

MEMORANDUM

TO: Steve Knell
FROM: Bill Paris
DATE: March 29, 2016
RE: Impact of Non-Collection of Water Delivery Charges

Question Presented:

If OID intentionally stops collecting water delivery charges from users in Knights Ferry, will such action result in the loss of the underlying water right which OID uses to serve users in Knights Ferry?

Short Answer:

No. Once established, pre-1914 appropriative water rights can only be lost via abandonment, forfeiture, prescription, or estoppel. Each of these requires, to some degree, action or inaction by OID directly concerning the diversion and delivery of water by OID. Provided OID continues to divert and deliver water to users in Knights Ferry, and otherwise takes actions to assert its ownership of the underlying water right, none of these methods of loss will apply if OID decides to intentionally stop collecting water delivery charges from users in Knights Ferry.

Facts:

In approximately 1910, OID acquired a water right to divert and use 5 cubic feet per second ("cfs") from the Stanislaus River. OID also acquired an existing system of water diversion and conveyance facilities, commonly known as the Schell Ditch, that delivered the 5 cfs of water from the Stanislaus River to properties located in Knights Ferry, California. As a condition of the acquisition, OID is required to provide up to 4 cfs for irrigation uses in and around Knights Ferry, and up to 1 cfs for domestic use by residents of the town of Knights Ferry. Further, OID cannot charge more than \$2.30 per acre for water delivered to Knights Ferry. In 2009, the Stanislaus County Superior Court determined that the charge for water service is forever fixed at \$2.30 and cannot be increased. (July 6, 2010 Judgement of Stanislaus County Superior Court, p. 18, in matter of Eakin et al v. OID, Case # 618947).

The water right acquired by OID was adjudicated between 1917 and 1929, and was determined to have a priority date of 1853. (See July 21, 1921 Order of California State Water Commission, p. 19; see also San Joaquin County Superior Court Case # 16783, p. 42 ("Stanislaus River Adjudication")).

Since at least 2009, the cost of providing water service, including the administrative cost of billing for the Knights Ferry water service charge, including staff time and hard costs associated with printing and postage, has exceeded the amount the users in Knights Ferry are required to pay. Further, the rate of non-payment is very high, and the costs of seeking to enforce payment only

WATER COMMITTEE DISCUSSION ITEM

March 1, 2016

➤ **SUBJECT:** Cessation of Water Payments in Knights Ferry

BACKGROUND AND DISCUSSION:

Pursuant to agreements concerning the acquisition of one of the District's pre-1914 water rights by OID and SSJID, OID is obligated to serve up to five cubic feet per second of raw, untreated water for irrigation and domestic uses in and around the town of Knights Ferry (KF). As part of this agreement, the District can only charge \$2.30 per acre for irrigation and \$5.00 per lot for domestic uses. For total revenues of \$870 annually.

Following the Superior Court trial of *Eakin, et al, vs. OID* in 2012, the District updated its Knights Ferry billing records and found that there were KF irrigation customers being billed that were not entitled to water (\$2.30); and KF domestic customers that were not being billed for water (\$5 per lot,)

On February 28, 2012, the District notified those customers that were no longer entitled to water under the KF water right and would not receive a 2012 KF irrigation water bill. Additionally, those domestic water customers that had not been billed in the past were billed.

The cost service of billing, collections, return mail, address changes, parcel splits, and updating current ownership well exceeds the revenues stated above. Therefore, the District ceased it KF billing in 2013.

ATTACHMENTS:

- List of 2012 Knights Ferry Water Billing Customers
- List of Knights Ferry Water Rights

Committee Comments:

exacerbate the difference between the cost of service and the amount which can be charged. Since OID cannot address the imbalance between by raising the charges for water service, OID is considering whether it can continue to provide water service to Knights Ferry while foregoing all efforts to collect the \$2.30 per acre charge it is allowed to levy for such service.

Analysis:

There are four ways in which appropriative water rights can be lost – abandonment, forfeiture, prescription/adverse possession, and estoppel. While non-payment of charges relating to water service could be a factor contributing to the loss of the water right, this would only apply in circumstances where such non-payment was made by the water right holder. In this case, OID is the water right holder, and the non-payment will be made by an end user who is not an owner. So long as OID continues to divert and convey water to the users in Knights Ferry, who in turn continue to make reasonable and beneficial use of the water delivered, non-payment will not result or contribute to the loss of the underlying water right.

A. Abandonment of a Water Right Depends Upon the Intent and Conduct of the Water Right Holder.

An appropriative right can be lost where the owner expresses an intent to abandon the right and takes an action demonstrating his intention to abandon. (*Wood v. Etiwanda Wat. Co.* (1905) 147 Cal. 228, 233-234). A mere intention to abandon, without a concomitant action signifying the intent to abandon, is insufficient. Likewise, mere nonuse, without an associated intention to abandon, will not be considered abandonment. (*Id.*). Whether abandonment has occurred is a question of fact. (*Utt v. Frey* (1895) 106 Cal. 392, 397-398).

Here, OID intends to continue to divert water from the Stanislaus River pursuant to its appropriative rights, to deliver such water to users in Knights Ferry for irrigation and domestic purposes, and to report such diversion and use to the SWRCB. It has no intention to abandon its water rights, and thus cannot be found to have abandoned its water rights, even if its decision to stop levying water service charges could be construed as indicating an intention to abandon. Further, the continued diversion and delivery of Stanislaus River water for use by users in Knights Ferry will demonstrate OID's intent to maintain the water right, regardless of any inference to the contrary that could be made from its decision to stop levying water service charges when looked at singularly and out of context.

If the users in Knights Ferry were the water right holders, a decision by them to stop paying water service charges could be construed as conduct supporting an intent to abandon the right, provided it was coupled with an actual intent to abandon. (*See, e.g., Martin v. Cassidy* (1957) 149 Cal.App.2d 106, 110-111 [evidence of mere nonpayment of rent, without more, insufficient to support prima facie case of abandonment of lease]). But since the users in Knights Ferry are not the holders of the underlying right, their failure to pay water service charges which OID affirmatively chooses not to levy against them, cannot be construed as abandonment of the water right by OID.

B. Forfeiture of a Pre-1914 Appropriative Right Requires 5 Consecutive Years of Non-Use and the Establishment of a Conflicting Claim.

Pre-1914 water rights that (1) have not been used, or fully used, for a period of five (5) consecutive years and (2) for which a competing claim has been made, can be found to be wholly or partially forfeited. (Millview County Wat. Dist. V. State Water Resources Control Bd. (2014) 229 Cal.App.4th 879, 900). The application of such rule does not depend on, and indeed is often contrary to, the intention of the water right holder. (Lindblom v. Round Valley Water Co. (1918) 178 Cal. 450, 455). Rather, the essential element of forfeiture is the period of nonuse. (Hutchins, *The California Law of Water Rights*, U.S. Dept of Agriculture, 1956, p. 297-298).

Here, if OID decides to stop levying the fixed water service charge of \$2.30 per acre, it will continue to divert water from the Stanislaus River for delivery to and use by users in Knights Ferry. Such decision will not result in a period of nonuse which, if continued for a period of at least five (5) consecutive years, might give rise to a claim of forfeiture.

C. Prescription of a Pre-1914 Appropriative Water Right Requires a Person to Make Use of the Water Right that is Open, Notorious, Hostile and For A Period of Five (5) Consecutive Years.

The elements that support a claim of prescriptive water right include use that is actual, open and notorious, hostile and adverse to the real owner, under a claim of right, for a continuous uninterrupted period of five years. (Brewer v. Murphy (2008) 161 Cal.App.4th 928, 938). All of the elements must be satisfied. (Peck v. Howard (1946) 73 Cal.App.2d 308, 326). Whether the elements have been established is a question of fact. (Warsaw v. Chicago Metallic Ceilings, Inc. (1984) 35 Cal.3d 564, 570). The elements are designed to insure that the true owner being encroached upon has actual notice of the adverse use and time to take the necessary action to stop the adverse use before it ripens into a prescriptive right. (Brewer, supra, 161 Cal.App.4th at 938-939). Each of the elements depends almost exclusively on the action of the one seeking to establish a right by prescription.

Arguably, the failure to pay any water charge actually levied while continuing to use the water for a period of five consecutive years could perhaps give rise to a claim for prescription as the refusal to pay could be construed as an assertion of owning the right and not having to pay anything for it. In this case, however, the Knights Ferry users will not be given the opportunity to refuse to pay; rather, OID is considering the affirmative step of foregoing any further water service charges from the users. Thus, the conduct at issue is that of the true owner – OID – and not that of the one potentially attempting to establish a claim by prescription – a user in Knights Ferry. OID's decision to not levy any water service charges for water deliveries to users in Knights Ferry will not satisfy any of the elements of prescription.

D. For Estoppel to Apply, OID Must Undertake Conduct Which Others Rely Upon, Such Reliance Preventing OID From Reversing Course.

Generally speaking, estoppel applies to prevent a party from changing course to another's detriment. Four elements must be present in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury. (City of Long Beach v. Mansell (1970) 3 Cal. 462, 489).

Taken out of context, or in combination with actions OID is not currently contemplating, the decision to stop levying and collecting water service charges could be seen as evidence that OID no longer has or believes it has the underlying water right. But, since OID plans to continue to divert and deliver water from the Stanislaus River to users in Knights Ferry, and to report such diversion and use in annual reports to the SWRCB, and take all other actions necessary to maintain the underlying water right, the decision to stop levying water service charges to users in Knights Ferry should not contribute to a situation where OID is estopped from asserting that it has and maintains the underlying right.

Conclusion:

Once established, the key element in maintaining ownership of a water right is the diversion of water and application to a beneficial use. So long as OID continues to divert and deliver Stanislaus River water pursuant to its 1853 water right for use in Knights Ferry, and continues to do all ancillary actions supporting the right including maintaining the diversion and conveyance facilities, reporting to the SWRCB, and asserting and defending the right in court and other forums, then the decision to stop levying and collecting water service charges should not have any impact on OID's ownership of the underlying water right. If OID were to stop undertaking these actions, then the decision not to levy or collect water service charges could be considered relevant to the question of the underlying right.