

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

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In the Matter of Application 2043, Permit 856 of
Phebe J. Henshaw to appropriate from
Davis Springs for Agricultural
and Domestic Purposes.

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DECISION A 2043 D-337

Decided *December 7, 1932*

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APPEARANCES AT HEARING HELD AT SAN BERNARDINO, OCTOBER 28, 1932

For Permittee

Phebe J. Henshaw

D. Withington, Attorney

For Complainant

A. J. Barlow

M. H. Lewis

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

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O P I N I O N

Application 2043 having been approved by issuance of Permit 856 to
appropriate from Davis Springs, objections thereto having been filed based
on the ground that permittee has not prosecuted her development work at the
point specified in the approved application, and a hearing having been
requested by complainant, the matter was noticed for hearing at San Bernardino
October 28, 1932 under the provisions of Sec. 20 of the Water Commission Act,
of which the complainant and permittee were duly notified.

THE PROJECT

Application 2043 was filed by Phebe J. Henshaw, October 11, 1930, to
appropriate from Davis Springs, which were described in the application as
being located South 1500 feet and West 300 feet from the Northeast corner of

Section 32, T. 4 N., R. 1 E., S.B.B.& M., being within the SE $\frac{1}{4}$ or NE $\frac{1}{4}$ of said Section 32. On December 10, 1920 one Grace Blood filed a homestead embracing the entire NE $\frac{1}{4}$ of said Section 32 (160 acres more or less), which was later patented and subsequently acquired by one A. J. Barlow, the complainant herein. The application of Mrs. Henshaw was approved April 12, 1921 and the date of July 1, 1921 was set in the permit as the time on or before which construction should begin.

DISCUSSION

At the time Application 2043 was filed the applicant stated in the application in answer to the question relative to right of access, that she had applied to the United States Land Office for right of way. This statement is strengthened by a letter received from her September 10, 1921 in which she said she had forgotten the "particulars" regarding right of way but that she would go to the Land Office and determine the requirements. The record indicates that the survey for the right of way was made September 16 and 17, 1921 and that the application for right of way was approved March 22, 1922. A copy of the approved map is in the files of the application which indicates the source (of water) approximately at the point where the development has been made as will be discussed later.

Shortly after Grace Blood filed her homestead on the NE $\frac{1}{4}$ of said Section 32, upon discovering that Mrs. Henshaw had filed an application to appropriate water from a spring on the land, she objected to the filing and was advised in effect that, inasmuch as Mrs. Henshaw's application to appropriate water was filed prior to the date of her homestead entry, Mrs. Henshaw's right of access to the spring was paramount to her own rights as an entryman. However, bad feeling was engendered between Grace

Blood and Mrs. Henshaw and these conditions have not improved since A. J. Barlow acquired the property in 1926. The chief bone of contention has been the claim by Grace Blood and later by Barlow that Mrs. Henshaw's tunnel development was not made at the point described in the application. Of recent years each party has charged the other with unfriendly acts and even sabotage, and finally on June 5, 1931 Mrs. Henshaw applied to the Court for an injunction to prevent Barlow from interfering with the peaceful possession or her right of way and her right to consummate the appropriation.

The last extension within which to consummate the appropriation expired December 1, 1930 and the Division of Water Resources declined to grant a further extension during the pendency of this litigation. Under these circumstances Mrs. Henshaw asked for an inspection and the issuance of a license confirming her right to such an amount of water as had been beneficially used. An inspection was accordingly made on July 8, 1932 at which time it was found that water had been developed by means of a tunnel driven into the hillside at approximately the point indicated on the map showing right of way granted by the United States Land Office. The tunnel was found to be timbered and 4 feet by 6 feet in cross section and 155 feet long. A 2 inch pipe 4000 feet long connected the tunnel with the place of use in the SE $\frac{1}{4}$ of NE $\frac{1}{4}$ of Section 29, T. 4 N., R. 1 E., S.B.B.& M., where the measured yield of the spring, or tunnel, amounting to 540 gallons per day had been put to beneficial use by six persons and for watering a few cottonwoods and vines.

Barlow, however, insisted that the development of water by Mrs. Henshaw was not made at the point described in the approved application and that therefore, she had not complied with the terms and conditions thereof. The

matter was accordingly set for hearing as above noted. At this hearing there was much confusion of testimony but complainant failed to establish, and Mrs. Henshaw stoutly denied, that her present development is other than at the point of original intent.

This latter statement by Mrs. Henshaw is worthy of more than passing consideration for on March 7, 1921, before Permit 356 was issued, she wrote to the then State Water Commission, asking if any action had been taken on her application and stating that a man by the name of Barlow (Jake Barlow, husband of the former Grace Blood and brother of complainant, A. J. Barlow) had built a house "close" to the springs and that he claimed that he owned the springs. It is true that the point of diversion (tunnel) where water has been developed is not located at the point described in the application, but some 700 feet westerly therefrom; it is also true, however, that the tunnel is near the present Barlow house and at approximately the point shown on the map showing right of way secured from the United States Land Office; and it is also significant that it was found by our engineer at the time of his inspection on July 8, 1932 that there were no springs or other source of water at the point described in the application. There were found by the engineer some 200 to 300 feet westerly from the point described in the application an old abandoned tunnel, camp site, sump, shaft, arrastra and an excavation, which were said to represent a former mining venture by Holcomb Brothers and others. There is nothing to indicate, however, that Mrs. Henshaw had this location in mind when she filed her application, but, on the contrary, there is every reason to believe that she proposed a development at the site where her tunnel has been driven and from which her supply of water is now being secured.

CONCLUSION

The information before us indicates that at the time application 2043

was filed applicant proposed to file an application with the U. S. Land Office for a right of way to the springs under consideration; that she then had in mind the site which she later developed, else why should she have been apprehensive when Jake Barlow built a house near that site; that she proceeded within a few months after issuance of the water permit to cause a survey to be made and to file an application for a right of way which was allowed; that the source indicated by the right of way map is that which she later developed; that she began her development work at her present tunnel on July 2, 1921 (whereas the date set in the permit for beginning construction was July 1, 1921,) which indicates that there was no uncertainty in her mind in regard to the location or the point intended for development when the application was filed; that she has for more than eleven years endeavored with a marked degree of success to maintain possession of the right of way and constructed works thereon; and, finally, that she is now in possession thereof and is using the water from Davis Springs. In view of this showing of diligence, this office is forced to the conclusion that the irregularities in Application 2043 arise out of an error in description rather than an actual change in physical location and that permittee is entitled to a license confirming her right to use the amount of water found by inspection to have been put to beneficial use from the source indicated on the U. S. Land Office right of way map.

O R D E R

Permit 856 having been issued and time having been allowed within which to complete construction work and beneficial use of water, construction work and beneficial use of water having been reported complete, an inspection having been made as provided by Sec. 19 of the Water Commission Act, development and use having been found complete, complaint having been made that permittee had not proceeded in accordance with the terms and conditions of the approved application and permit, a hearing having been held under the provisions of Sec. 20 of the Water Commission Act, and the Division of Water Resources now being fully informed in the premises:

IT IS HEREBY ORDERED that a license be issued to said permittee confirming her right to use the amount of water found by inspection to have been put to beneficial use under Application 2043, Permit 856.

WITNESS my hand and the seal of the Department of Public Works, this
7th day of December, 1932.

EDWARD HYATT, State Engineer

By Harold Conkling
Deputy

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Dec 10 1932