

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

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In the matter of Applications 9072, 9073, 9299 and 9300
of Leo Thayer, Application 10324 of P. W. Cunningham,
and Applications 10564 and 10565 of T. W. Coverston
to appropriate from springs tributary to
Cajon Canyon in San Bernardino County
for domestic and irrigation purposes.

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DECISION A. 9072, 9073, 9299, 9300, 10324, 10564, 10565 D 510

Decided March 20, 1944

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APPEARANCES AT INVESTIGATION CONDUCTED AT THE SITE OF THE PROPOSED
APPROPRIATION UNDER APPLICATION 10324 OF P. W. CUNNINGHAM ON JULY 14, 1942.

For Applicant

P. W. Cunningham

In propria persona

For Protestant

Leo Thayer

In propria persona

For Division of Water Resources

Biscoe Kibbey, Associate Hydraulic Engineer for Harold Conkling,
Deputy State Engineer in Charge of Water Rights, Division of Water
Resources, Department of Public Works, State of California.

APPEARANCES AT INVESTIGATION CONDUCTED AT THE SITE OF THE PROPOSED
APPROPRIATIONS UNDER APPROVED APPLICATIONS 9072, 9073, 9299 and 9300
AND PENDING APPLICATIONS 10324, 10564 and 10565 ON AUGUST 30, 31
AND SEPTEMBER 8, 1943.

For Applicant (Application 10324)

P. W. Cunningham

In propria persona

For Protestant (Application 10324)

Leo Thayer

In propria persona

For Applicant (Applications 10564, 10565)

T. W. Coverston In propria persona

For Protestants (Applications 10564, 10565)

Leo Thayer In propria persona
Devore Water Company Mr. Gelling

For Petitioner (Applications 9299, 9300)

Leo Thayer In propria persona

For Protestants against approval of petition

P. W. Cunningham In propria persona
T. W. Coverston " " "
T. L. Croom, Sr. " " "

For other interested parties

U. S. Forest Service District Ranger Isaac Bays

For Division of Water Resources

George B. Gleason, Senior Hydraulic Engineer for Harold Conkling,
Deputy State Engineer in Charge of Water Rights, Division of Water
Resources, Department of Public Works, State of California.

APPEARANCES AT HEARING HELD AT LOS ANGELES ON DECEMBER 8, 1943, TO AFFORD
PERMITTEE AN OPPORTUNITY TO SHOW CAUSE WHY THE PERMITS ISSUED IN APPROVAL
OF APPLICATIONS 9072, 9073, 9299 and 9300 SHOULD NOT BE REVOKED UNDER
SECTION 1410 OF THE WATER CODE.

For Permittee

Leo Thayer In propria persona

For Revocation of Permits

T. W. Coverston In propria persona
P. W. Cunningham " " "
T. L. Croom, Sr. " " "

For Division of Water Resources

Harold Conkling, Deputy State Engineer in Charge of Water Rights, and
George B. Gleason, Senior Hydraulic Engineer, Division of Water Resources,
Department of Public Works, State of California.

O P I N I O N

GENERAL DESCRIPTION OF THE PROPOSED DEVELOPMENTS

Applications 9072 and 9073 were filed by Seward Brush and Leo Thayer, respectively, on August 9, 1937, with the understanding that the priority of filing would be the same, and were approved on September 23, 1938, by the issuance of Permits 5212 and 5213, each for an amount of water not to exceed 0.05 cubic foot per second to be diverted from two unnamed springs within the SE $\frac{1}{4}$ of NW $\frac{1}{4}$ of Section 21, T 2 N, R 5 W, S.B.B.&M., the water to be used for irrigation and domestic purposes, from about May 1 to about November 15 of each season and throughout the remainder of the year as required for domestic purposes. The place of use in Application 9072 was described as being 11 acres in SE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Section 20 and 3 acres in NE $\frac{1}{4}$ of NE $\frac{1}{4}$ of Section 29, T 2 N, R 5 W, S.B.B.&M. The place of use in Application 9073 was described as being 9 acres in SW $\frac{1}{4}$ SW $\frac{1}{4}$ Section 21, T 2 N, R 5 W, S.B.B.&M. The terms of each permit provided that construction commence on or before January 1, 1939; to be completed on or before December 1, 1941, and full beneficial use made on or before December 1, 1942.

On January 24, 1944, and February 14, 1944, petitions were filed by Mr. Thayer to whom approved Application 9072 had been assigned, to change the place of use under both filings to 10.4 acres in Lot 4, Block 2, Devore Heights, San Bernardino County.

Applications 9299 and 9300 were filed by Leo Thayer and Seward Brush, respectively, on May 19, 1938, with the understanding that the

priority of filing would be the same, and were approved on September 23, 1938, by the issuance of Permits 5214 and 5215, each for an amount of water not to exceed 0.05 cubic foot per second to be diverted from an unnamed spring within the NE $\frac{1}{4}$ of NE $\frac{1}{4}$ of Section 20, T 2 N, R 5 W, S.B.B.&M. said spring being more particularly described as being South 515 feet and West 145 feet from the NE $\frac{1}{4}$ of said Section 20, the water to be used for irrigation and domestic purposes from about May 1 to about November 15 of each season and throughout the remainder of the year as required for domestic purposes. The place of use in Application 9299 was described as being 9 acres in SW $\frac{1}{2}$ of SW $\frac{1}{2}$ of Section 21, T 2 N, R 5 W, S.B.B.&M. The place of use in Application 9300 was described as being 11 acres in SE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Section 20 and 3 acres within the NE $\frac{1}{4}$ of NE $\frac{1}{4}$ of Section 29, T 2 N, R 5 W, S.B.B.&M.

On January 24, 1944, and February 14, 1944, petitions were filed by Mr. Thayer to whom approved Application 9300 had been assigned to change the place of use under both filings to 10.4 acres in Lot 4, Block 2 Devore Heights, San Bernardino County which is the same place of use to which Mr. Thayer proposes to deliver the water under Applications 9072 and 9073. This place of use is within the SE $\frac{1}{4}$ of SE $\frac{1}{4}$ of projected Section 20 and SW $\frac{1}{2}$ of SW $\frac{1}{2}$ of projected Section 21, T 2 N, R 5 W, S.B.B.&M. and is really a corrected area for the place of use originally described in Applications 9073 and 9299.

On February 19, 1943, and on January 24, 1944, petitions were filed by Mr. Thayer to correct the description of the point of diversion

described in Applications 9299 and 9300, respectively, to points within the NW $\frac{1}{4}$ of NW $\frac{1}{4}$ of projected Section 21, T 2 N, R 5 W, S.B.B.&M. more particularly described as follows:

- (a) North 1119 feet and West 217 feet from Corner 14 of Rancho Muscupiabe.
- (b) North 1252 feet and West 54 feet from Corner 14 of Rancho Muscupiabe.

These points of diversion are the same points from which Mr. Cunningham proposes to appropriate under his Application 10324.

Application 10324 was filed by P. W. Cunningham on November 18, 1941. It proposes an appropriation of 0.10 cubic foot per second to be diverted from two unnamed springs (from either or both) throughout the year for irrigation and domestic purposes, the irrigation season being described as extending from about April 1 to about November 1 of each season. The points of diversion are described as being within the NW $\frac{1}{4}$ of NW $\frac{1}{4}$ of Section 21, T 2 N, R 5 W, S.B.B.&M. and more particularly as follows:

- (a) South 1087 ft. and East 450 ft. from N.W. corner of said Section 21.
- (b) South 1162 ft. and East 337 ft. from N.W. corner of said Section 21.

The place of use is described as being 2 acres within the SE $\frac{1}{4}$ of NE $\frac{1}{4}$ of Section 20, 2 acres within the NE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Section 20, 4 acres within the NW $\frac{1}{4}$ of SW $\frac{1}{4}$ of Section 21 and 4 acres within the SW $\frac{1}{4}$ of NW $\frac{1}{4}$ of Section 21, T 2 N, R 5 W, S.B.B.&M.

Application 10564 was filed by T. W. Coverston on November 21,

1942. It proposes an appropriation of 0.05 cubic foot per second from an "unnamed undeveloped spring" throughout the entire year for irrigation and domestic purposes on 10 acres of land within the NW $\frac{1}{4}$ of SE $\frac{1}{4}$ of Section 21, T 2 N, R 5 W, S.B.B.&M. The point of diversion is described as being South 1560 feet from the N $\frac{1}{4}$ corner of Section 21 being within the SW $\frac{1}{4}$ of NE $\frac{1}{4}$ of Section 21, T 2 N, R 5 W, S.B.B.&M.

Application 10565 was filed by T. W. Coverston on November 21, 1942. It proposes an appropriation of 0.05 cubic foot per second to be diverted from "Smith Spring" throughout the entire year for irrigation and domestic purposes on 10 acres of land within the NW $\frac{1}{4}$ of SE $\frac{1}{4}$ of Section 21, T 2 N, R 5 W, S.B.B.&M. The point of diversion is described as being South 1700 feet from the N $\frac{1}{4}$ corner of Section 21, being within the SW $\frac{1}{4}$ of NE $\frac{1}{4}$ of Section 21, T 2 N, R 5 W, S.B.B.&M.

Under date of January 12, 1943, Mr. Coverston informed the Division that if he could find water on the site of the "unnamed spring" named as the source of appropriation in Application 10564 in sufficient quantities to meet his needs he would withdraw his Application 10565 to appropriate from "Smith Spring".

PROTESTS

Protest Against the Approval of Application 10324

Application 10324 of P. W. Cunningham was protested by Leo Thayer on April 21, 1942, upon the grounds that the springs from which applicant proposes to appropriate were immediately above his property and

that the water therefrom flowed onto his property and sank into the gravels. Although he claimed a right based upon a prior application, the number of the filing was not stated.

On April 23, 1942, a letter was addressed by this office to Mr. Thayer, with a copy to Mr. Cunningham in which the points of diversion in Applications 9073, 9299 and 10324 were described by coordinate distances from section corners as stated in the applications and suggesting that he and Mr. Cunningham locate the springs in the field and determine for themselves whether there would be any interference.

Under date of April 28, 1942, James L. King, attorney for Mr. Thayer, informed this office that he had been informed by Mr. Thayer that he and Mr. Cunningham had already located the springs and that there was no misunderstanding between himself and Mr. Cunningham concerning the location of the several springs; that although Application 10324 of Mr. Cunningham did not directly cover the location of the points of diversion in Mr. Thayer's applications, there might be some underground connection between the springs. He stated that the real cause of protest was based upon the fact that Mr. Thayer's property lies immediately south of the springs from which Mr. Cunningham seeks to appropriate, that one of the springs lies almost on the property line of Mr. Thayer and the other not more than 200 yards from the property line and that both springs drained directly upon Mr. Thayer's property and had long been put to beneficial use.

First Field Investigation

As it appeared that no agreement could be reached between the

applicant and the protestant whereby the protest would be withdrawn, stipulations under Regulation 12B of the Rules and Regulations of the Division of Water Resources were signed by the interested parties and approved by this office consenting to an informal hearing and on July 14, 1942, an investigation was conducted at the site of the proposed appropriations under the direction of this office at which the interested parties were urged to be present.

During the investigation Mr. Thayer stated that he had erred in his protest as to the proximity of the springs described in Application 10324 to his property as he had mistaken them for others, that the springs upon which Mr. Cunningham had filed were the springs which he had intended to describe in his Application 9299 but because of the inaccuracy of the survey data available at the time Application 9299 was filed the point of diversion was incorrectly described.

Amended Protest filed Against the Approval of Application 10324

On October 2, 1942 an amended protest was filed by Mr. Thayer in which he claimed that Application 10324 covered the same springs as he had intended to describe in his Application 9299 but that his description was inaccurate because of insufficient survey data available at the time that Application 9299 was filed. He stated that he had shown these springs to Mr. Cunningham who had entered into an agreement with him to purchase them and had paid him a \$10.00 deposit but that shortly thereafter Mr. Cunningham filed his Application 10324 to appropriate from these springs and abrogated the agreement. Mr. Thayer also stated that following the approval of Appli-

cation 9299 he had commenced improvement of the springs by having 3 cuts made in the surface of the ground at the point of seepage for the purpose of locating the main flow and had expended about \$250.00 in the construction of a reservoir.

Protests against Approval of Applications 10564 and 10565 of T. W. Coverston

The protest of Leo Thayer is based upon possible interference with his proposed appropriation under his approved Application 9073. He claims that applicant has erroneously described the location of the springs intending to describe them as being within the SE $\frac{1}{4}$ of NW $\frac{1}{4}$ of Section 21. He alleges in effect that he had entered into an agreement with the Devore Water Company which involves the waters from these springs and that should Applications 10564 and 10565 be approved it would result in depriving him of his only source of supply on lands that the springs flow over.

The Devore Water Company, a corporation, claims a right to the waters which Mr. Coverston seeks to appropriate, which right is based upon an appropriation made prior to December 19, 1914, the effective date of the Water Commission Act for the benefit of its stockholders. It alleges in effect that in 1933 the pipe lines were damaged and had not been repaired due to the "National Emergency". Protestant claims that its rights have not been abandoned however and use of water will be resumed as soon as repairs to the pipe line can be made. It claims the right to at least 1 $\frac{1}{2}$ miners inches under a 4 inch head and refers to an agreement between the Company and Thayer and Brush as a result of which its protest against the approval of Applications 9072 and 9073 was withdrawn.

Protests Against the Petition of Mr. Thayer to Correct the Point of Diversion in his Application 9299.

P. W. Cunningham claims that if the petition is approved it will result in his seeking under Application 9299 (and 9300) to appropriate from the same springs as are described in his Application 10324 which was filed prior to the petition and upon which action is still pending. He states that when his Application 10324 was filed there was no evidence of any improvement work on the springs; that Mr. Thayer's Application 9299 covered one spring located approximately 1000 feet northwest of his springs; that the legal map and survey notes that he used in preparing his Application 10324 have been available to the public since about 1884 with no recent change in the survey; that Corner 14 of Rancho Muscupiabe is the northeast corner of his property. He further stated that other springs which rise across the northern boundary of his property are due south and in a distinct water course from the springs described in Mr. Thayer's petition and therefore injury to him is possible due to the decrease in the flow of water as there is an underground connection between them. He also questions the diligence under approved Application 9299.

T. W. Coverston protests against the approval of the petition because he believes that the springs may be in the vicinity of Smith Spring and that if so the proposed appropriation would interfere with his proposed diversions under Applications 10564 and 10565.

T. L. Croom, Sr. claims that the springs are on his mining claim which was filed on March 1, 1942, and that without the use of the water from these springs it would be impossible to operate his mine. He states

that when he filed his mining claim there was no record or evidence of any water rights or right of way granted to anyone over this claim.

Second Investigation

An amended protest having been filed against the approval of Application 10324 of P. W. Cunningham, protests having been filed against the approval of Applications 10564 and 10565 of T. W. Coverston and against the approval of the petition of Leo Thayer to correct the description of the point of diversion in his Application 9299 and stipulations to an informal hearing having been signed by Leo Thayer, P. W. Cunningham, T. W. Coverston and T. L. Croom, Sr. and approved by the Division, a field investigation was conducted at the site of the proposed appropriations on August 30 and 31 and September 8, 1943, at which all the parties at interest were present. The investigation was conducted for the Division by Mr. George B. Gleason.

Public Hearing

As the matter of diligence in connection with Mr. Thayer's approved Applications 9072, 9073, 9299 and 9300 was questioned, these applications were set for public hearing in accordance with Section 1410 of the Water Code on Wednesday, December 8, 1943, at 10:00 o'clock A.M. in Room 803 California State Building, Los Angeles, California. Of this hearing Leo Thayer, S. H. Brush, P. W. Cunningham, T. W. Coverston and T. L. Croom were duly notified and all appeared at the hearing except S. H. Brush who had assigned all of his interest in Applications 9072 and 9300 to Leo Thayer.

Records Relied upon in the Determination of Action in Connection with Applications and Petitions

Application 8976 (cancelled)	Entire file
Application 9071 (cancelled)	" "
Application 9299	" "
Application 9300	" "
Application 10324	" "
Application 10564	" "
Application 10565	" "
U. S. Geological Survey San Bernardino Quadrangle	
U. S. Geological Survey Devore Quadrangle	

GENERAL DISCUSSION

The preponderance of evidence on file with the Division in connection with the controversy between Mr. Thayer and Mr. Cunningham indicates that at the time Applications 9299 and 9300 were filed by them on May 19, 1938, it was intended to file upon the spring (or springs) described correctly by Mr. Cunningham in his Application 10324.

The rules and regulations of the Division require that the points of diversion be accurately located by giving bearing and distance or coordinates from some government corner and should be described by reference to the 40 acre subdivision of the public survey. It appears that in preparing maps to accompany Applications 9299 and 9300 Mr. Thayer indicated the spot where he believed the spring to be and his attorney completed the maps and applications to conform to the location of the spring neither having had any experience in surveying. Apparently Mr. Thayer's attorney endeavored to comply with the rules and regulations of the Division by estimating the coordinate distances from the projected northeast corner of Section 20, T 2 N, R 5 W, S.E.B.&M. rather than by tying the point of diversion to Corner 14

of the Rancho Muscupiabe as did Mr. Cunningham when he first filed his Application 10324. Here it is significant to note that upon receipt of Application 10324 we informed Mr. Cunningham that the U. S. survey monument #14 was not satisfactory to tie to unless it was tied into the U. S. land survey and suggested that his points of diversion be tied to the N.W. corner of Section 21 (which is the same corner to which Mr. Thayer tied his point of diversion) and which had previously been used by him in the preparation of his Application 10297. That such an error could have been made is entirely possible as Mr. Cunningham in filing his Application 10297 in that locality admitted that an error of approximately 600 feet had been made in locating his point of diversion which was subsequently corrected and Mr. Coverston (according to the report of the investigation by George Gleason) who has resided in that vicinity for many years erroneously described his point of diversion in Application 9448 as being approximately 800 feet northerly of where it actually is. Even the San Bernardino Quadrangle of the U. S. Geological Survey (Edition of November 1909, reprinted 1929) does not correctly indicate the northerly boundary lines of the Rancho Muscupiabe in relation to the section corners as projected thereon and does not agree with the U.S.G.S. Devore Quadrangle (Edition of 1941). Although it may be possible that the section corner to which the ties were made has been established subsequent to the filing of Applications 9299 and 9300 and prior to the filing of Application 10324 this fact was not established. It seems entirely clear however that U. S. Survey Monument 14 which is a corner of the Rancho Muscupiabe and the N.E. corner of the lot of the Devore Heights Subdivision which was purchased by Mr. Cunningham from Mr. Thayer has been well established for many years.

The confusion as to the location of the springs might well have been avoided had Seward Brush acting for himself and Mr. Thayer posted a copy of the notice of Applications 9299 and 9300 at the springs as did Mr. Cunningham. They however did comply with the law as the notices were posted in "two conspicuous places in the locality to be affected by said proposed appropriation", i.e. on a public service pole at Devore Service Station and at the corner of Rancho Avenue and Woodlawn Avenue.

The filing procedure does not admit of any change in source under an application but on rare occasions an applicant is permitted to correct the description of his point of diversion where the original intent is clear and it is obvious that a reasonable mistake has been made and there is some substantial evidence indicating that the junior claimant was put on notice as to the true point of diversion under the prior application.

In this instance the record indicates that about September 1941 (approximately two months prior to the filing of Application 10324 by Mr. Cunningham) Mr. Cunningham discussed the matter of water supply with Mr. Thayer who had sold Mr. Cunningham a lot in the northern portion of the Devore Heights Subdivision and that Mr. Thayer showed him the springs upon which he believed he had filed, offered to sell them to Mr. Cunningham for \$375, a deposit of \$10.00 was paid to Mr. Thayer by Mr. Cunningham and an agreement was drawn up wherein the springs were to be sold to Mr. Cunningham.

Subsequent to this transaction, however, Mr. Cunningham discovered that the spring upon which Mr. Thayer had filed was described in his Application 9299 as being in the 40 acre subdivision adjacent on the west to the 40 acre subdivision in which the springs were actually located, filed Application 10324 to appropriate from these springs and rescinded his agreement with Mr. Thayer.

We are of the opinion that the claim of Mr. Thayer to these springs and his offer to sell his right thereon to Mr. Cunningham, put Mr. Cunningham on notice that he had filed or had believed that he had filed on these springs, as the only way in which a right to appropriate from these springs could have been initiated by Mr. Thayer was by filing an application to appropriate water with the Division.

Although Mr. Thayer informed this office through his attorney, immediately following the filing of his original protest against the approval of Application 10324, that he and Mr. Cunningham had already located the springs in question and that there was no misunderstanding between them as to the location of the springs, the protest itself which incorrectly describes the location of the springs filed upon by Mr. Cunningham and the subsequent discovery at the first investigation of the true location of Mr. Cunningham's points of diversion appear to us to be conclusive evidence that Mr. Thayer had been mistaken in the location of the springs in question.

Although it was reported by Mr. Cunningham at the first field investigation in the presence of Mr. Thayer that no work had been done on the spring prior to the filing of Application 10324 and this statement was apparently not disputed by Mr. Thayer at the time, the 1939 and 1940 progress reports filed in connection with Application 9299 of Mr. Thayer and Application 9300 of Mr. Brush indicate that some work had been done in cleaning out the spring and affidavits by Seward Brush and Oliver Bjorkman dated September 3, 1943, indicate that during the years 1938 and 1939 some development work was accomplished. As the development work was apparently done under

the supervision of Mr. Brush rather than by Mr. Thayer it is possible that Mr. Thayer was uncertain at the time of the investigation as to just how much work had been accomplished prior to the filing of Application 10324.

T. W. Coverston, who had on several occasions emphatically declared that it was his opinion that the springs specified in Applications 9299 and 9300 were in the approximate location as described in these applications and that the springs described in Application 10324 were separate and distinct from the springs specified in Applications 9299 and 9300, changed his mind at the time of the second field investigation stating that he had been under the impression that the Thayer and Brush spring was the spring upon which Mr. Cunningham has approved Application 10297 (which spring also lies within the NE $\frac{1}{4}$ of NE $\frac{1}{4}$ of Section 20 about 1000 feet west of the springs in question) and was convinced that Mr. Thayer's original intention was to file on the springs described in Mr. Cunningham's Application 10324.

Mr. Lamson, until recently secretary of the Devore Water Company, was also of the opinion that the springs upon which Mr. Cunningham had filed were the same springs upon which Mr. Thayer had intended to file under his Application 9299.

Although Mr. Cunningham stated at the hearing held on December 8, 1943, that Forest Ranger Bays had told him that Mr. Thayer had nothing to sell so far as the spring was concerned, the record clearly indicates that Mr. Bays has repeatedly asserted that the springs are the same.

While it appears that there is a green spot on the hillside within the NE $\frac{1}{4}$ of NE $\frac{1}{4}$ of Section 20 which Mr. Cunningham asserts is the spring upon

which Application 9299 was filed, an approximate survey made by Messrs. Gleason and Kelly at the time of the second field investigation indicated that this green spot was almost as far south of Mr. Thayer's original description as it was west of Mr. Cunningham's. It was unfortunate that the green spot was not visited and examined in the field by our representatives but this was not done due to difficulty of access and lack of time and consequently it could not be reported directly by them as to whether or not there was surface water there or any signs of attempted development. Mr. Thayer stated, however, that the spot was usually dry and Forest Ranger Bays declared that he had been at the spot several times without noticing any water. Mr. Gleason reported that the growth of vegetation at this spot was not nearly as luxuriant as it was at the springs described in Application 10324 of Mr. Cunningham or at many other points in that area.

It appears that Mr. Cunningham, himself, when confronted with the evidence presented in the report of the second investigation conceded at the public hearing that it was possible that the two filings were on the same spring.

As to the contention of Mr. Cunningham that the diversion proposed by Mr. Thayer would interfere with the flow of the springs which rise across the northern boundary of his property, the fact remains that it was the original intent of Mr. Thayer to file on these springs prior to the purchase by Mr. Cunningham of his property and he was under the impression that his Application 9299 covered these springs. Furthermore Mr. Cunningham admitted at the public hearing that the spring at the upper edge of his property was "tied up" so that if he developed it, the Devore Water Company could take it away from him.

The protest of T. W. Coverston was based upon the possibility of error in description and that the springs might be in the immediate vicinity of Smith Spring and that any diversion therefrom might interfere with his proposed development under Applications 10564 and 10565. The field investigation, however, apparently satisfied Mr. Coverston that no injury would result to him by the approval of the petition.

As to the protest of T. L. Croom, Sr. the record indicates that prior to the filing of his mining claim on March 1, 1942, he had been shown the springs in question by Mr. Thayer and given to understand that they belonged to Mr. Thayer. Such being the case, we are of the opinion that any rights which Mr. Croom may have to the waters of these springs are subordinate to the rights initiated by Mr. Thayer under Application 9299 filed on May 19, 1938.

From a careful consideration of the evidence before this office, we are convinced that it was the original intent of Mr. Thayer to file upon the springs named as the sources of proposed appropriation in Application 10324 of Mr. Cunningham and now correctly described in his petition to correct the description of the point of diversion in his Application 9299; that both Mr. Cunningham and Mr. Croom were put on notice that Mr. Thayer claimed the ownership of these springs, presumably under his Application 9299, prior to the filing of Application 10324 by Mr. Cunningham and prior to the filing of the mining claim by Mr. Croom; that no injury to Mr. Coverston can result from the proposed change and that therefore the petition to correct the description of the point of diversion in Application 9299 should be approved.

Although the petition to correct the description of the point of diversion in Application 9300 has not been advertised (and therefore is unopposed) the necessity for setting this matter for hearing is not apparent as the same evidence introduced in connection with Application 9299 is directly applicable to Application 9300. However the question of diligence enters into this matter and our action in connection with Application 9300 is based upon this rather than upon the petition.

Diligence

The progress reports filed in connection with Applications 9072, 9073, 9299 and 9300 for the years 1939 and 1940 were almost identical for each filing and are therefore misleading. Each report really states the amount of work done in connection with all four filings instead of in connection with each of the applications. These reports indicate that during the year 1939 some \$170.00 had been expended in cleaning out the springs and excavating for the reservoir and that during the year 1940 some \$15.00 had been spent for cleaning out the springs.

The 1941 progress reports consisted of letters from both Mr. Brush and Mr. Thayer indicating that 1000 feet of 2" pipe had been placed on the ground. They requested extensions of time within which to complete the developments, due to the National Emergency. They were informed that as the time within which to complete the use of water did not expire until December 1, 1942, action would be suspended pending the receipt of the 1942 progress reports.

The 1942 progress reports indicated that little or nothing had been accomplished toward the consummation of the projects during the year 1942 because of lack of labor and materials and directed attention to

their requests for extensions of time. As in similar instances, both Mr. Thayer and Mr. Brush were informed that action in the matter would be temporarily suspended. This was apparently misinterpreted in the report of the hearing as meaning that no further reports would be required until the end of the war.

The question of diligence having arisen, the matter was set for public hearing as noted above to afford Mr. Thayer, to whom Applications 9072 and 9300 had been previously assigned by Mr. Brush, an opportunity to appear and show cause why the permits issued in approval of Applications 9072, 9073, 9299 and 9300 should not be revoked for noncompliance with the permit terms. This hearing was held at Los Angeles on December 8, 1943.

Prior to the hearing affidavits dated September 3, 1943, were filed with this office signed by Seward Brush and Oliver Bjorkman indicating that during the year 1938 some work had been done toward developing the Smith Spring and the springs described in Mr. Cunningham's Application 10324.

From the evidence presented at the hearing it also appears that immediately following the approval of the applications, Mr. Brush acting for himself and Mr. Thayer, hired labor and attended to the construction work. A reservoir of 100,000 gallons capacity was excavated on the property of Mr. Thayer and the rock walls partially constructed. This work may be considered to have been done in connection with all four of the applications. Some development work was also done at the springs, the greater part being accomplished under Applications 9299 and 9300. Prior to the purchase of Mr. Brush's interests it appears that 1000 feet of 2" diameter pipe had been delivered to the locality but the pipe had not been laid.

In 1941, it appears that financial reverses and sickness in his family, resulted in an effort on Mr. Thayer's part to sell his interest in Application 9299 to Mr. Cunningham who had purchased a tract of land from Mr. Thayer lying within the Devore Heights Subdivision. This resulted in the agreement which was entered into between Mr. Thayer and Mr. Cunningham which was subsequently abrogated by the latter.

In 1942, Mr. Thayer expected to enter the army but a severe illness prevented this. He did, however, at the request of the United States Government, start an investigation in April of that year of the potential supply of fish from Lower California waters and in addition to agreeing to carry on the insurance business for other insurance agents in San Bernardino for the duration, he was so actively engaged in war work that he had little time to look after his own interests. He stated that he felt that the war effort should come first.

We are well aware that since the beginning of the war there has been a scarcity of both labor and materials and for this reason the Division has in many instances suspended action temporarily rather than either taking steps to revoke a permit or granting a definite extension of time.

A letter addressed to the Division of Water Resources from Crane Company in San Bernardino under date of December 7, 1943, a copy of which was filed as Exhibit 3 of the permittee, states that the Company has had a definite order for pipe from Mr. Thayer for some time, that Government regulations had prohibited it from delivering more than 2000 pounds of pipe in any one quarter to any individual without a control material allotment or symbol; that as Mr. Thayer had neither and was not eligible, it had been

unable to make delivery; that recent C.M.P. Regulation No. 4 had been amended to allow individuals to purchase 20,000 pounds of pipe in any one quarter but since this release it had insufficient pipe in stock to supply its requirements as various army and industry installations had been drawing heavily on its stock for its third and fourth quarter allotments; that it expected to have in the first quarter of the year 1944 sufficient allocated carbon steel pipe to be able to supply Mr. Thayer's requirements; that it was fully acquainted with the situation and had tried to divert its stock as it arrived to those places in the best interests of the war effort; that Mr. Thayer had been most patient and cooperative with the Company in the matter and that he certainly could not be criticized because he did not have the pipe.

Although it appears that very little development has been done at the springs themselves, the work done in connection with the regulatory reservoir may, as stated above, be considered diligence toward the consummation of each application and while Mr. Thayer may be subject to criticism for not accomplishing more prior to the war, in view of the above, and the fact that Mr. Thayer is now apparently in a position to proceed with the proposed development it is the opinion of the Division that an extension to July 1, 1944, should be granted within which to complete construction work and to apply the water to beneficial use under approved Applications 9073 and 9299 with the proviso that all pipe required be purchased or contracted for by April 15, 1944, and that construction work be 50% completed by June 1, 1944.

Relative to Applications 9072 and 9300 which were originally

filed by Mr. Brush and assigned by him to Mr. Thayer, we are not sure but what actual abandonment took place before these applications were assigned. Certainly Mr. Brush no longer has any need for the filings as he has left that locality and does not intend to complete the construction work and Mr. Thayer to whom the applications have been assigned and who has filed petitions with this office to change the place of use to that described in his Applications 9073 and 9299, cannot beneficially use any more water on his property than the amounts which were named in approved Applications 9073 and 9299.

We do not believe that the amount of diligence manifested in connection with the four applications would justify granting extensions of time on all of these applications and it would appear logical that the extension of time should be granted in connection with Applications 9073 and 9299 which are to serve the purpose originally intended rather than in connection with Applications 9072 and 9300 which are not now intended to serve the purpose for which they were originally filed. It is our opinion therefore that the permits issued in approval of Applications 9072 and 9300 should be revoked for failure on the part of the permittee to comply with the terms and conditions of the permits.

Application 10324

Should Mr. Thayer proceed with due diligence under an order of extension granted by this office to complete the proposed appropriation under his Application 9299, there is some doubt as to whether water in sufficient quantities to justify the approval of Application 10324 would

be available. Action in connection with Application 10324 should therefore be withheld temporarily pending the development under Mr. Thayer's prior Application 9299. If for any reason Application 9299 should be revoked or it is found that unappropriated water exists in the springs after the development of Mr. Thayer has been completed, Application 10324 may be approved.

Applications 10564 and 10565

Application 9073 of Mr. Thayer and Applications 10564 and 10565 are for the appropriation of water from the same cienega. The Devore Water Company claims a right to appropriate from Smith Spring which right was initiated prior to December 19, 1914, the effective date of the Water Commission Act. At the time Applications 9072 and 9073 were filed, the Devore Water Company protested the approval of these applications but subsequently withdrew its protest after the applicants agreed to supply it with one miners inch of water measured under a four inch pressure. It would appear that 3 years continuous nonuse had elapsed since the Company had used the water from this spring and therefore its protest against the approval of Applications 10564 and 10565 may be dismissed.

Although Mr. Coverston describes the point of diversion in Application 10565 as being about 800 feet north of Smith Spring as described by Mr. Thayer he intended the proposed appropriation to be from Smith Spring and named this source in his application. He also apparently intended the point of diversion in Application 10564 to be some 50 feet north of Smith Spring.

The report of the Field Investigation clearly indicates that a diversion at Mr. Coverston's upper spring would reduce the flow of water

at Smith Spring as it is in the same cienega. This cienega covers an area of two or three acres and supports a growth of lush vegetation which possibly consumes about 8 acre feet or more per annum. It would appear that if all diversions were made at the upper edge of this cienega as proposed by Mr. Coverston under his Application 10564 a large portion of the 8 acre feet per annum could be saved. Mr. Thayer has expressed his intention of digging out a large portion of the cienega with a power shovel but the economic feasibility of such an operation is questionable.

Mr. Thayer also claims a riparian right to this water based upon the fact that the lower part of the cienega is on land owned by him and although the land is not suitable for agricultural development he believes that there are four highly desirable building sites on ridges that flank the cienega. Because of the proximity to the San Andreas Fault, the irregularity of the topography and the difficulty of access, it is doubtful whether the construction of buildings in this locality is practicable.

The diversion proposed by Mr. Coverston would undoubtedly decrease the amount of water available to Mr. Thayer under his Application 9073 and it is doubtful if enough water can be developed to satisfy the claims of both.

Action in connection with Applications 10564 and 10565 should therefore be withheld pending developments under prior Application 9073. If for any reason approved Application 9073 should be revoked or if it should be found that unappropriated water exists in the springs after the development of Mr. Thayer has been completed, then Mr. Coverston should be

allowed to proceed with his proposed development under Applications 10564 and 10565.

Action in connection with Applications 10564 and 10565 should be withheld until further order is entered.

O R D E R

Permits 5212, 5213, 5214 and 5215 having heretofore been issued by the Division of Water Resources in approval of Applications 9072, 9073, 9299 and 9300, it appearing that permittee had not complied with the terms and conditions of the permits and said permittee having been duly cited to appear and show cause why said permits should not be revoked, and

Petitions having been filed with the Division of Water Resources to amend approved Applications 9299 and 9300 by correcting the description of the points of diversion therein and protests against the approval of said petitions having been received, and

Applications 10324, 10564 and 10565 for permits having been filed with the Division of Water Resources as above stated, and protests against the approval of said applications having been received, and

Stipulated hearings and a public hearing having been held and the Division of Water Resources now being fully informed in the premises:

IT IS HEREBY ORDERED that an extension of time be granted until July 1, 1944, within which to complete construction work and to apply the water to beneficial use under Permits 5213 and 5214 heretofore issued in approval of Applications 9073 and 9299, respectively, subject to the proviso that on or before April 15, 1944, all pipe required shall be purchased or contracted for and that on or before June 1, 1944, all construction work shall be fifty per cent completed; and

IT IS FURTHER ORDERED that Permits 5212 and 5215 heretofore issued in approval of Applications 9072 and 9300, respectively, be revoked and cancelled upon the records of the Division of Water Resources; and

IT IS FURTHER ORDERED that Permit 5214 heretofore issued in approval of Application 9299 be amended to conform to the petition filed on February 19, 1943, to correct the description of the point of diversion named therein; and

IT IS FURTHER ORDERED that action in connection with Applications 10324, 10564 and 10565 be withheld until further orders are entered.

WITNESS my hand and the seal of the Department of Public Works of the State of California, this twentieth day of March, 1944.

EDWARD HYATT, STATE ENGINEER

BY Harold Conkling
Deputy State Engineer

WES:MP

