

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

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In the Matter of Application 3269 of Ballarat Mining Corporation to appropriate from North Branch of Surprise Canyon or Water Canyon Springs, tributary to Surprise Canyon in Inyo County for Mining and Domestic Purposes, and in the Matter of Revocation of Permit 2154 heretofore issued upon Application 3979 of Ballarat Mining Corporation allowing the appropriation of 1.25 cubic feet per second from Surprise Canyon tributary to Panamint Valley Sink in Inyo County for Power Purposes, and of Permit 2116 heretofore issued upon Application 3998 of Ballarat Mining Corporation allowing the appropriation of 0.50 cubic foot per second from a spring in Pleasant Canyon tributary to Panamint Valley Sink in Inyo County for Mining and Domestic Purposes.

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DECISION A. 3269, 3979, 3998 D - 264

Decided - August 14, 1930

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APPEARANCES AT HEARING HELD August 4, 1924, upon Application 3269.

For Applicant

Mary A. Thompson

Stephen W. Downey

For Protestants

S. F. Hopkins

John Dennison

A. D. Myers and J. R. N. Levens

Chas. LaVerne Larzelere

EXAMINER: Edward Hyatt, Jr., Acting Chief of Division of Water Rights, Department of Public Works, State of California.

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APPEARANCES AT HEARING HELD May 20, 1929, upon Applications 3269, 3979 and 3998, Permits 2154 and 2116.

For Applicant and Permittee

Ballarat Mining Corporation

Mary A. Thompson

For Protestants

A. D. Myers and Mrs. Greenwood, successors in interest of McCleod, Seeley & Corum

H. J. Marsh

S. F. Hopkins

No appearance

J. R. N. Levens

No appearance

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

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## O P I N I O N

### GENERAL FEATURES AND STATUS OF APPLICATIONS AND PERMITS

Application 3209 was filed by H. H. Thompson on February 24, 1923, assigned by him to his wife Mary A. Thompson on November 5, 1924, who in turn assigned it to the Ballarat Mining Corporation on March 13, 1929.

It proposes an appropriation of 3 cubic feet per second from the waters of the North Branch of Surprise Canyon or Water Canyon Springs, tributary to Surprise Canyon in Inyo County to be directly applied to beneficial use without storage. The water is to be used throughout the entire year for mining and domestic purposes at the Woodpecker and Curran Groups of mining claims in Surprise Canyon within unsurveyed T 21 S, R 45 E, M.D.B. & M. The point of diversion is described as being at the confluence of Water and Surprise Canyons within the unsurveyed SW $\frac{1}{4}$  of Section 7, T 21 S, R 46 E, M.D.B. & M. The application was protested by S. F. Hopkins, A. D. Myers and J. R. W. Levens on behalf of B. W. Levens, G. W. Levens and himself.

#### Application 3979 - Permit 2154

Application 3979 was filed by Mary A. Thompson on May 7, 1924, and being unprotested was approved on July 15, 1925, by the issuance of Permit 2154 which granted the permittee the privilege of diverting 1.25 cubic feet per second throughout the entire year from Surprise Canyon tributary to Panamint Valley Sink in Inyo County for power purposes. The water was to be diverted at a point within the NE $\frac{1}{4}$  of NW $\frac{1}{4}$  of projected Section 16, T 21 S, R 45 E, M.D.B. & M. and after being used for power purposes was to be returned to Surprise Canyon at a point within the SW $\frac{1}{4}$  of NW $\frac{1}{4}$  of projected Section 16, T 21 S, R 45 E, M.D.B. & M.

Under the terms of the permit actual construction work was to begin on or before November 1, 1925, to be completed on or before November 1, 1927, and complete application of the water to the proposed use was to be made on or before June 1, 1928.

On March 18, 1929, the permit was assigned to the Ballarat Mining Corporation.

According to the progress reports submitted apparently no use of water has been made under the permit and work has been suspended pending the outcome of the litigation involving Application 3269.

Application 3998 - Permit 2116

Application 3998 was filed on May 22, 1924, by Mary A. Thompson and all protests either having been withdrawn or dismissed for failure to show cause, the application was approved on July 13, 1925, by the issuance of Permit 2116 allowing the permittee the privilege of diverting 0.5 cubic foot per second throughout the entire year of the waters of a spring in Pleasant Canyon tributary to Panamint Valley for mining, milling and domestic purposes. The point of diversion was described as being within the NE $\frac{1}{4}$  of SE $\frac{1}{4}$  of projected Section 12, T 22 S, R 44 E, M.D.B. & M. The place of use was described as being within the SE $\frac{1}{4}$  of NE $\frac{1}{4}$  and NE $\frac{1}{4}$  of SE $\frac{1}{4}$  of Section 12, T 22 S, R 44 E, M.D.B. & M. and within the SW $\frac{1}{4}$  of NW $\frac{1}{4}$  and NW $\frac{1}{4}$  of SW $\frac{1}{4}$  of Section 7, T 22 S, R 45 E, M.D.B. & M.

Under the terms of the permit actual construction work was to begin on or before October 1, 1925; to be completed on or before October 1, 1926, and the water to be applied to complete beneficial use on or before June 1, 1928.

The progress report for the year 1925 indicated that \$200.00 had been spent on construction work consisting of the removal of willows and brush at the point of diversion; the partial construction of the dam and the laying of 2 inch pipe from the dam to a watering trough and cook house; that water had been used from September 26, 1925, to December 25, 1925, for mining, machinery operation and domestic purposes at boarding and lodging houses. A statement was made to the effect that the development work on the mining property had temporarily ceased December 25, 1925, to be continued as soon as more complete equipment had been installed.

The progress report for the year 1926 stated that about \$500.00 had been spent on construction work but that the diversion dam had not been completed; a contract had been let to construct a road to the mine and that the water had been used in connection with the development of a large lead deposit and domestic use for men at mine and on road construction work. Based upon this report an extension of time was granted until December 1, 1927, within which to complete construction work.

According to the progress report for the year 1927, no further construction work had been done and use of water ceased July 15, 1927, due to the fact that a mining company was to take over all the holdings and that operations had been postponed pending the outcome of a lawsuit involving Application 3269. A request for further extension was submitted but no action was taken by this office.

According to the progress report for the year 1928 \$900.00 had been expended on construction work and water was used for mining, domestic and irrigation purposes from April 10th to August 15, 1928. The dam had not been completed.

On March 18, 1929, this office received an assignment of Permit 2116 to the Ballarat Mining Corporation.

On June 28, 1930, Mrs. Ada Norris of Trona filed Application 6713 with this office which application covers the same project as described in Application 3998. Mrs. Norris has informed this office that little or nothing had been done under the permit and as long as it was in effect it prevented others from using the water, who could actually apply it to beneficial use.

PROTESTS AGAINST APPLICATION 3269

Mr. A. D. Myers claims a right to the use of water from the proposed source of diversion by virtue of an appropriative right initiated prior to the effective date of the Water Commission Act and use thereof for the last 50 years. He alleges in effect that there is no unappropriated water available.

Mr. J. R. N. Levens, et al. allege in effect that the water which applicant proposes to divert is used by all interested parties in the district and should not be under the control of a single individual.

Mr. S. F. Hopkins alleges in effect that the stream of water from which applicant proposes to divert flows directly through mining claims upon which he and his associates have erected a stamp mill and that in order to operate said mill it will require 10 miners inches of the water the entire flow of which does not exceed 20 miners inches; that the applicant has no title to the claims upon which it is proposed to use the water and that the granting of the application will seriously interfere with the development and operation of the mines located in Surprise Canyon.

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

Application 3269 was completed in accordance with the Water Commission Act and the requirements of the Rules and Regulations of the Division of Water Resources and being protested was set for public hearings in accordance with Section 1a of the Water Commission Act on August 4, 1924, at 10:00 o'clock A.M. in Room 818 Pacific Finance Building, Los Angeles, and on May 20, 1929, at 10:00 o'clock A.M. in Room 401 Public Works Building, Sacramento, California. Of these hearings applicants and protestants were duly notified.

HEARING SET IN ACCORDANCE WITH SECTION 20  
OF THE WATER COMMISSION ACT

It appearing that permittee had failed to comply with the terms and conditions of the permits heretofore issued in approval of Applications 3979 and 3998, Application 3979, Permit 2154 and Application 3998, Permit 2116 were set for a public hearing in accordance with Section 20 of the Water Commission Act on May 20, 1929, at 10:00 o'clock A.M. in Room 401 Public Works Building, Sacramento, California. Of this hearing the several parties at interest were duly notified.

STIPULATION

At the hearing held in August 1924 upon Application 3269 it was agreed that the Division would submit a form of stipulation to the applicant and protestants which would, if signed by all of the interested parties, give this office the authority to determine the matter of Application 3269 to the end that recourse to the courts might be avoided and the right to the water in question conclusively and finally determined. The stipulation was accepted by Mr. Myers but was rejected by the applicant under date of October 30, 1924.

### FIELD INVESTIGATION

On April 26th and 27, 1925, a field investigation was made by engineer F. W. Bush, Jr., under the direction of this office and a report was submitted by him under date of April 30, 1925, to which reference is made. Much of the matter set forth below under the heading of "Physiography and Hydrography" is taken from the report.

### PHYSIOGRAPHY AND HYDROGRAPHY

The source of the proposed appropriation under Application 3269 is the North Branch of Surprise Canyon or Water Canyon Springs situated at the confluence of Water and Surprise Canyons tributary to the Panamint Valley in Inyo County. The drainage area above the point of diversion is about 5 square miles and extends to a portion of the northerly slope of Telescope Mountain which is 11,000 feet in elevation. Just above the proposed point of diversion there is an old tunnel extending into the hillside a distance of about 70 feet, which was evidently excavated for the purpose of developing water. From this tunnel a small stream flows into the creek above the point of diversion.

The amount of water at the point of diversion is approximately 28 gallons per minute of which about one-half is supplied from the tunnel. This water flows down the creek a short distance and disappears into the gravels.

About one-half mile below the proposed point of diversion and on the north bank of Surprise Canyon there is a small partially developed spring locally known as Slaughter House Spring from which Mr. Hopkins obtains his water supply. The flow of this spring is about 5 gallons per minute.

No attempt will be made to discuss the physical or hydrographic features relative to Application 3979, Permit 2154 and Application 3993, Permit 2116 as the water supply situation is not involved.

#### USE OF WATER BY PROTESTANTS

From the facts presented at the hearings it appears that at one time there was in Surprise Canyon an active mining camp but that no real mining operations of any magnitude have been carried on there for some time.

In 1910 protestant A. D. Myers acquired certain patented mining claims and mill sites in the Canyon together with appurtenant water rights including water from the applicant's proposed point of diversion and water from a small spring known locally as "Slaughter House Spring". The water from the upper source was conducted through a three inch pipe line originally constructed in approximately the year 1875 together with the waters of "Slaughter House Spring" which were conveyed to the main pipe line by means of a one inch feeder.

Apparently very little use of the water was made except for camp and domestic use prior to May 1923 when he put in his first gardens. (Transcript of August hearing.) Since that time the use is not definitely established but apparently less than one acre of land has been irrigated and the domestic use has been confined to the needs of three or four persons on an average. The customary allowance for such use would not exceed 0.025 cubic foot per second or about 11.2 gallons per minute.

Until sometime in May 1924 the water used by Mr. Myers was obtained from both the source in question and the lower spring but since that time the pipe at the upper source was disconnected on account of alleged pollution of the source of supply by the applicant and the only water which

was used by Mr. Myers has been obtained from the lower spring. Mr. Myers claims that any attempt on his part to stop the pollution and to reconnect the pipe line was met with opposition. (Transcript pp. 122-123)

From the above it would appear that the rights originally acquired by protestant Myers had been lost by non use with the exception of the right to as much water as had been used by him for the domestic and other incidental uses to which the water had been applied, which amount would probably not exceed what he has been using from the lower spring. Apparently Mr. Myers intends to discontinue his irrigation use as soon as he commences his mining operations.

The use of water made by Mr. Levens and Mr. Hopkins, the other protestants, appears to have been very intermittent and any water used by them appears to have been obtained from Mr. Myer's pipe line with his knowledge and consent.

On August 15, 1921, when Mr. Myers was in the East, S. F. Hopkins filed Application 2495 with this office to appropriate from the waters of Water Canyon for mining and domestic purposes. This application was approved by this office on October 6, 1922, for 0.15 cubic foot per second but was cancelled on December 2, 1922, for failure on the part of permittee to remit permit fees. The fact that the application was filed with this office would appear to indicate that in his opinion there was unappropriated water at the proposed point of diversion. Mr. Myers claimed no knowledge of the filing and stated at the hearing that had the matter been brought to his attention he would surely have protested it.

### LITIGATION

The places of use named in Application 3269 are the Woodpecker and Curran group of mines in Surprise Canyon.

The Curran group of claims consists of the Curran, the Tenacious, the Curran Extension and Curran 2, 3, 4, 5, 6, 7 and 8. Curran Mill Site No. 1 and Curran Mill Site No. 2; the Woodpecker group consists of the Woodpecker, the Woodpecker Extension and Woodpecker No. 1, 2, 3, 4, 5, 6, 7 and 8, and the Woodpecker Mill Site.

The Curran, Tenacious and Woodpecker claims were originally located many years ago by one John E. Curran and were distributed in his estate by decree of distribution dated January 22, 1924 to Mr. and Mrs. H. H. Thompson.

On February 3rd and 4, 1923, these three claims were relocated by Arnold, Jackson, Dennison and Hills and the same claims were relocated by Mr. and Mrs. Thompson under the names of Patrimony 1, 2 and 3 on February 1st and 2, 1923. The same three claims were also relocated by W. S. Hart of Sacramento, Mrs. Thompson's brother, on July 1, 1924, under the names of Surprise Canyon Mines 1, 2 and 3.

At the time of the hearing held August 4, 1924, the three claims were involved in litigation arising from the fact that Mr. Dennison and Mr. Hopkins and others had filed suit to quiet title, the litigation was at that time pending in the Superior Court of Inyo County and was ready for trial. The claim in the suit is that Curran did not do his assessment work on the Woodpecker, Tenacious and Curran claims and that therefore the claims were open to relocation and therefore Arnold, Jackson, Dennison and Hills have the prior location on these claims. The applicant contends that Curran did his assessment work but that even if he had not, her locations under the name of Patrimony 1, 2 and 3 were ahead of their locations. The applicant also

contends that inasmuch as Arnold, Jackson, Dennison and Hills did no assessment work in 1923 the relocation by Mr. Hart would give her the title in case the other claims were forfeited. Mr. Dennison contends that assessment work was not done on these claims up to the time he located them and that the locations were filed by the Thompsons without the necessary posting. He also claims that he and his associates had done the necessary work and that the proofs had been filed.

According to applicant's brief filed in this office on February 16, 1925, the above litigation had been settled and Mrs. Thompson had a clear title to all claims referred to above.

On June 5, 1925, the Myers interests secured a temporary restraining order in the Superior Court of Inyo County against the Thompson interests. The suit was transferred from the Superior Court of Inyo County to the United States District Court, Southern District, and filed in that Court on June 19, 1925. The case became at issue on December 2, 1925, when an answer was filed by the defendants. A stipulation and order was filed on April 22, 1926, that the case be placed on the calender at Los Angeles for setting and on July 12, 1926, the case was set for trial for January 11, 1927, on which date it was continued to October 13, 1927, on which date it was continued to January 3, 1928 for setting, on which date it was set for trial on July 10, 1928, at Los Angeles. On March 2, 1928, Messrs. Boardwell, Mathews and Wadsworth, Attorneys for the defendants withdrew from the case. On July 10, 1928, the case was on the calendar at Los Angeles and there being no appearance by counsel the case was continued for the term. On the calling of the next term calendar on January 14, 1929, the case was again continued for the term on account of there being no appearance by counsel for either side.

On October 4, 1929, a stipulation and order covering the use of water pending judgment of the trial court was issued by the Court at the request of the parties at interest whereby under certain conditions the plaintiff and defendant might share equally the water in question.

On December 23, 1929, appearance was made by the defendants and the case was again set for trial on June 17, 1930, on which date it was again continued at the request of Joseph Marchetti, attorney for Mary Thompson and the Ballarat Mining Corporation.

Although it has been the well established policy of this office to suspend action upon applications when the water involved is in litigation or the taking thereof is temporarily enjoined, it appears that neither of the parties have actively pressed the matter before the court and in view of the fact that under date of May 20, 1929, the Ballarat Mining Corporation was advised that in the event of any further delay or continuance without the consent of the Division, this office would immediately proceed to action without waiting further for termination of the litigation, it is our opinion that this office is justified in proceeding.

#### CONCLUSION

As it appears that there is unappropriated water at the proposed point of diversion described in Application 3269, this application should be approved. Although the quantity of water applied for is apparently greatly in excess of the amount available at the present time, there is a possibility that the supply may be increased by further development and therefore it is not deemed advisable to reduce the amount asked for. The reduction of the amount may be made if and when license is issued. In view of the failure of applicant to

diligently bring to a conclusion the litigation which has been urged by applicant as the cause of delay in this matter, the pendency of this litigation should not be accepted as good cause for failure to commence and complete construction and use under this permit.

As it appears that some use of water has been made under Application 3998, Permit 2116 it is in order that further action toward revocation of permit should be delayed until a field inspection may be made and immediately following the inspection either a license should be issued based upon the use which has been made of the water or the permit should be revoked.

As to Application 3979, Permit 2154, it appears that no water has been used thereunder for power purposes and therefore it should be revoked.

#### O R D E R

Application 3269 for a permit to appropriate water having been filed with the Division of Water Rights as above stated, protests having been filed, a field investigation having been made, public hearings having been held and the Division of Water Resources now being fully informed in the premises, and it appearing to the Division of Water Resources after hearing that the terms and conditions of Permits 2116 and 2154 have not been complied with:

IT IS HEREBY ORDERED that Application 3269 be approved and a permit be issued subject to the usual terms and conditions, and

IT IS FURTHER ORDERED that Permit 2154 heretofore issued upon Application 3979 be revoked and cancelled upon the records of the Division of Water Resources, and

IT IS FURTHER ORDERED that action on Application 3998, Permit 2116  
be withheld until further order is entered.

WITNESS my hand and the seal of the Department of Public Works of  
the State of California, this 14 day of August, 1930.

EDWARD HYATT, State Engineer

BY Harold Conkling  
Deputy

WES:MP

OFF EDWARD HYATT