

BEFORE THE DIVISION OF WATER RIGHTS
DEPARTMENT OF PUBLIC WORKS
STATE OF CALIFORNIA

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In the Matter of Application Number 4606 of D. F. Breeden to
Appropriate Water From Telephone Spring, a Tributary of
the East Fork of the West Fork of the Mojave River in
San Bernardino County for Domestic and Irrigation
Purposes.

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DECISION NO. 4606 D 134-A-4606
Decided December 20, 1926

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APPEARANCES AT HEARING HELD September 1, 1926.

For Applicant;
D. F. Breeden

in propria persona

For Protestants;
R. F. Garner and R. F. Garner, Jr.

Swing and Wilson

EXAMINER: Harold Conkling, Hydraulic Engineer, for the
Division of Water Rights.

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O P I N I O N

Application Number 4606 was filed by D. F. Breeden on May 25, 1926.
It proposes an appropriation of 0.001 cubic foot per second throughout the en-
tire year from Telephone Spring whose waters are tributary to the East Fork of
the West Fork of the Mojave River in San Bernardino County. The water is to
be used for domestic purposes and the irrigation of 2 acres of garden in the
NW $\frac{1}{2}$ of NW $\frac{1}{2}$ of Section 8, T 2 N, R 4 W, S.B.B. & M. The irrigation season
named in the application is from about April 1st to about October 31st of each
year. The application was protested by R. F. Garner and R. F. Garner, Jr.

The application was completed in accordance with the Water Commis-
sion Act and the requirements of the Rules and Regulations of the Division of
Water Rights and being protested was set for a public hearing at the Council

Chamber of the City Hall, San Bernardino, California, at 10:00 o'clock a.m. on September 1, 1926. Of this hearing applicant and protestant were duly notified.

R. F. Garner and E. F. Garner, Jr. claim the right to the use of the waters of the East Fork of the West Fork of the Mojave River and its tributaries above their points of diversion by virtue of an agreement entered into between E. D. Black and Carl Hewitt predecessors in interest of the applicant and by virtue of appropriation and use of said waters and allege in effect that all of the flow in the river and its tributaries is required for the irrigation of their lands, 500 acres of which have been irrigated during the past four years.

From evidence presented at the hearing the situation appears to be as follows:

Under date of June 13, 1923, an agreement was entered into between the predecessors in interest of the applicant and the protestants Garner to the effect that all the water and water rights there appurtenant to or thereafter become appurtenant to the lands then owned by the predecessors in interest of the applicant including all riparian rights in and to the waters of the Mojave River and its tributaries and all rights to develop any waters upon any of the lands in Sections 5, 6, 7 and 8, T 2 N, R 4 W, S.B.B. & M. would be conveyed to the protestants Garner with the exception of (1) the waters of Sawpit Canyon Creek, (2) the right to the waters of a certain spring in Section 6, (3) the right to develop water upon lands then or thereafter owned by the applicant's predecessors in interest for domestic purposes in connection with use of such lands for agricultural purposes and (4) the right to develop water in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 6.

This agreement was later confirmed by grant deeds to protestants under dates of July 12th and July 16, 1923.

Under date of July 18, 1923 a judgment was rendered by the Superior Court of San Bernardino County, Judge Frank E. Daley presiding, wherein the protestants were decreed the right to take and divert all water flowing in the West Fork of the Mojave River at their points of diversion to the extent of 2,000 inches together with the right to have all waters of the said West Fork of the Mojave River and its tributaries flow down the natural channel of said river to the intakes of the protestant undiminished and uninterfered with by the applicant's predecessors in interest save and except the waters of Saw Pit Canyon Stream which is tributary to the West Fork of the Mojave River.

Although much stress was laid at the hearing by the protestants upon the possibility of the violation of the agreement between the applicant's predecessors in interest and the protestants, this office is not concerned with the transaction as it is a matter which should be settled between the interested parties themselves.

If there is unappropriated water in the source of supply from which the applicant proposes to divert it is incumbent upon this office to approve the application and not to pass upon the validity or effect of that portion of the transaction between the protestant and the applicant's predecessor in interest wherein it is claimed there is a covenant running with the land which constitutes a waiver of the rights of applicant as successor in interest to appropriate water. In other words it is not deemed an appropriate function of this office to decide collateral issues relative to covenants claimed to run with the land and constitute a waiver of the right to appropriate unappropriated waters of the State of California.

If the applicant is in fact bound by the covenants of his predecessor in interest, a point upon which we express no opinion the proper remedy is by an action in court based upon said covenant and wherein the decision of this issue can be directly and judicially determined.

Relative to the judgment rendered by the Superior Court of San Bernardino County it may be said that that judgment refers only to waters which are tributary to the West Fork of the Mojave River above the protestants' points of diversion and if the evidence shows that the waters which the applicant proposes to divert do not go to make up a portion of the waters which contribute to the waters of the Mojave River above protestants' points of diversion and no injury will result to the protestants by the proposed diversion, the judgment has no bearing on the case.

Inasmuch as flood waters pass down the gulch in which the spring is located to the East Fork of the West Fork of the Mojave River the protestants claim that any water which may be diverted from the spring would deplete the amount available at their points of diversion by the amount diverted less evaporation losses in transit.

The applicant appears to have been fully informed of the alleged right of the protestants as set forth in the agreement, deeds and court judgment but claims that the waters which he seeks to appropriate did not contribute to the protestants' supply but were lost through evaporation and transportation before they had flowed 200 feet from the spring.

The water is to be conveyed to the applicant's house by means of a pipe line 1100 feet in length. The place of use is located in close proximity to the bank of the East Fork of the West Fork of the Mojave River and it would appear probable that water would be conserved by the proposed use of the applicant rather than diminished as any return flow would have but a short distance to travel to the river.

On August 11, 1926, an investigation of the proposed source of diversion was made by an engineer of this office who reported that the spring is located in a steep gully on the south slope of the East Fork of the West Fork of the Mojave River at an elevation of about 250 feet above the bed of the

river and about 1000 feet distant therefrom. The spring is formed by an impervious transverse granite dyke approximately 100 feet wide behind which the water rises and flows into the gully passing over solid rock and through a growth of willows and alders.

At the time of the inspection the flow of the spring was estimated to be about 0.002 cubic feet per second which is twice the quantity which the applicant proposes to divert and practically this entire flow was lost within the first 100 feet due probably to evaporation and transpiration there being only a trace of moisture left to seep into the gravels below the dyke.

There was no flow in the West Fork of the Mojave River at the time of the investigation in the vicinity of the upper point of diversion of the applicant, known as Burchams dam but water was standing in numerous pools in the bed of the stream. No diversion was being made by the protestants at Burchams dam.

The channel of the West Fork of the Mojave River between the Burchams dam and the East Fork a distance of approximately $5/8$ of a mile is very flat and meanders through a dense growth of willows and alders. The dam is located on an impervious granite dyke which crosses the bed of the channel at that point and may intercept all the underflow in the West Fork Canyon but in the opinion of the engineer who made the investigation, such underflow is at periods of low stream flow entirely lost by evaporation, transpiration and deep percolation in the wide sandy basin above Burcham dam, and only surface waters in the West Fork of the Mojave and its tributaries are available for diversion at the dam.

From the testimony presented at the hearing and the report of the engineer who made a field investigation of the situation it is the opinion of this office that the waters of Telephone Spring do not contribute to the protestants' water supply and are therefore unappropriated.

O R D E R

Application Number 4606 for a permit to appropriate water having been filed with the Division of Water Rights as above stated, a protest having been filed, a public hearing having been held, a field investigation having been made, and the Division of Water Rights now being fully informed in the premises;

IT IS HEREBY ORDERED that said application Number 4606 be approved and that a permit be granted to the applicant, subject to such of the usual terms and conditions as may be appropriate.

Dated at Sacramento, California, this 20th day of December , 1926.

(Edward Hyatt, Jr.)
CHIEF OF DIVISION OF WATER RIGHTS

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