriously the burden upon the servient tenement.

9 The evidence is overwhelmingly to the effect that the
10 Guardias and their predecessor, Mr. Thomason, used the two small
11 pipes in the Thomason Ditch above Guardia's house since about
12 the year 1955. This use was continuous, adverse, open and
13 notorious and thus a prescriptive right was acquired and has
14 vested in the defendants. This right is limited to its present
15 and past use and is to be exercised in a reasonable manner with
16 no undue waste of the water.

17 Although the evidence on the issue of rotation is not
18 as clear in the court's mind as on some of the other issues it
19 is still the court's opinion that there would be less chance of
20 any waste of the water during an extremely dry year if the
21 rotation was every five (5) days rather than seven (7) and it is
22 so ordered. The rotation time is also based upon the evidence.
23 Defendant is ordered to remove his own diversion pipe on the
24 fifth day by 8 p.m., and plaintiff can remove same if defendant
25 fails to do so but the court emphasizes that the order is binding
26 on the defendants and to keep peace between these neighbors urges
27 him to be diligent about this removal.

28 The court at this time has no jurisdiction over Mr. Cook
29 but requests that he join with the plaintiff and the defendant in
30 the use of a watermaster in order to terminate this seemingly
31 endless litigation over the waters of Willow Creek.

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AGREEMENT

THIS AGREEMENT made and entered into this 20 day of August,
June, Nineteen Hundred and Fifty-five by and between R. W.
THOMASON and PEARL O. THOMASON, his wife, parties of the first
part, A. J. SYLVA and MARY J. SYLVA, his wife, parties of the
second part and B. H. HAGER and M. M. HAGER, his wife, parties
of the third part.

W I T N E S S E T H :

That whereas the parties of the first part are now and for
many years last past have been the owners of certain farm lands
and premises located on Willow Creek in Siskiyou County, Calif-
ornia and being in Section 28, Township 46 North, Range 4 West,
M.D.M. which land shall hereinafter be referred to as the
Thomason Ranch, and

WHEREAS the parties of the second part are the owners of a
certain ranch and premises located upon the said Willow Creek
in said County and State and being in Section 32, Township 46
North, Range 4 West, M.D.M., which said premises shall hereinafter
be referred to as the Sylva Ranch, and

WHEREAS the parties of the third part are the owners of
certain lands and premises on Willow Creek in said County and
State, located in Section 16, 17 and 21, Township 46 North,
Range 5 West, M.D.M. which said lands shall hereinafter be re-
ferred to as the Hager Ranch, and

WHEREAS the parties hereto all claim the right to use waters
from Willow Creek for the irrigation of their said premises, and

WHEREAS said parties have reached an agreement relative to the
use of said waters and desire to commit the same to writing,

NOW THEREFORE this agreement further witnesseth:

For and in consideration of the mutual covenants, promises and

and agreements hereinafter contained to be performed by the respective parties hereto and as a complete settlement of any disputes which might have heretofore existed with reference to the rights of the respective parties hereto to the use of ~~the~~ ~~waters~~ of the Waters of Willow Creek upon their respective lands said parties agree as follows:

1. The parties hereto agree that there shall be installed and hereafter maintained a measuring box or weir approved as to specifications by a representative of the State Department of Public Works Division of Water Resources at each of the following places:

wires available

(a) One at a point on Willow Creek above all diversions by the parties hereto which said point is located in the Southeast quarter of the Northeast quarter of Section 28, Township 46 North, Range 4 West, M.D.M. and at the head of the Thomason Ditch.

casualties minus lot in Thomason Ranch

(b) One at the head of the Sylva upper ditch in the Northeast quarter of the Northwest quarter, Section 33, Township 46 North, Range 4 West, M.D.M.

casualties minus lot in Thomason Ranch = allotted to Thomason Ranch

(c) One at a point on Willow Creek near the westerly boundary of the Sylva Ranch property.

The costs of installation of said measuring boxes or weirs shall be borne by the respective parties hereto in the proportions as follows, to-wit:

One-sixth by the parties of the first part, one-sixth by the parties of the second part and ^{two} ~~one~~-thirds by the parties of the third part.

It is understood and agreed that during each irrigation season when the waters in Willow Creek become sufficiently low that each party hereto shall not have sufficient water to adequately irrigate his said premises then the waters of Willow Creek shall be measured at the measuring box or weir installed at the head of the Thomason Ditch. In the event the parties do not mutually agree as to when the water condition is such as to warrant measure

ment and division of water as herein provided, anyone of the parties hereto may by demand upon the others cause a measurement to be taken and after such measurement is taken said parties agree that the use of the waters of Willow Creek and the ownership thereof and the rights of the parties herein to the use of the same shall be as follows:

(a) The party of the first part shall be the owner of and entitled to divert at the head of his ditch one-sixth of the waters then flowing in said Creek.

(b) The parties of the second part ^{may} use through anyone of three diversions from Willow Creek an amount of water equal to one-sixth of the amount measured at the Thomason weir.

(c) The parties of the first part and the parties of the second part agree that at all times they will permit to flow over the weir constructed at the West boundary of the Sylva property an amount of water equal to two-thirds of that found to be present in Willow Creek at the Thomason measuring box or weir.

For the purpose of determining the water flowing in the creek measurements shall be taken at 6:00 o'clock P.M.

It is further understood and agreed by and between the parties hereto that ^{if} at any time between July 1 and October 15 of any year ~~when~~ the waters of Willow Creek become sufficiently

low that the quantity flowing over the weir at the West boundary of the Sylva property does not exceed 10 inches then the parties of the first part and the parties of the second part shall each be entitled to one-half of the waters flowing in said

creek and neither party shall be required to permit waters to flow past the weir at the West boundary of the Sylva property; provided further that first parties shall not be required to let any water pass over the weir at the West boundary of the Sylva

property ^{if} after it has been determined that the flow of water in the creek ^{during said dates aforesaid} is so low that none of the waters thereof will reach a point on the creek immediately above the point where the Kuck Ranch

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drainage water enters the same, after over a 48 hour period the
Bill 2/3 referred to in sub-paragraph (h) above has been permitted
to pass over said weir. (County of ^{Butte} ~~Butte~~ ^{Contra Costa} - miles below Sylva Ranch)

IN WITNESS WHEREOF, the parties herunto have set their hands
the date first above written.

R.W. Thomason

Pearl Thomason

Mary J. Sylva

A.J. Sylva

M.M. Hager

B.H. Hager

STATE OF CALIFORNIA

County of Siskiyou ss.

On this 30th day of June in the year one thousand nine hundred and fifty-five
before me, Geo. A. Tabbe a Notary Public in and for the

County of Siskiyou State of California, residing therein,
duly commissioned and sworn, personally appeared R.W. Thomason, Pearl
Thomason, Mary J. Sylva, A.J. Sylva,
M.M. Hager and B.H. Hager
known to me to be the person whose name same subscribed to the within instrument
and acknowledged to me that they executed the same.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal
in the County of Siskiyou the day and year in this
certificate first above written.

Geo. A. Tabbe
Notary Public in and for the County of Siskiyou
State of California. My Commission Expires Dec 23 1958



Cowder's Form No. 32—Acknowledgment—General.
(C. C. Sec. 1187)

RECORDED AT REQUEST OF
B. J. SYLVA
15 MIN. PAST 11 A.M.
OFFICIAL RECORDS DISTRICT COUNTY, OREGON
DEC 20 1955
Vol. 361 Page 88
Ernest Johnson
RECORDER FEE \$ 3.60 paid
Box 126 - Montague

INTERNAL MEMO

YREKA WATER MASTER LIGHT HOUSE

APPLICANT

~~APPLICANT~~

TO: Files

FROM: G. K. Mork

DATE: October 20, 1976

SIGNATURE: *G. K. Mork*

SUBJECT: APPLICATION 24654, AN UNNAMED STREAM IN SISKIYOU COUNTY

An investigation under the proceedings in lieu of hearing was conducted on October 19, 1976. Present during the investigation was the Applicant, Barry R. Whitehurst. Also present was the Protestant Cyril Cook. Interviewed at the completion of the investigation was Mrs. June Cook.

The proposed point of diversion was visited and the area in which the dam is to be constructed is completely covered with blackberry bushes. Mr. Whitehurst proposes to develop a spring in the area of the blackberry bushes and have this spring flow into his reservoir. There was flow in the unnamed stream; it was measured and found to be 0.037 cfs. Mr. Whitehurst said that the flow in the stream originated on some springs on his father's property which is adjacent to his property. He stated that above his father's property the streambed is dry. Mr. Whitehurst proposes to divert water and irrigate a grain crop once or twice per year. Any water placed to beneficial use that is not consumed by the plants would drain back into the stream and thence down to Willow Creek.

The unnamed stream was checked at the point it enters Willow Creek. The streambed was dry; no flow that was occurring at the proposed point of diversion reached Willow Creek. The flow of Willow Creek was estimated to be five times as great as the flow measured at the proposed point of diversion and thus was estimated to be 0.19 cfs. About one-half mile below the confluence of the unnamed stream and Willow Creek is the first point of diversion of Protestant Cook. This point is described in the report on the Willow Creek reference dated March of 1950 and is as follows:

"The diversion works consist of a temporary rock and gravel dam used to divert water into an earth ditch about 3.0 feet wide by 1.0 foot deep. Diversion is made through a 24 inch pipe 12 feet in length which is fitted with a Calco screw gate. The pipe and gate are set in a concrete headwall 10 feet long and 3 feet high. The conduit is about 1.8 miles in length to its terminus in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 17, T. 46 N., R. 5 W., M.D.B.&M. The ditch has a capacity of about 5.0 cubic feet per second."

We proceeded on downstream approximately $\frac{1}{4}$ miles to the second point of diversion known as Point of Diversion 6 on the Willow Creek reference and it is described as follows:

"The diversion works consist of a reinforced concrete buttress type dam about 7.0 feet high with a 10 foot

flashboard opening. Concrete wing walls 15 and 18 feet long extend from the center section into the creek bank on each side. This structure is used to divert water into an earth ditch about 2.0 feet wide by 1.0 foot deep. The conduit is about 0.6 mile in length to its terminus in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 17, T. 46 N., R. 5 W., M.D.B. & M. The ditch has a capacity of about 3.0 cubic feet per second."

In between these two points of diversion that have been described is another point of diversion used by the Cooks. This consists of an earth dam in the stream with a ditch on either side of the dam which diverts water to flood irrigation of various portions of the place of use.

The Cooks have experienced a great deal of trouble in obtaining water, that has been used on the ranch since before 1914, in recent years. This has lead to several court cases in which the Court referred the matter to the Department of Water Resources for watermaster service. Since 1972 Willow Creek has been under the guidance of a watermaster who has regulated the diversions of the Cooks as well as two parties upstream, above the confluence of the source under this application.

In a memorandum dated April 27, 1949 from P. E. Stephenson to Harrison Smitherum which may be found in the 263.01 file on the Willow Creek reference is the following quote:

"Inspection of the remainder of the watershed area indicates that any flow from the numerous tributaries is of minor consequence during the irrigation season and therefore would supply little if any water to the main stream of Willow Creek and use of water from these tributaries would probably never be in conflict with the uses of the main stream."

This observation was borne out during the investigation on October 19 in that there was flow at the proposed point of diversion and yet none of that flow was reaching Willow Creek, additionally Willow Creek ceased its flow prior to reaching Point of Diversion No. 6 of Willow Creek reference.

The Cooks were greatly disposed to withdraw their application, however, there was some reservation on their part with regards to a time when there might be some flow at the proposed point of diversion that possibly could reach their points of diversion and thus would deprive them of water that they otherwise would receive. The following term was discussed with the Applicant and the Protestant. The Term is:

"In the event of shortage of water, the Watermaster for Willow Creek Reference has the authority to regulate the diversions under Application 24654, if in his opinion such diversions would be adverse to the diversions at Willow Creek Diversion Points 5 and 6."

With the inclusion of this term in any permit issued on Application 24654 and with the understanding that any invasion of the vested rights of the Cocks by the permittee will give rise to action on their part, the Cocks readily signed the Withdrawal of Protest form. Mr. Whitehurst, the Applicant, indicated that these conditions were agreeable to him and he signed such a statement at the bottom of the Withdrawal of Protest form. Inclusion of such a term in a permit issued on this application would not be inconsistent with the Department's responsibility to decide in what cases watermaster service will be provided. If the Department is unable to provide the anticipated supervision, or if watermaster service on Willow Creek is ever discontinued, the Board's continuing authority (Permit Term 12) would allow imposition of suitable alternate controls.

I recommend, following the obtaining of environmental clearance under CEQA, that a permit be issued subject to the above terms and permit terms 5f (0.7 cfs April 1 to August 31 and 6 afa January 1 to July 1 and 227 af per year), 5i, 6, 7, 8, 9, 10, 11, 12, 13, 26 (0.78 cfs and 42 af), 100, 101 (North Coast Region).

GKMork;mjeppesen

cc: Tom Mackey
Supervising Watermaster
Department of Water Resources
2440 Main Street
P. O. Box 607
Red Bluff, CA 96080