

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

oOo

In the Matter of Application 6897 of Mrs. Effel Rudy to Appropriate  
Underground Water in San Bernardino County for Domestic Purposes.

oOo

DECISION A. 6897 D-319

Decided

*June 1, 1932*

oOo

APPEARANCES AT HEARING HELD AT SAN BERNARDINO, MARCH 30, 1932

For Applicant

Mrs. Effel Rudy

In propria persona

For Protestant

Henry Kuhleisen

Everett H. Swing

EXAMINER: Harold Conkling, Deputy in Charge of Water Rights  
Division of Water Resources, Department of Public Works  
State of California.

oOo

O P I N I O N

GENERAL FEATURES OF APPLICATION 6897

Application 6897 was filed by Mrs. Effel Rudy on February 24, 1931. It proposes an appropriation of 0.025 of a cubic foot per second, or approximately 16,000 gallons per day, from underground water tributary to no stream, to be diverted throughout the entire year for household, stock watering, auto camp and incidental irrigation purposes within the NW $\frac{1}{4}$  of NW $\frac{1}{4}$  of Section 8, T 8 N, R 18 E, S.E.B.& M. The source of the proposed appropriation is within the SE $\frac{1}{4}$  of NW $\frac{1}{4}$  of Section 23, T 8 N,

R 18 E, S.B.B.& M. The application was protested by Henry W. Muhleisen.

PROTEST

Henry W. Muhleisen claims to have first used the water from the proposed source of diversion about the year 1917, that in 1927 he and his associates purchased water rights from one Eddy Cornell who claimed the springs by virtue of a mining claim and also that two of his associates, H. B. Martin and Ira W. Martin, had filed applications to appropriate from "Fenner Spring", which applications were subsequently "dropped" on account of lack of finances; that \$1,000 or more had been expended on the development and in view of the time and money which had already been expended by him on the project, he should be allowed to proceed with the same and Application 6897 should be denied as there is not a sufficient flow of water from the spring to supply more than one applicant.

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

Application 6897 of Mrs. Effel Rudy 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 a public hearing in accordance with Section 1-a of the Water Commission Act on March 30, 1932, at 10 o'clock A.M. in the Council Chamber of the City Hall, San Bernardino, California. Of this hearing applicant and protestant were duly notified.

SOURCE OF APPROPRIATION

It appears that the source of appropriation proposed in Application 6897, although commonly known as "Fenner Spring", is in reality a

subterranean water course developed by means of cross-cut tunnel. There is no vegetation on the ground surface, or other evidence of a spring or water hole. The "Spring" is located upon the public domain in the Mojave Desert Area.

In Water Supply Paper 578 of the U. S. Geological Survey, published in 1929, the following description of "Fenner Spring" appears on page 688.

"Fenner Spring is situated in Section 28, T 8 N, R 18 E., about 6 miles southeast of Fenner. The water comes from a tunnel 200 feet long. The flow is small. The water formerly was piped to Fenner for use by the railroad but the pipe line was torn up several years ago."

The record indicates that the maximum flow of water from the "Spring" when the tunnel is clean and the conditions most favorable does not exceed 5,000 gallons per day, but that at the present time under unfavorable conditions the flow would not exceed about 1500 gallons per day.

#### WITHDRAWAL ORDER AND MINING CLAIM

By order of the President of the United States, dated December 3, 1914, "all lands within one-quarter mile of Fenner Springs located approximately in what will probably be when surveyed Section 29, T 8 N, R 18 E, S.B.B. & M." were withdrawn from settlement, location sale or entry and reserved for public use.

In 1927 it appears that Muhleisen and his associates filed a mining claim upon the lands upon which "Fenner Spring" is located, did the necessary assessment work and filed proofs of labor, until he learned of the above withdrawal and then abandoned the claim, which has since been filed on by Mrs. Rudy.

The order of the President of the United States above referred to was made under and pursuant to the provisions of the Act of Congress approved June 25, 1910, and as amended August 24, 1912, which provides that all lands withdrawn under the Act should at all times be open to exploration, discovery, occupation and purchase under the mining laws of the United States so far as the same might apply to metalliferous minerals.

It would therefore appear that, having filed a mining claim upon the lands upon which Fenner Spring is located, applicant's right of possession would be unaffected by the withdrawal order and she may proceed with the development under permit from this office.

#### JURISDICTION BY THIS OFFICE

In the absence of a showing that the water which applicant seeks to appropriate is merely percolating water and not water flowing in a definite underground channel, we are of the opinion that jurisdiction should be assumed by this office.

#### GENERAL DISCUSSION

It appears from information on file with this office and testimony presented at the hearing that prior to the effective date of the Water Commission Act an appropriation from "Fenner Springs" was initiated by the Santa Fe Pacific Railroad Company, predecessor in interest of the Santa Fe Railroad Company. This appropriation was consummated and until about 1915 the water was used at Fenner Station for domestic and railroad purposes. Notwithstanding the opinion of protestant's attorney to the contrary, the record clearly indicates that the right was abandoned by the Railroad Company subsequent to the effective date of the Water Commission Act and the protestant failed to show that the right upon which he bases his claim is

in any way whatsoever a continuation of the right initiated by the Santa Fe Pacific Railroad Company.

Evidence presented at the hearing clearly indicates that little, if any, use of water was made from about 1915 to about 1920 except by occasional prospectors, and in the event that the water was not abandoned it appears that the right lapsed by non-user.

The only way in which an appropriative right may be initiated subsequent to December 19, 1914, the effective date of the Water Commission Act is by the filing of an application with this office and although protestant and/or his associates have on various occasions initiated such a right, their applications have all been cancelled either at their request or for failure to complete and the only application now before this office to appropriate water from Fenner Spring is Application 6897 of Mrs. Effel Rudy.

As to the right purchased from one Cornell, there is nothing to indicate that Cornell had any right to sell and this opinion was voiced at the hearing by protestant himself.

In view of the above the protest may be dismissed.

#### CONCLUSION

Henry Muhleisen, the protestant, began the use of water from "Fenner Spring" subsequent to the abandonment of the water by the Santa Fe Pacific Railroad Company, which abandonment was subsequent to the effective date of the Water Commission Act. It has not been shown that Mr. Muhleisen's claim of right is based upon appropriation and use initiated prior to the effective date of the Water Commission Act and all applications which have been filed by him or his associates to appropriate the waters of Fenner Spring have been cancelled by this office.

On the other hand, Mrs. Effel Rudy, the applicant, has proceeded to acquire an appropriative right to the waters of "Fenner Spring" in accordance with the Water Commission Act and the rules and regulations of this office. The uses to which applicant proposes to put the water are useful and beneficial ones, she controls the point of diversion and place of use and there is unappropriated water available in sufficient quantity to justify the proposed appropriation. We are therefore of the opinion that Application 6897 should be approved.

O R D E R

Application 6897 for a permit to appropriate water having been filed with the Division of Water Resources, as above stated, a protest having been filed, a public hearing having been held and the Division of Water Resources now being fully informed in the premises,

IT IS HEREBY ORDERED that said Application 6897 be approved and that a permit be issued to the applicant subject to such of the usual terms and conditions as may be appropriate.

WITNESS my hand and the seal of the Department of Public Works of the State of California, this *1st* day of *June*, 1932.

EDWARD HYATT, State Engineer

BY

Harold Conkling  
Deputy

JES:R

