

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 16122 by Walter Krupp to Appro-
priate Water from Three Unnamed Springs Tributary Via Mill
Creek to Santa Ana River, in San Bernardino County for
Domestic Purposes.

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Decision A 16122 D 856

Decided June 25, 1956

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Appearances at Hearing Held at San Bernardino on December 14,
1955:

For the Applicant

Walter Krupp in propria persona

For the Protestants

Orange County Water District)	H. Rodger Howell Attorney at Law
Santa Ana River Development)	
Company et al.)	

EXAMINER - L. C. Jopson, Principal Hydraulic Engineer*,
Division of Water Resources, Department of Public Works

Assisting the Examiner - J. J. Heacock, Senior Hydraulic
Engineer, Division of Water Resources, Department of Public Works

*Assistant State Engineer since January 16, 1956

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DECISION

Substance of the Application

The application initiates an appropriation of 2,000 gallons per day, year-round, from three certain springs within the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 18, T1S R1W, SBB&M, in San Bernardino County. The springs are tributary via Mill Creek to Santa Ana River. The water is wanted for domestic purposes: five people are to be served, domestic animals watered and a half-acre garden irrigated. The project works include a small rubble masonry dam at each spring and a total of 2,400 lineal feet of 1-inch pipe. The applicant states that he owns the proposed place of use, that the springs are within Angeles National Forest, that a special use permit has been or will be applied for.

Protests

The application is protested by Orange County Water District individually, and by Santa Ana River Development Company, Anaheim Union Water Company and Santa Ana Valley Irrigation Company jointly.

Orange County Water District asserts in its protest that its boundaries include some 170,000 acres, that said lands all lie within Santa Ana River watershed and depend upon that stream system for their water supply, that the entire flow of Santa Ana River and its tributaries has long been appropriated, that

no water within that stream system is unappropriated and that any upstream diversion such as proposed by Applicant Krupp will create a deficiency which will be transferred downstream to District's lands. It asserts that water rights attaching to its lands include riparian and appropriative rights, also rights of overlying owners to underground waters originating in Santa Ana River and/or tributaries, that under said rights the entire water supply reaching Orange County is used completely and continuously, year-round, for agricultural, domestic, municipal and industrial purposes, that when irrigation is in progress the entire surface flow is diverted directly and that at other times the flow of the river sinks or is spread so as to recharge underground storage. It declares that under no conditions may its protest be disregarded and dismissed.

Santa Ana River Development Company, Anaheim Union Water Company and Santa Ana Valley Irrigation Company assert jointly that Applicant Krupp's proposed appropriation will deprive them of water which they own and will therefore injure them and their stockholders and that the appropriation will likewise injure all water users in Orange County dependent upon Santa Ana River as a source of supply. They assert that there is no unappropriated water in or from the applicant's proposed source, that all water flowing in Santa Ana River and its tributaries for many years has been and now is appropriated and in beneficial use, that the diversion proposed by the applicant would cause a deficiency in

supply which would be transferred downstream to the lowermost users. They claim that since 1876 they have appropriated and put to beneficial use the entire surface and subsurface flow of the Santa Ana River which reaches Orange County, that the waters are used continuously, year-round, for agricultural, domestic, municipal and industrial purposes. They assert that all surface flow is diverted throughout each irrigation season and that all flow not so diverted is percolated into the ground to recharge subsurface storage. They represent themselves to be mutual water companies, assert riparian rights, appropriative rights and rights of overlying owners to underlying ground waters, describe their diversion point as being located within Section 26, T3S R8W, SBR&M, state that their protest may under no conditions be disregarded.

Answer

Extracts from the applicant's answer to the protests are as follows:

"I believe the protestants do not understand what a small thing they are trying to deny me. The water does not come from a flowing stream, in fact the three springs are not much more than wet spots. I am ... taking quite a gamble ... and have no proof (that) the three springs combined will yield enough for our domestic use. The springs do not flow on the surface and so it is hard for me to believe any water from the springs could ever get to Santa Ana"

"... if I am denied these springs I will have no alternative but to ... drill a well."

Hearing Held in Accordance with the Water Code

Application 16122 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 public hearing under the provisions of the California Administrative Code, Title 23, Waters, on Wednesday, December 14, 1955, at 10:00 o'clock a.m. in the City Council Chamber, City Hall, San Bernardino, California. Of the hearing the applicant and the protestants were duly notified.

Hearing Incidents

Early in the proceedings protestants' attorney (Mr. Howell) moved (page 12 of transcript) that the application be dismissed as being without the jurisdiction of the Division as set forth in Sections 1200 through 1225 and Section 1375 of the Water Code. The examiner overruled the motion.

The examiner offered in evidence (page 13 of transcript) a report entitled "Report of Division of Water Resources on Application 16122," dated September 28, 1955. The protestants' attorney suggested that the document be offered for identification only, pending introduction of supporting evidence. The examiner acquiesced (page 14 of transcript).

Applicant Krupp testified (pages 15 to 27 of transcript) to the effect that he considers the report (of September 28, 1955) accurate, that he is unsure that he can develop as much as 2,000

gallons per day from the springs filed upon or that he can use that much if he gets it, that if he cannot develop the springs he will be obliged to drill a well in which event more water would probably be used than the developed springs would produce. He testified further to the effect that he had never obtained an estimate of what the springs would produce, that after exploring personally he decided that probably enough water could be developed to meet his needs, that if his water supply is large enough he will irrigate up to 1/2 acre, that diversion of water from the springs would stop the growth of nearby vegetation described as resembling tules. On cross examination he testified further that he cannot state the extent of the tule-like vegetation near the springs or the amount of water that would be saved if the vegetation were removed, that the springs are on public land and that he has not as yet secured permission to develop a supply thereon, that the area containing water loving vegetation might be between 20 and 30 feet wide by from 100 to 150 feet long, that the wash toward which the springs drain traverses his property.

The examiner offered in evidence the file maintained by the Division in connection with Application 16122. The protestants' attorney objected to the introduction by broad reference of the documents in the file in question, in the absence of opportunity beforehand to examine them. He contended that some of the items in the file were hearsay and therefore inadmissible and that others might be objectionable on other grounds. The

examiner placed the file in evidence subject to the protestants' attorney's stated objections.

The protestants' attorney moved that the application be dismissed, alleging that the application itself and the answer to the protests indicate that the appropriation proposed is not within the contemplation of the Water Code. The examiner overruled the motion.

The protestants' attorney next stated that he would offer no evidence with respect to Application 16122, that his position in the matter is in his opinion entirely justified, that hearings must follow the rules that apply to State agencies not constitutionally authorized in which exercise of State-wide powers of a quasi-judicial nature is made, that he submits the matter for decision upon his argument and the record and that he has nothing further to offer. The examiner replied that the objection to the State taking jurisdiction is overruled and that if the protestants do not submit evidence the matter will have to be determined without that evidence.

The examiner offered in evidence (page 60 of transcript) the document entitled "Report of Division of Water Resources on Application 16122," dated September 28, 1955, signed J. J. Heacock, Senior Hydraulic Engineer. Attorney Howell entered a general objection that the report in itself is inadmissible and moved to strike several specific passages in the report. The examiner overruled the objection and motion (page 69 of transcript) and

accepted the document as evidence subject to possible exception of passages later considered to represent conclusions. The examiner next offered in evidence documents designated California State Water Resources Board Bulletin No. 1 - "Water Resources of California" - 1951 and California State Division of Engineering and Irrigation Bulletin No. 19 - "Santa Ana Investigation" - December 1, 1928. Attorney Howell objected to the introduction of said documents as evidence and the examiner stated (page 73 of transcript) that subject to review by the Division's legal staff of the objection to the introduction in evidence of the documents, the latter will be officially noted for the purpose of the hearing and for such reference as may later be desired.

J. J. Heacock, Senior Hydraulic Engineer, Division of Water Resources, was called as a witness and was questioned by Attorney Howell who prefaced his questioning by stating that he does not doubt Mr. Heacock's qualifications as an investigator of water matters but does dispute Mr. Heacock's legal right to set forth conclusions in the report which he wrote and which was accepted in evidence over protestants' objections. Mr. Heacock's testimony (pages 75 to 79 of transcript) was to the effect that he examined physically the springs from which the applicant seeks to appropriate, that if flow from the springs were sufficient the flow would pass via an unnamed stream to Mill Creek, that there was a drip from a pipe at one of the

springs but no visible flow from the others, at the time of inspection, and none in Mill Creek where the unnamed creek intersects it, that Mill Creek is intermittent, running during periods of heavy rainfall, that the debris cone in the vicinity of the springs is normally porous and absorbent of water and is within the Santa Ana River drainage area.

Paul Bailey, called as a witness by the protestants, testified (pages 79 to 81 of transcript) to the effect that he is familiar with the Bulletin No. 1 and the Bulletin No. 19 that were introduced by the examiner, that he remembers no reference in either bulletin to the immediate vicinity of Applicant Krupp's proposed points of diversion, that the bulletins refer generally to the total supply from the Santa Ana River Watershed and to larger areas than the application at issue contemplates, that there is nothing in them that he knows of that indicates either existence or nonexistence of unappropriated water in the near vicinity of the subject springs.

Attorney Howell next stated (pages 81 and 82 of transcript) that the protestants have nothing more to offer, other than to renew the objections earlier expressed to the admission of certain reports in evidence, to submit that the applicant had a responsibility of affirmatively carrying on his proof, and to restate their contention that Application 16122 is not a valid application to appropriate unappropriated water as envisioned in the Water Code.

Among the passages in the document entitled "Report of Division of Water Resources on Application 16122", exclusive

of passages to which the protestants' attorney took specific exception, are the following:

"Springs Nos. 1 and 2 lie at the toe of the right or westerly bank of an unnamed ravine, and Spring No. 3 lies in the bottom of a small steep tributary ravine along the westerly side of the main ravine. The ravine lies in the southwesterly slopes of the mountain that is between Yucaipa Valley to the southwest and Mill Creek to the north and trends in a southwesterly direction through the property of the applicant to the valley (floor), whence the drainage is to the west to Mill Creek and the Santa Ana River. The ... spring appears to be above a dike and moisture is indicated by less than one-half acre of phreatophytes along the thread of the ravine covering the area of the proposed diversion. The watershed above the (points) of diversion contains about one-quarter square mile of steep mountainside with a moderate covering of brush and trees."

"The springs were apparently developed many years ago by small basin excavations, and an old pipe line extends along the westerly side of the ravine apparently to the SW $\frac{1}{4}$ of Section 18 or possibly beyond. . . . Spring No. 1 lies near a large boulder and a hole about four feet in diameter by three feet into the bank has been excavated; there was no flow of water but the lower portion of the back wall and the bottom were moist. Spring No. 2 has about the same size hole, and there was a pool of water about four feet in diameter by six inches deep but there was no outflow, all the production being lost by seepage and evaporation. At Spring No. 3 there had been some trenching up the bottom of the ravine, exposing some moist earth along the walls and bottom but there was no measurable flow of water."

"The protestants, collectively, serve an old established highly developed irrigated area in Orange County, approximately 40 river miles downstream from the proposed project."

"The Orange County Water District contains about 170,000 acres, a large portion of which is dependent on Santa Ana River water."

"For several years the supply from the river has been deficient and large amounts of water imported from the Colorado River by the Metropolitan Water District have been purchased for use by the Orange County interests."

Discussion

Jurisdictional matters and legal objections interposed by the protestants' attorney are discussed in numbered sequence as follows.

1. Because the application is to appropriate water from "three unnamed springs ... tributary to Mill Creek" protestants contend that the department has no jurisdiction. While the basis for the contention is far from clear, apparently it is their theory that the department has no jurisdiction under any circumstances to permit appropriations of water from springs; that therefore the application shows a lack of jurisdiction on its face and should not have been accepted for filing or should have been dismissed at the hearing before any testimony was received. They moved to dismiss the application "as being without the jurisdiction of the Division of Water Resources as set forth in Section 1200 and those following, including 1225, of the Water Code." They also cited Water Code Section 1375, Mogle v. Moore, 16 Cal. 2d 1, Katz v. Walkinshaw, 141 Cal. 116, and Costello v. Bowen, 80 Cal. App. 2d 621.

Jurisdiction of the department to issue permits and licenses for the appropriation of water is defined by the terms of Water

Code Section 1200 to include "surface water" in streams, lakes or other bodies of water and "subterranean streams flowing through known and definite channels." Only percolating ground water is excluded. To the extent water of a spring rises to the surface of the ground within the channel of a natural water-course it is obviously "surface water" within the meaning of Section 1200. Therefore the designation of the source in the application as "three unnamed springs ... tributary to Mill Creek" would not disclose lack of jurisdiction. The precise nature of the water was a matter to be developed by the evidence and the motion to dismiss made prior to introduction of evidence was properly overruled by the examiner. Nothing in any of the authorities cited by protestants is contrary to the foregoing conclusion. We are not here concerned with technical distinctions between "surface", "stream" and "flood" waters as defined by the rules governing the right to obstruct waters to protect property from damage.

At the close of applicant's case, protestants renewed their motion to dismiss the application upon substantially the same grounds as previously stated, and in addition contended that the evidence showed that the waters sought to be appropriated were not of the kind over which the department has jurisdiction. In particular, they pointed to statements contained in the applicant's answer to the protests (quoted on page 4, supra).

Other evidence concerning the nature of the water here involved is found principally in the report of field investigation by Mr. Heacock (examiner's exhibit 1, quoted in part on pages 12 and 13 supra) and in cross-examination of Mr. Heacock by protestants' counsel (summarized on pages 10 and 11 supra).

The criteria for distinguishing between water from a stream, whether surface or subterranean, and percolating ground water are found in Los Angeles v. Pomeroy (1899) 124 Cal. 597. Under the principles declared by the Supreme Court, it may be reasonably inferred from the evidence adduced at the hearing that the water sought to be appropriated is the surface and subsurface water of a natural watercourse and it is so determined.

2. There is evidence of water standing at one of the proposed points of diversion, of seepage at the others, and of a considerable growth of phreatophytes along the thread of the ravine covering the area of proposed diversion, all of which points to the physical availability of water. There is no direct evidence of the amount of water applicant may be able to develop from surface and subterranean sources, but such evidence is not necessary and could not be expected to be produced at the hearing since the amount cannot be determined in advance of development work.

No evidence was introduced at the hearing concerning the nature and extent of the prior rights, if any, of protestants

or of others to use the water which is available to applicant and which he seeks to appropriate. Hence it must be and it is found and determined that unappropriated water is available to supply applicant. Furthermore, physical considerations - the remoteness of the springs from the protestants' lands, the smallness of the amount which the applicant seeks, the likelihood that much of the flow which the applicant might capture is being dissipated currently by evapo-transpiration, the lack of certainty that any portion at all of such water reaches the protestants - indicate that the applicant's proposed development will probably not materially or measurably diminish the supply available to the protestants, and the protests therefore are not a bar to approval of the application.

3. Applicant proposes to use the water which he seeks to appropriate for domestic purposes, including the watering of domestic animals and a small garden. Such use is beneficial and entitled to preference over uses of water for other purposes.

4. Application 16122 contains the matter and information prescribed by Division 2 of the Water Code and the rules and regulations of the department and is in proper form. All fees prescribed by law and payable at this time have been paid.

5. Protestants objected generally to introduction of examiner's exhibit 1 (report of field investigation) and also interposed objections to specific portions of the report on various grounds. It is not necessary to consider their specific

objections since the findings of fact and conclusions which determine a decision in the matter are not dependent upon those portions of the report to which specific objections were made. The same consideration applies to protestants' objections to introduction into evidence of examiner's exhibits 2 and 3 and therefore those objections need not be further considered.

The grounds stated by protestants for their general objection to exhibit 1 are: "It would be physically impossible to divide the report into portions that are not objectionable from portions that are", and an investigation by the division of an application to appropriate water is improper, unauthorized, and "cannot form the basis of a decision".

The first ground is patently untenable since no obstacle has been encountered in dividing those portions of the report to which objections were made from those portions to which no objections were interposed.

The second ground is equally devoid of merit. General authority for the department to conduct surveys and investigations in connection with the determination of applications to appropriate water is found in Article 2, Chapter 2, Division 1 of the Water Code in conjunction with Section 1009 of the Code, and specific authority is contained in Sections 1051 and 1251. The objection was properly overruled by the examiner.

Conclusion

The data indicate that unappropriated water exists in small amounts in the sources from which the applicant seeks to appropriate and that such water may be taken and used beneficially in the manner proposed in the application, without measurably decreasing the supply available to downstream users including the protestants, if decreasing that supply at all. It is the opinion of this office therefore that the protests against Application 16122 are insufficient to bar the approval of that application which should therefore be approved and permit issued, subject to the usual terms and conditions.

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ORDER

Application 16122 having been filed with the Division of Water Resources as above stated, protests 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 16122 be approved and that a permit be issued to the applicant, subject to such of the usual terms and conditions as may be appropriate.

WITNESS my hand and the seal of the Department of Public Works of the State of California this 25th day of June 1956



HARVEY O. BANKS, STATE ENGINEER

By

A handwritten signature in dark ink, appearing to read "L. E. Jopson", written over a horizontal line.

L. E. Jopson
Assistant State Engineer