

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

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In the Matter of Application 5328 of W. R. Wallace to appropriate from Darwin Wash in Inyo County for Mining and Domestic Purposes and Application 5407 of W. R. Wallace to appropriate from Old Coso Springs in Inyo County for Domestic Purposes.

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DECISION A. 5328, 5407 D - 207

Decided - *December 21, 1928.*

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Appearances at Hearing Held August 23, 1928

For Applicant

W. R. Wallace

No appearance

For Protestant

Wagner Assets Realization Corporation)
Theo Peterson and Alex Ruona)

Benjamin M. Stansbury

EXAMINER: Everett N. Bryan, Deputy Chief for Harold Conkling,
Chief of Division of Water Rights, Department of
Public Works, State of California.

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O P I N I O N

GENERAL FEATURES OF THE APPLICATIONS

Application 5328 was filed January 11, 1927 by Corbett Bland and W. R. Wallace. On August 29, 1928 evidence was filed in this office that the interests of Mr. Bland in the project had been transferred to Mr. Wallace.

The application proposes an appropriation of one cubic foot per second to be diverted throughout the entire year from Darwin Wash in Inyo

County for quartz mining and domestic purposes. The place of use is located in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ Section 13, T 19 S, R 40 E, M.D.B. & M. The application was protested by the Wagner Assets Realization Corporation.

Application 5407 was filed April 7, 1927 by Corbett Bland and W. R. Wallace. On August 29, 1928 evidence of the assignment of Mr. Bland's interest in the project to Mr. Wallace was filed in this office.

The application proposes an appropriation of 0.33 cubic foot per second to be diverted throughout the entire year from Old Coso Springs in Inyo County for domestic purposes in the town of Darwin. The application was protested by the Wagner Assets Realization Corporation and by Theo Peterson and Alex Ruona, trustees appointed by the residents of the unincorporated town of Darwin.

PROTESTS

Application 5328.

The protest of the Wagner Assets Realization Corporation was filed June 23, 1927. Protestant claims the privilege of diverting two cubic feet per second from Darwin Wash under Application 2359, Permit 1086 and alleges in effect that the total available supply does not exceed the amount which it has the privilege of diverting and consequently any water diverted by the applicant would interfere with its rights.

Application 5407.

The protest of the Wagner Assets Realization Corporation was filed July 29, 1927. Protestant alleges in effect that the waters of Old Coso Springs which the applicant proposes to appropriate contribute to the underground supply in Darwin Wash which it has the privilege of diverting under Application 2359, Permit 1086 and any diversion made by applicant from this

source would necessarily diminish the supply to which it is entitled. Protestant also alleges that it and its predecessor in interest have used all of the available supply of water from Old Coso Springs which rises to the surface, through a pipe line from said springs to the town of Darwin continuously since about the year 1875.

The protest of Theo. Peterson and Alex. Ruona (Trustees) was filed September 13, 1927. They allege in effect that the waters from Old Coso Springs have been diverted through a pipe line to the town of Darwin for the last forty years and there used continuously for domestic purposes and claim that the proposed diversion of the applicant would result in depleting the water supply of the town of Darwin.

HEARING SET IN ACCORDANCE WITH SECTION 1a
OF THE WATER COMMISSION ACT

Applications 5328 and 5407 were completed in accordance with the Water Commission Act and the requirements of the Rules and Regulations of the Division of Water Rights and being protested were set for public hearing in accordance with Section 1a of the Water Commission Act on August 23, 1928 at 2:00 P.M. in Room 1026 Associated Realty Building, Los Angeles, California. Of this hearing applicant and protestants were duly notified.

The applicant failed to appear at the hearing. This however is not indicative of a lack of interest as this office was informed prior to the hearing that he would rest his case upon the result of a field inspection conducted under the supervision of this office.

FIELD INVESTIGATION

On April 28, 1928, prior to the hearing, a field investigation was made by an engineer of this office. Present at the investigation were W. R. Wallace, the applicant, Theo. Peterson, representing the residents of Darwin

and Benjamin M. Stansbury, attorney, and L. L. Farnham resident superintendent for the Wagner Assets Realization Corporation.

The results of this investigation are fully set forth in a report by I. M. Ingerson of this office prepared under date of May 23, 1928, which report was introduced in evidence at the hearing and to which reference is hereby made.

PHYSIOGRAPHY AND HYDROGRAPHY

For a detailed description of the physical and hydrographic features involved reference is made to the report of Mr. Ingerson above referred to and a report by Mr. Bowen introduced at the hearing on an investigation conducted by him for the Wagner Assets Realization Corporation on June 19th, and 20th, 1928.

DARWIN WASH

In general it may be stated that Darwin Wash is a meandering canyon at the foot of the westerly slope of the Argus Range. The slope of the wash is in a general northerly direction. Only at times of extreme flood is there any water flowing on the surface.

Although Darwin Wash is designated as the source of the proposed diversion in Application 5328 the source appears to be a small spring located on the west side of the wash and is so designated on the map accompanying the application. This spring is located approximately 0.8 of a mile below the point of diversion of the Wagner Assets Realization Company which is a well sunk into the wash. In elevation it is about 150 feet below this well.

The catchment basin of Darwin Wash is of the closed basin type and the underground water appears to lie some distance below the surface. From the evidence submitted it would appear that the well of the Wagner Assets Realization Corporation taps the aquifer which feeds the spring from which

the applicant proposes to divert but all of the water has not been intercepted.

At a point about five miles below the protestant's point of diversion the water comes to the surface over a rim rock. Testimony presented at the hearing indicated that the flow at this point does not exceed 0.4 cubic foot per second. The amount of water passing the protestant's point of diversion however would probably be in excess of this amount on account of the fact that the lower four miles of the canyon are heavily wooded with willows and dense vegetation and there is a very substantial loss of water by evaporation and transpiration through this growth. It appears doubtful that more than one second foot could be developed from the underground basin which amount is considerably less than the amount named in the permit of the Wagner Assets Realization Corporation.

OLD COSO SPRINGS

Old Coso Springs, the source of the proposed diversion named in Application 5407 is a cienega in the floor of a constricted canyon about four miles westerly of Darwin Wash and about 8 miles southeasterly of the point of the Wagner Assets Realization Corporation. The present yield of Old Coso Springs is about 12 gallons per minute all of which is diverted into the 4 inch pipe line which carries the water to the town of Darwin. Only a small proportion of this amount reaches the town however as there is a considerable loss in the pipe line through leaks.

The underflow of the springs which may be as much as the surface flow sinks and undoubtedly contributes to the ground water supply of Darwin Wash.

USE OF WATER BY PROTESTANTS

Under Application 2359, Permit 1086 the Wagner Assets Realization

Corporation has the privilege of diverting 2.0 cubic feet per second from Darwin Wash for mining, milling and domestic purposes throughout the entire year. The diversion is made from a well located about 0.8 of a mile above the proposed point of diversion of the applicant in Darwin Wash.

Under the terms of the permit construction work was to be completed on or before June 1, 1924 and the water applied to complete beneficial use on or before June 1, 1925. For good cause shown the Corporation has been granted extensions of time to complete the project and at the present time the corporation is allowed until December 1, 1929 to complete the same. Over \$54,000 has been expended on the project and at the present time the American Metals, Inc., the lessee of the Wagner Assets Realization Corporation is engaged in making plans for extensive underground development proposing the installation of a suitable milling plant to properly concentrate the ores and make marketable products. The controlling factor in the ultimate operations appears to be the available water supply.

The protestant corporation has used a maximum of about 0.17 of a cubic foot per second from the well and the milling plant has been operated continuously from February 1926 to July 7, 1927 ^{from} / which latter date the plant has not been operated due to the reorganization of the company, and no water has been used except for domestic and fire protection purposes.

Testimony presented at the hearing would indicate that a 500 ton plant or even a 1000 ton plant may be installed which would require from about 2 to $2\frac{1}{2}$ tons of water per one ton of ore to operate. For a 500 ton plant this would be equivalent to 0.37 to 0.50 of a cubic foot per second or twice these amounts for a 1,000 ton plant if that amount of water can be developed. It appears doubtful that the full amount of water, namely 2.0

cubic feet per second, which applicant applied for is available for appropriation.

The Town of Darwin (unincorporated) appears to have been using water from Old Coso Springs for at least 20 years last past. The residents were at one time served by the owners of the Defiance Mine and later by the Darwin Silver Company who succeeded to their interests. About 1921 this service was discontinued and the residents of Darwin took over the pipe line and have operated it since on a mutual basis, each person contributing whatever money they could to keep the pipe line in repair. To care for their interests and to look after the pipe line they appointed Mr. Peterson and Mr. Ruona, trustees, who protested Application 5407 of W. R. Wallace.

DISCUSSION OF PROTESTS

Application 5328.

The protestant Wagner Assets Realization Corporation admits that it is unlikely that any diversion at the proposed point of diversion named in Application 5328 would have any physical effect upon the available water supply at the point of diversion of the Wagner Assets Realization Corporation except that such a diversion might possibly result in the lowering of the water plane thereby increasing its pumping costs. It is believed however that since the proposed point of diversion is 0.8 of a mile distant from and about 150 feet in elevation below protestant's well that the prospect of injury to protestant is altogether speculative and that the effect of the diversion would at most be negligible.

The protestant appears to be concerned rather with the thought that any diversion made under Application 5328 might interfere with its prospects, cloud the title to its water right and would result in needless expenditure.

In this connection attention is directed to the fact that a downstream appropriator cannot prejudice the rights of an upstream appropriator and any right which applicant may acquire will be subordinate to the right of protestant. The only way by which the applicant could acquire a right there as against the protestant would be by abandonment of the rights of the protestant or a forfeiture by nonuse.

The evidence presented at the hearing, clearly indicated that at the present time there was unappropriated water passing protestant's point of diversion. Whether or not the entire available supply will in the future be appropriated by the protestant is a matter of conjecture, and any development made by the applicant would be at his own risk.

If it should develop that for any reason diversion from the proposed point of the applicant would interfere with protestant's rights the situation may readily be remedied.

In view of the above the protest of the Wagner Assets Realization Corporation against Application 5328 may be dismissed.

Application 5407.

As stated above it appears reasonable to assume that the waters of Old Coso Springs which are not diverted at protestant's intake find their way into the gravels and reed the underground supply which is tapped by the well of the Wagner Assets Realization Corporation.

It is believed however that the applicant's proposed diversion would have no serious effect upon the diversion of the Wagner Assets Realization Corporation as the well is located about 8 miles downstream from Old Coso Springs and it appears likely that the draft at the Springs would be replenished by the storms of the succeeding winter or winters before the effect would be

felt due to the fact that the movement of the waters through the underground recesses is probably very slow.

As to the protest of the trustees appointed by the town of Darwin it may be said that the applicant has entered into no contractual relation with the residents of the town who are now deriving their supply from Old Coso Springs under a plan of mutual agreement and apparently there is no desire on their part to change the present system.

While it may be true that for purely domestic uses the total amount of water which would be diverted from Old Coso Springs to beneficial use would not be increased by the proposed diversion as only a certain amount could be so applied whether it be obtained under the old system or the proposed one yet the hearing clearly established the fact that the project is not looked upon with favor by the residents of the town of Darwin and would therefore not be feasible. Applicant is at present in a position to obtain service through the existing pipe line from Coso Springs and it would appear a permit issued upon Application 5407 could serve little purpose other than to throw confusion into the matter of a water supply for the Town of Darwin from this source.

PROPOSED POINT OF DIVERSION NAMED IN APPLICATION 5328
IS WITHIN PUBLIC WATER RESERVE NO.13 CALIFORNIA NO. 1

Under date of December 1, 1913, by order of the President of the United States certain lands were withdrawn from settlement, location, sale or entry and reserved for public use. These lands were designated as Public Reserve No. 13, California No. 1.

Included among the lands so withdrawn were all lands within one-quarter mile of each of three springs located approximately 5 miles north-

east of Darwin in what will probably be when surveyed Sections 4, 8 and 9,
T 19 S, R 41 E, M.D.B. & M.

The Spring from which the applicant proposes to divert appears to be one of the springs mentioned above and before Application 5328 is approved the necessary right of access should be acquired by the applicant. Applicant claims however, that he owns the land at the point of diversion. Before this application is approved the facts in the matter should be ascertained. If applicant acquired title before the withdrawal of December 1, 1913 then nothing would appear to stand in the way of approval of this application. If on the other hand the point of diversion is not on land owned by applicant he should be allowed a reasonable time within which to secure right of access, and if such right is not obtained the application should be cancelled as it appears the spring is close beside the public road and there is reasonable prospect of a public necessity for the waters thereof.

POSO SPRINGS AFFECTED BY WITHDRAWAL ORDER OF APRIL 17, 1926

By executive order of April 17, 1926, the following order of withdrawal was issued.

"Under and pursuant to the provisions of the Act of Congress approved June 25, 1910 (36 Stat., 847), entitled 'An act to authorize the President of the United States to make withdrawals of public lands in certain cases', as amended by act of Congress approved August 24, 1912, (37 Stat., 497) it is hereby ordered that every smallest legal subdivision of the public land surveys which is vacant unappropriated public land and contains a spring or waterhole, and all land within one quarter of a mile of every spring or water hole located on unsurveyed public land be, and the same is hereby, withdrawn from settlement, location, sale, or entry, and reserved for public use in accordance with the provisions of Section 10 of the Act of December 29, 1916 (39 Stat., 862), and in aid of pending legislation."

The above order of withdrawal would appear to effectively bar this office from approving any application to appropriate from Old Coso Springs unless applicant submits satisfactory evidence to the Division of Water Rights that he has received the necessary right of access.

CONCLUSION

At the present time there is unappropriated water at the point of diversion under Application 5328 which is not being applied to any useful or beneficial purpose and as the project of the applicant would result in putting this water to such a use Application 5328 should be approved provided that within a reasonable time the applicant satisfies this office that the necessary right of access has been acquired and if right of access is not so demonstrated Application 5328 should be cancelled. In the meantime action should be withheld pending the acquisition of this right of access.

Before action can be taken by this office on Application 5407 to appropriate from Old Coso Springs satisfactory evidence should be submitted to this office that contractual relationship is established between the residents of the town of Darwin which applicant proposes to serve and that the necessary right of access has been acquired. If such evidence be submitted within a reasonable time the application may be approved but if not it should be cancelled.

ORDER

Applications 5328 and 5407 for permits to appropriate water having been filed with the Division of Water Rights as above stated, protests having been filed, a public hearing having been held and the Division of Water Rights now being fully informed in the premises:

IT IS HEREBY ORDERED that action on Application 5328 be withheld for a reasonable time to allow applicant to submit satisfactory evidence as to the necessary right of access, and if such evidence is submitted within a reasonable time Application 5328 shall be approved, but if such evidence is not submitted within a reasonable time Application 5328 shall be cancelled, and

IT IS FURTHER ORDERED that action on Application 5407 be withheld for a reasonable time to allow applicant to submit satisfactory evidence as to the necessary right of access and contractual relationship with the residents of the town of Darwin which it is proposed to serve, and if such evidence is submitted within a reasonable time Application 5407 shall be approved, but if within a reasonable time satisfactory evidence is not submitted either as to right of access or contractual relationship the application shall be cancelled.

DATED at Sacramento, California, this 21 day of *December*
1928. *1928*

MP
WES:
GG

Harold Conkling
(Harold Conkling)
CHIEF OF DIVISION OF WATER RIGHTS. *J*