STATE OF CALIFORNIA
DEPARTMENT OF PUBLIC WORKS
BEFORE THE STATE ENGINEER AND
CHIEF OF THE DIVISION OF WATER RESOURCES

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In the Matter of Application 14342 by T. N. Cline to Appropriate Water from an Unnamed Spring Tributary via an Unnamed Stream to Pacific Ocean, in Del Norte County, for Domestic and Irrigation Purposes.

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Decision A. 14342 D. 766

Decided November 28, 1952

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Appearances at Hearing Held at Crescent City on May 14, 1952:

For the Applicant

T. N. Cline — Robert F. Appel

For the Protestants

Charles F. Huffman, Sr.)
Charles F. Huffman, Jr.) — C. A. Degnan

EXAMINER - HARRISON SMITHERUM, Supervising Hydraulic Engineer, Division of Water Resources, Department of Public Works, for A.D. EDMONSTON, State Engineer.

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OPINION

General Description of the Proposed Development

The applicant seeks to appropriate 10,400 gallons per day throughout the year from an unnamed spring, tributary via an unnamed stream to Pacific Ocean, and, from the same spring, to appropriate 3 acre-feet per annum, collected between November 1 and April 1. The spring is described as being located within the NW¼NE¼ of Section 26, T16N R1W, HB&M. The water is wanted for domestic purposes and for irrigation on lots which lie within the same 40 acre subdivision and are designated as Lots 1000, 1001, 1002 and 1003 of Bertsch Ocean View Tract. The domestic supply is wanted for the service of 2 houses with one acre of

appurtenant garden, the irrigation supply for 1 acre of general crops, irrigation extending approximately from May 1 to October 1. The applicant claims no other water right than the one sought under the application. His project includes a concrete diverting dam 20 feet high by 6 feet long, a concrete storage dam 4 feet high by 6 feet long and 320 lineal feet of 1 inch galvanized iron pipe. The proposed storage reservoir, which is to be excavated, is to have a surface area of 1 acre and a capacity of 10 acre-feet.

Protest

Charles F. Huffman, Sr., and Charles F. Huffman, Jr., jointly protest the application, stating as the basis of their objection:

> "We own the property in fee at the proposed point of diversion, and the water does not flow off our property except in the extreme rainy season, and no permission has been given to pass over our land or place pipes thereon; cattle are on the premises and such diversion will deprive the cattle of drinking water."

The protestants claim a right to the use of water from the spring upon which the applicant has filed by virtue of "ownership in fee of the land where the spring is located." As to the extent of present and past use of water from the spring by themselves or by their predecessors in interest they state:

> "Use by cattle running at large, for years past, until the spring was covered over by trespassers a few years ago."

They state no terms under which their protest may be disregarded and dismissed.

Answer

In answer to the protest the applicant's attorney wrote on October 4, 1951 as follows:

> "Mr. Cline denies that the protestants - - - own fee title to the property where he has indicated as a point of diversion - - - -. The title of the protestants is not free from an easement of use for the specific purpose for which Mr. Cline seeks by his application to have established with the Division of Water Resources as a matter of record. The identical use and appropriation of the water and land here involved has been continuously made for a period of

approximately 8 years or more by Mr. Cline or the prior holders of the land to which he now holds title. The existing system —— has existed without change for approximately 8 years or more with the water passing through the system at all times from the point of diversion through the pipe and onto the land that Mr. Cline recently acquired - - -. This use has been adverse and as a result thereby, an easement for the particular use and appropriation has accrued to the benefit of Mr. Cline. Further Mr. Cline denies that the granting of a permit to appropriate water and the establishment as a fact of record of the use of the water and the easement on the land of the protestants will deprive the protestants' cattle - - - of water which has been available to them during the past approximately eight years or more.

"In short, Mr. Cline claims, as against these protestants or the owners of the land of which they claim fee title, an easement of use consisting of the full flow of water which has been flowing through the system described in the application for the past approximately 8 years or more, together with the right to go upon the land of the protestants for the purpose of making appropriate repairs to the system."

Hearing Held in Accordance with the Water Code

Application 14342 was completed in accordance with the Water Code and the Rules and Regulations of the Division of Water Resources and being protested was set for formal hearing under the provisions of Section 733(a) of the California Administrative Code, Title 23, Waters, on Wednesday, May 14, 1952 at 10:00 o'clock a.m., in the Board of Supervisor's Room, Del Norte County Court House, Crescent City, California. Of the hearing the applicant and the protestants were duly notified.

Discussion

The substance of the testimony adduced at the hearing is as follows: Robert F. Appel, the applicant's attorney, testified (pages 6 to 15 of transcript) to the effect that the pipeline extends from a cement-capped spring on the protestants' property, some 320 feet, to a point on the applicant's property, that the pipeline originally lay on top of the ground except that the end at the applicant's property is elevated to connect with a water tank and from there on sags back to the ground, that the pipeline was installed

7 or 8 years ago, that it operates by gravity, that the tank serves watering troughs, that the applicant uses overflow from the troughs for irrigation, and that recently in the course of bulldozing by one of the protestants' workmen the pipeline was plowed up and service disrupted. Mr. Appel further testified that he first saw the pipeline five or six months ago (before the hearing), that that was after the bulldozing, that Mr. Huffman admitted to him that he had bulldozed it (the pipeline) up, that he had done so unintentionally but that he wasn't going to reestablish it, that Mr. Cline acquired the property 3 or 4 years ago, that one Art Moore told him that he was the former owner of the applicant's property but not of the protestants' property and that he (Moore) capped the spring and established the water system, that Moore may have been the former owner's employee instead of actual owner. Mr. Appel further testified that the unnamed stream to which the spring is tributary crosses the roadway that Mr. Huffman put in with his bulldozer, that the roadway is a small strip between the parties' properties, that the unnamed stream is not well defined, that it has not "cut any open gash in the earth", that the water travels sometimes on the ground surface and at other times underground, that according to Mr. Moore the water system was installed 7 or 8 years ago, that the owner at that time said "go ahead, take all the water you want", that between 270 and 280 feet of the pipeline lie on the protestants' property, and that the applicant's and protestants' properties join one another except for the separation by a road.

Protestant Charles F. Huffman, Sr., testified (pages 15 to 26 of transcript) to the effect that he owns the property upon which the spring in controversy is located, that he has owned it about one year, that it was purchased from the

three Strang sisters, that the property was overgrown with brush, that he had the property bulldozed and leveled. As to the disrupting of the pipe-line he testified:

> "Well, one day they was working there with the bulldozer and on the road, and uncovered this pipe, and a fellow came rushing out and said we broke his pipe. So we didn't know it was there, and later we tried to trace it and you couldn't trace it at all. The pipe was all covered with brush and leaves and dirt, and where it came from the spring, why, they'd gone in and boxed it in and covered it over. You couldn't find the spring - - - -. I talked to Mr. Moore several times. He went in and put it in without permission and covered it over."

With regard to the housing on the spring Mr. Huffman testified:

> "You couldn't even see it. It was put in and covered over. It was covered with dirt and leaves, and he couldn't show me the exact place where the spring was."

In reply to a question as to whether Mr. Moore told him (Huffman) whether or not he had permission from the Strangs the witness testified:

> "No. Mr. Moore worked for me for quite a while afterwards and he said he had no permission to put it in. He just went in and put it in."

Further testimony by Mr. Huffman was to the effect that the distance via pipeline from the spring to the boundary of his property is close to 300 feet, that "we" can't use water from the spring because "they" have it boxed in and intimate that "they" will sue if "we" disturb it, that the right of way for the pipe line is in dispute, that he (Huffman) needs the water from the spring for beneficial use on his own property because he has cattle now and because he plans to build houses and sell houses which will need a water supply, that there is no well defined channel leading from the spring, that "we" have been on the place about a year, that "we" have in all about 3000 acres, that the parcel the spring is on contains 144 acres, that cattle ran on it when the Strang sisters owned it, and that Applicant Cline purchased his property from Mr. Moore, who had gotten it from his step-father, name forgotten.

At the conclusion of Mr. Huffman's testimony the hearing recessed for a visit by the examiner, the protestants and Attorneys Appel and Degnan to the scene of the controversy. According to the examiner's statement (page 26 of transcript),

> "- - - we went up the pipeline from the tank there at the Cline house to - - - a spot that was pointed out as the spring that was covered up. There was no water visible at that end, but there was a pipeline - - -. The pipeline as it came out of the spring was an inch in diameter and about in the middle of the opening - - - was reduced to a three quarters inch diameter - - -."

After the field visit the hearing was resumed and further testimony received as follows:

T. N. Cline, the applicant, testified (pages 27 to 45 of transcript) to the effect that he acquired the property for which he is seeking a water supply about April 20, 1951 by purchase from Art Moore, that the water system was installed in about 1943, that he (Cline) visited the property in 1944 and saw the pipeline, that he could then see the pipeline on the ground, that before he bought the place Art Moore showed him where the spring was and said it was "redwood boxed in", that the location of the pipeline now is the same as it was in 1944, that the covering of the pipe, if any, has resulted from weather and from the moving about of animals, that when the bulldozer dug up the pipe the water system was in good order and the water was flowing, that he doesn't know the amount of the flow but that it is small, that it is constant, that he plans to increase the pipeline diameter to 1 inch, all the way, that he wants a water supply for some more houses and for commercial use, that use so far has been for the house and garden, that the house is a 1 family house,

that there is also a well on the property, that the well is 53 feet deep with 33 feet of water in it, that the well water can't be used because it has oil in it, that neighbors used the well water on his land and for stock, that his property was rented but that the renters moved away when the water pipe broke. Mr. Cline testified further to the effect that he bought his property before Mr. Huffman acquired his property from the Strangs, that the well on his own property was drilled 5 years ago, that Moore's mother and step-father owned it at that time, that the supply from the spring was more than enough for one house, that when he bought the place the tanks ran over, that the spring also used to overflow, the overflow reaching and passing through his place and down a ditch at the road side, that it is his impression that the overflow occurs year-round, excepting during August and September, that the houses he hopes to build are to have 4 or 5 rooms each and are to be fully plumbed, and that if he builds said houses he wants to fully develop the spring to include cement-capping it and increasing the size of the pipe.

Subsequent to the hearing briefs were filed on behalf of the parties, by the two attorneys. The opening brief cites Antioch v. Williams Irrigation District, Haight v. Costaneck and Duckworth v. Watsonville Water etc. Company, points to the showing at the hearing of an 8 year user of spring water by the applicant, the filing of an application and the non-use of the water by the protestants and concludes that the applicant has already appropriated up to the capacity of the present pipeline and has appropriated the remainder of the flow of the spring by the filing of his application. In the reply brief it is argued that adverse possession must be open and notorious and adverse to the servient tenement, that the applicant by filing

an application, tacitly admits that he has not obtained any rights through user or adverse posession, that the pipeline over the protestants' land was hidden, not disclosed to the former owner and not adverse, that the appropriation would be futile for lack of necessary right of way. The reply brief cites Fryer v. Fryer and Crain v. Hoefling and concludes that since the onus of proof rests upon the applicant, the applicant has not acquired and cannot acquire any right to the waters in question. The closing brief asserts as facts that the applicant and his predecessors have openly and notoriously used the water from the spring for the past eight years, that the pipe was laid openly and the spring boxed pursuant to an oral grant perfected by user for the prescriptive period, that the applicant has filed his application, that the applicant and his predecessors have used the water beneficially, that the protestants have made no use of the water for eight years, that the applicant seeks the water for immediate use and that the protestants desire to use it at an unspecified future time for an unascertained purpose. The closing brief argues that the issue is, who was the first appropriator. It argues that the protestants' denial of the applicant's legal right to make the appropriation in the first place does not change that issue. It contends that the appropriation was initiated some 8 years ago and completed when the application was filed and it contends further that the legal question as to whether the applicant is a licensee, easement owner or trespasser need not prevent the approval of the application. It concludes:

> "It is therefore respectfully submitted that the uncontroverted facts disclose the applicant's undeniable appropriation and his right to a permit therefor, subject of course to the protestants' legal right, if such they have, to show applicant's lack of legal right to further exercise said appropriation."

Right of access to the spring filed upon obviously is a matter of controversy between the parties as is also the right to such use of the spring water as has been made by the applicant and his predecessors over recent past years. These matters are beyond the authority of the Department to determine, but may be settled by the parties by negotiation or by litigation. Section 746, Article 15 of the California Administrative Code, Title 23, Waters, provides that before an appropriative right can be consummated it is necessary to obtain right of access. Lack of right of access however, while a bar to consummation, and therefore to the issuance of a license, is not a bar to the approval of an application. And the asserted expectation of the protestant to use the spring water for stockwatering and for domestic use at houses yet to be built (page 19 of transcript), again is not a bar to the approval of the application. Testimony to the effect that the applicant and his predecessor have used water from the spring for domestic supply, stockwatering and irrigation for a number of years indicates that the spring yields substantially. Since no one but the applicant and his predecessor has used water from the spring during those years and since no application (prior to Application 14342) was filed thereon, that water falls within the category of unappropriated water.

Summary and Conclusions

The applicant and his predecessor have been diverting from the spring filed upon, for approximately 8 years. The applicant asserts thereby to have acquired right of access to the spring. The protestants, within whose property the spring is located, deny the applicant's asserted right of access and assert a desire to use the spring water themselves. The spring flow appears to be sufficient in amount for the purposes for which the applicant in his application proposes to use it. That water,

in view of its nonuse in recent years by parties other than the applicant and his predecessor and the absence of applications other than Application 14342, to appropriate it, appears to be unappropriated water. The fact that the applicant cannot at this time show undisputed right of access is not a bar to the approval of the application.

In view of the circumstances above outlined it is the opinion of this office that unappropriated water exists, that the protestants' objections to approval of the application are insufficient and that the application should therefore be approved and permit issued subject to the usual terms and conditions but subject also to a special term and condition providing that the issuance of the permit does not confer upon permittee a right of access to the point of diversion.

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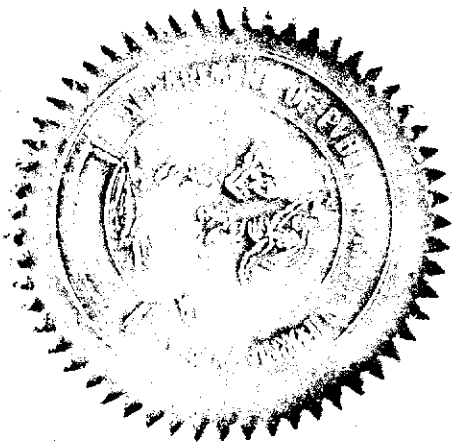
ORDER

Application 14342 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 State Engineer now being fully informed in the premises:

IT IS HEREBY ORDERED that Application 14342 be approved and that a permit be issued to the applicant subject to such of the usual terms and conditions as may be appropriate and subject to the following special term and condition, to wit:

> The issuance of this permit shall in no way be construed as conferring upon permittee a right of access to the point of diversion.

WITNESS my hand and the seal of the Department of Public Works of the State of California this 28th day of November, 1952.



A. D. Edmonston,
State Engineer