

BEFORE THE DIVISION OF WATER RESOURCES

DEPARTMENT OF PUBLIC WORKS

STATE OF CALIFORNIA

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In the Matter of Application 8477 of Alfred Mondorf and Applica-
tion 8490 of the Smithson Springs Mutual Water Company to appropriate from
Smithson Springs in San Bernardino County for Domestic Purposes and In the
Matter of Revocation of License 8 of Alfred Mondorf et al and License 417
of Alfred Mondorf heretofore issued confirming the rights under Applications
71 and 976, respectively, to appropriate from Smithson Springs in San Bern-
ardine County for Agricultural and Domestic purposes.

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DECISION A. 71, 976, 8477 and 8490 D 428

DECIDED September 30, 1938

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Appearances at Hearing Held at San Bernardino July 15, 1936.

For Applicant, Licensee and Protestant

Alfred Mondorf

In propria persona

For Applicant

Smithson Springs Mutual Water Company

I. M. McAllister

For Protestants

Mr. and Mrs. J. F. Free

Mrs. Alta Free

Ray R. Fitzgerald

E. B. Bright

For Public Works Administration

Mr. Aiken

Examiner

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

OPINION

Nature of Proceedings Involved

In these proceedings four applications are involved. In the case of two applications (71 and 976) licenses were issued several years ago and the licensees are cited to show cause why the licenses should not be revoked. The other two applications (8477 and 8490) are pending, and being protested were scheduled for hearing upon the protests. Briefly stated the circumstances surrounding each case are as follows:

Under Application 71, a license was issued September 28, 1917 confirming the right of Sumner B. Wright and Roy C. Sharpless to 0.976 cubic foot per second from Mathison Springs for domestic, agricultural and stock-watering purposes, the diversion to be made 1100 feet north and 900 feet east of the southwest corner of Section 19, Township 4 N., Range 7 W., S.B.B. and M., within the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 19 for use upon 2.5 acres within the S $\frac{1}{2}$ of NE $\frac{1}{4}$ and 1 acre within the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 18 of the same township and range. There have been numerous assignments and our record at present shows title in Sumner B. Wright, Mrs. J. B. Palmer, and Alfred Mondorf although, as will be shown later, there is uncertainty as to the true ownership, and uncertainty that any beneficial use has been made in recent years under this license. Accordingly when those claiming a beneficial interest under this filing protested Application 8477 and 8490 the parties in interest were requested to stipulate, at the hearing of July 15, 1936 upon said last named applications, to a simultaneous hearing upon Application 71 in which proceeding licensees would be cited to show cause why License 8, theretofore issued on Application 71, should not be revoked upon the grounds that licensee had ceased to use the water. Such a stipulation of the parties was agreed to and

therefore in this proceeding we are concerned with the question as to whether or not License 8 should not be revoked because licensee has ceased to use the water.

Application 976 is similarly involved. On December 9, 1925, License 417 was issued under this application confirming the right of M. M. Horine to 0.05 cubic foot per second from this source for agricultural and domestic use from about April 1st to about November 30th of each season and throughout the remainder of the year as required for domestic purposes, diversion to be made at a point which bears northeast 150 feet from the point of diversion described above for License 8, and use to be made on 10 acres within the SW $\frac{1}{4}$ OF SE $\frac{1}{4}$ Section 18, Township 4 N., Range 7 E., S.E.B. and M. This license passed through several transfers into the hands of Alfred Mondorf, it would appear from our records, but it is possible that the rights under this license have been forfeited by non-use and for reasons as stated above in connection with Application 71 it was stipulated that License 417 be included for simultaneous hearing on July 18, 1936 with Applications 8477 and 8490 upon the issue that there had been such a forfeiture.

Application 8477 was filed October 23, 1935 by Alfred Mondorf who, as indicated above, is one of the record parties in interest claiming title to rights under Applications 71 and 976. Application 8477 is to appropriate 0.025 cubic foot per second from Smithson Springs throughout the year for irrigation and domestic uses, diversion to be made at the point described under Application 71, License 8, and use to be made in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 18, Twp. 4 N., R. 7 E., S.E.B. and M. It was protested by Annabelle Harper, Stella B. Nieman, Mr. and Mrs. J. F. Free, Victor Thomas, A.E. Wright, as agent for Ray H. Fitzgerrill, Mrs. A. J. Revert and I. M. McAllister,

Jennie W. Hudson, Wm. S. Gans and Mary Lou Smith, the Harper protest, however, being withdrawn on March 27, 1936. The hearing of July 15, 1936 was originally called upon these protests.

Application 8490 by Smithson Springs Mutual Water Company was filed November 9, 1935. Under the application it is sought to appropriate 1.00 cubic feet per second from Smithson Springs for domestic purposes throughout the year, diversion to be made at the same point as under Application 71, License 8 and Application 8477. It was protested by Alfred and Meta Mendorf and it was upon this protest alone that the hearing of July 15, 1936 was originally called.

Hearing Duly Scheduled

Applications 8477 and 8490 having been protested were scheduled for hearing upon the protests after due notice to the interested parties. The validity of the rights under Application 71 License 8 and Application 976, License 417 having been challenged upon the bases that a forfeiture had resulted from non-use and the validity of these rights being an issue in connection with the protests to Applications 8477 and 8490 which were to be heard on July 15, 1936 it was arranged by stipulation of the parties on that occasion to hear said issue under the provisions of Section 20 of the Water Commission Act.

Conflicting Rights Asserted to Smithson Springs Water

The situation surrounding this case has been one of the most troublesome in the history of the Division despite the small amount of water involved. Trouble has arisen out of uncertainty as to the true ownership of the rights under Applications 71 and 976, and uncertainty as to the obligation of the rightful owners to serve their neighbors with water.

There is nothing in the record to indicate that it was the intention of the original applicants in either case to undertake the service of their neighbors. A report of an inspection of the project covered by Application 71, license S, made by an engineer of this office on November 9, 1915, however, indicates that in addition to the use by R. C. Sharpless (one of the record title owners) use had been made "by several other parties for domestic supply" and we suspect that already they had begun some service of the neighbors. In fact, we suspect that people in this area had for years more or less depended on Smithson Springs for their domestic supply.

In any case when the project covered by Application 976, License 417 was inspected by an engineer of this office on July 10, 1920 he found that R. H. Morine, who had succeeded to an interest in both of these earlier filings, was supplying water to nine other families in addition to his own use, charging \$1.00 per year to each family, believing that in this manner he was protecting himself from the settlers acquiring title to the water he was allowing them to use.

Even at that time, however, it appears some of these other users were objecting to the payment of the \$1.00 per year, and there were threats that returned soldiers among them would take the law into their own hands and seize the water from Smithson Springs on the basis of their prior rights and necessity. The controversy over the right of the neighbors to share in the use of this water has waged bitterly since then, or for some eighteen years.

It is clear that record owners of these two earlier applications have shared the water with their neighbors, sometimes charging for the service; at other times allowing a free use; and on occasion apparently the diversion works have been repaired and maintained by some of these users who were not

record owners of any right made under Applications 71 and 976. But the bases of their right to service, unless as the consumer of a utility, is not clear. They assert no clear basis of right except the right to continue in the enjoyment of a service which they or their neighbors have previously had.

As was previously indicated, recorded ownership of the rights under Applications 71 and 976, insofar as any right remains, is vested in E. B. Wright, Mrs. J. B. Palmer, and Alfred Wondorf. There is nothing to show any use of water in recent years by E. B. Wright and the only use by Mrs. Palmer is for domestic purposes on occasional week ends when she visits her property which is situated within the limits of the place of use described in both Application 71, License 8 and Application 976, License 417. Mr. Wondorf, however, it appears now controls this use as if he were the sole owner and Mrs. Palmer is threatening to bring suit to establish a right in her own name.

Alfred Wondorf entered this area as a settler after Licenses 8 and 417 were issued and like many of his neighbors began to use the waters of Smithson Springs without any clear basis of right. He took the water from a so-called "weir" or diversion box on the public road near the south quarter corner of Section 18.

On June 24, 1936 he filed evidence of his succession in interest to all rights under Application 976, License 417 and to the right of Alfred Lutze under Application 71, License 8. Since that time with increasing persistence and success he has asserted full ownership and control of the waters of Smithson Springs. He asserts that E. B. Wright has made no use of the waters of Smithson Springs for years and we find no assertion to the contrary by Mr. Wright. Mrs. Palmer admits that he is in present control and threatens suit to establish her title. Other users are denied use without signing an

An agreement to pay Mr. Mondorf \$1.00 each per month for service. He has requested that licenses 9 and 417 be revoked so that he might proceed with clear title under Application 9477. The Division has, since July 1936, repeatedly urged upon all claimants of right to the water of Smithson Springs, the necessity to establish their title by appropriate steps if such right was to be recognized by the Division in its action upon these applications.

The Yield of Smithson Springs

Measurements of the yield of Smithson Springs have been made from time to time by engineers of this office who reported as follows:

- October 22, 1916, by Edward Hyatt who found a delivery of about 2 miner's inches (approximately 30,000 gallons per day) at the place of use and report there was some waste past the intake.
- July 25, 1917, by Edward Hyatt who found 34 gallons per minute (approximately 50,000 gallons per day) delivered at the place of use.
- July 18, 1920, by G. H. Hill who found 0.035 second-foot (approximately 25,000 gallons per day) delivered at place of use.
- July 13, 1921, by G. H. Hill who reported a delivery of 0.043 second-foot (approximately 28,000 gallons per day).
- June 5th, 1924, by T. D. Simpson who reported delivery at place of use of 35 gallons per minute (approximately 50,000 gallons per day).
- July 30th, 1936, by George B. Gleason who measured a flow of 2.2 gallons per minute or 0.0049 second-foot at the springs and estimated an additional 0.0045 second-foot could be developed which would indicate a total yield of some 6,500 gallons per day.
- June 23, 1938, by E. Kibbey who measured a delivery of 4.3 gallons per minute or 6200 gallons per day at the weir and was advised by Mr. Mondorf that "about that much more was wasting at the intake".

The Division, therefore, has a definite record of authentic measurements which indicate that delivery of water from Smithson Springs at the terminus of the pipe line has varied between a minimum of 6200 and 50,000 gallons per day

during the summer months of the last 23 years, except on one occasion (July 30, 1936) when only some 3000 gallons was flowing on the surface at the intake. There has generally been considerable leakage from the pipe line and there is much waste by transpiration and evaporation in the swamp area at the springs as well as underflow passing the intake. We have every reason to believe that a minimum of 6500 gallons per day is susceptible of development at Smithson Springs and that in favorable years a minimum of 50,000 gallons may be obtained.

Use of Water From Smithson Springs

License 8 was issued upon a report of an inspection made July 25, 1917 at which time it was found water was used for the irrigation of $3\frac{1}{2}$ acres and for domestic and stock purposes.

License 417 was issued upon reports of inspections made in 1921 and 1924 which indicated 9 acres were irrigated in addition to 3 acres irrigated under License 8 and some domestic and stock uses.

The use through the ensuing years to 1936 was evidently variable and we have every reason to believe there was a progressive decline in the irrigation use, with the use for domestic purposes assuming more important proportions. It is quite evident a considerable portion of this use was by other than those who had a record title to these two earlier applications upon which licenses 8 and 417 were issued. Payment was made in some cases to the several owners for this service, and in many other cases there was no payment for the service. The pipe line fell into disrepair and no one appears to have recognized any responsibility to maintain it. Whoever needed the water most patched up the pipe line to secure delivery of the water he required. With the passing years there was also an increasing tenseness, or bitterness, between

these users without title on the one hand and the record owners of title to these appropriations on the other hand. The basis upon which these users without record title claim the right to use water is not clear but apparently is compounded in the fact of their past use and the fact of their necessity for continued use if they are to reside in this area.

From testimony given at the hearing on July 15, 1936 it would appear that water was being hauled from the weir to serve ten or twelve families with domestic water, and to Phelan School and Beekly service station, the total use probably approximating an average of 750 gallons per day, exclusive of the use by Mr. Mondorf and Mrs. Palmer. Mrs. Palmer visited her property only on occasional week ends so her use was nominal.

An inspection of the project made by an engineer of the Division immediately following the hearing showed that while there were distribution lines leading from the main pipe line to several private homes the control valves were situated on Mr. Mondorf's property.

A later inspection made by an engineer of this office June 25, 1938 revealed that Mr. Mondorf had replaced some 2000 feet of pipe line above his place, installed a 2000 gallon closed regulation tank, together with charcoal filters, and had laterals with controls on his place leading to his own place and to three cottages in Section 19 and to one in Section 13. The weir formerly used by the public had been disconnected from the line as had also the lateral to the Palmer Place.

Apparently in 1935 Mr. Mondorf set about to acquire title to the rights under Applications 71 and 976, Licenses 8 and 417; to rehabilitate the pipe system; and to take entire control of the situation with his own hands. The evidence before us is that he presently denies access to the waters delivered through the pipe line from Smithson Springs except under his own conditions. Mrs. Palmer denies his right to do so and threatens litigation to

establish her title. Mr. Wright also asserts some right and requests additional time to establish his title but so far as we are advised he has made no use of water under these appropriations for several years.

The Status of Application 8477

Application 8477 by Mr. Mondorf has been completed and is protested by some who claim an interest in the record title to the prior applications referred to above, and by others who claim a right to use the waters of Smithson Springs as delivered through the existing pipe line because they have used it in the past either with or without the consent of the owners of record title to the earlier filings. It is quite clear that there is a surplus in this source over and above any use that has been made in recent years by anyone other than Mr. Mondorf and he has indicated his willingness that Licenses 8 and 417 be revoked. It appears he has purchased the 80 acres on which Smithson Springs are located, has rehabilitated the pipe line leading therefrom to the intended place of use under Application 8477, and is now using the water for the purposes proposed under said application. This application should therefore be approved.

The Status of Application 8490

There may be some surplus or unappropriated water in Smithson Springs over and above that which can now be rightfully claimed under Licenses 8 and 417, and application 8477, because there has doubtless been some impairment of the rights under the licenses through non-use in recent years. Smithson Springs Mutual Water Company is apparently not financed, lacks right of access to the point of diversion, and is not prepared to proceed if Application 8490 were now approved. Applicant should be afforded a reasonable time to demonstrate

a readiness to proceed and upon failure to do so Application 8490 should be cancelled upon the grounds of failure to complete.

The Status of Application 71, License 8

Diversion and use is apparently being made by claimants of right under Application 71, License 8, at places different than those described in said application and license. While the record shows E. B. Wright, Mrs. J. B. Palmer, and Alfred Mondorf as the owners of this right, there is no evidence before us of any beneficial use in recent years by E. B. Wright and Mrs. Palmer's service lateral has been disconnected. Others are buying water from Mr. Mondorf and claim a right to service but delivery is controlled by Mr. Mondorf, who may have become a utility. No injury can result to anyone by delaying action on the request which has been received from Mr. Mondorf to revoke this license. If he maintains his present position in full control of all deliveries from this source this license should in due course be revoked if Mr. Mondorf received a permit and proceeds under Application 8477.

The Status of Application 975, License 417.

The situation surrounding application 975, License 417 is similar to that surrounding Application 71, License 8 and as Mr. Mondorf is the sole claimant of any ownership in this filing and the use in recent years has been less than was allowed under License 8, it would appear proper to revoke License 417.

SUMMARY AND CONCLUSIONS

From the foregoing, we conclude as follows with respect to the several matters involved in this proceeding:

1. By reason of non-use in recent years it is doubtful that a right to more than 750 gallons per day may now be successfully asserted under Application 71, License 8, by all claimants combined other than Mr. Mondorf.

2. The basis of right of these claimants, other than Mr. Mondorf, under Application 71, License 8 is not clear. They may have some right to a continuation of such service as they have enjoyed in years recently passed which right would be founded upon a utility relationship to the owners of this filing.
3. Mr. Mondorf has indicated his willingness that this license be revoked and if he continues to successfully assert and maintain exclusive control of the diversion from Smithson Springs as in the recent past, and secures a proper permit under Application 8477, License 8 should be revoked.
4. There is no other record claimant under Application 976, License 417 and Mr. Mondorf has indicated his willingness that this license be revoked. It appears there has been no use under this license in recent years as distinguished from the claimed use under License 8 and therefore License 417 should now be revoked.
5. Surplus or unappropriated water is available under Application 8477. The applicant has right of access and is prepared to proceed with this application. Application 8477 should now be approved.
6. There is some doubt that there is any surplus water available for appropriation under Application 8490. Applicant is apparently without right of access and unprepared to proceed with development if a permit were issued. Action should be withheld on Application 8490 until the situation is clarified by further developments in connection with Applications 71 and 8477 at which time an appropriate further order may be entered.

ORDER

Licenses 8 and 417 having heretofore been issued confirming rights under Applications 71 and 976, it appearing that licensees had ceased to use the water to which right was conferred thereunder; and said licensees having been duly cited to show cause why said licenses should not be revoked; and

Applications 8477 and 8490 having been completed and being protested and a hearing upon said protests having been held after due notice to the parties in interest,

NOW THEREFORE IT IS HEREBY ORDERED with respect to these several applications and licenses:

1. That action be withheld on Application 71, License 8 until further order is entered.
2. That License 417 heretofore issued in confirmation of rights initiated by Application 376 be revoked and cancelled upon the records of the Division of Water Resources without prejudice.
3. That a permit be issued in approval of Application 9477 subject to such of the usual terms and conditions as may be appropriate.
4. That action be withheld on Application 8450 until further order is entered.

WITNESSE my hand and the seal of the Department of Public Works,
of the State of California, this 30th day of September 1938.

EDWARD HYATT, STATE ENGINEER

By HAROLD CONKLING
Deputy.

(Seal)

ENB:JR.