STATE OF CALIFORNIA
STATE WATER RIGHTS BOARD
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In the matter of Application 17194)
by Bruce D. Richart to appropriate)
water from an unnamed spring in)
Placer County)

Decision No. 871
Decided June 4, 1957

Appearances at Hearing Conducted at Sacramento on February 14, 1957 By Henry Holsinger, Chairman, John B. Evans, Member, and W. P. Rowe, Member, State Water Rights Board:

Bruce D. Richart, Applicant	Douglas C. Busath, Attorney
Earl Smith and May Smith, Protestants	Joseph W. Grossman, Attorney
William C. Melton and Louise D. Melton, Protestants	In pro per

DECISION

Substance of the Application

Application 17194, filed July 19, 1956, initiates an appropriation of 15 gallons per minute year-round from an unnamed spring, tributary to Little Bear River in Placer County for domestic irrigation, and fire protection purposes. The spring is described as being located within the SW¼ of NE¼ of Section 36, T 16 N, R 10 E, MDB&M. Diversion is to be by gravity. The project includes a concrete dam at the spring site, 5 feet high by 30 feet long, and 350 lineal feet of earth ditch. The water is to be used for domestic purposes at one residence and for the irrigation of one-half acre of garden and shrubbery. The applicant claims to own both the proposed place of use and the land at the proposed point of diversion.

Protests and Answers

William C. Melton and Louise D. Melton jointly protest Application 17194 stating that the spring in question contributes to the source of water supply to which they have an appropriative right by virtue of use commenced in 1855 pursuant to a recorded notice and "relocated" in 1913. They claim that water has been in constant use year-round from 1923 to date for domestic and agricultural use, that their point of diversion is located within the NW¼ of NE¼ of Section 35, T 16 N, R 10 E, MDB&M, immediately below the junction of Alta Ravine and Little Bear River, that in dry years their domestic water situation "is very serious" and that there has been no change in the area since Mr. Richart's Application 15408 was denied.

Earl Smith and Mary Smith jointly protest Application 17194 alleging that its approval will result in injury to them because they require the entire water supply from the spring. They claim that the proposed appropriation will encroach upon vested rights appurtenant to their property which are paramount to any claim of right of the applicant.

They state that the unnamed spring referred to in the application is situated on land originally owned by Hattie Decker, that by deed dated June 6, 1939, Hattie Decker conveyed to Applicant Richart the property whereon the unnamed spring is located, but excepted and reserved from the conveyance the two active springs located on the property (which include the spring in question), together with the water flowing from the springs and all buildings, pipelines and other means of holding and conveying water across the granted premises, and the right to repair, replace, maintain and

remove said pipelines and buildings. The Smiths further state that by a deed dated March 24, 1944, Hattie Decker conveyed to them the property they now own, that said deed also conveyed to them all of the grantor's right, title and interest in and to the rights excepted and reserved in the deed from Hattie Decker to Applicant Richart dated June 6, 1939, that the entire Decker tract was contiguous to the spring in question and therefore their property is riparian to the spring.

The Smiths claim that they divert the entire yield from the spring for the irrigation of 22 acres of orchard and garden, to offset evaporation and to aerate the water in a 22 acre-foot lake stocked with fish for commercial purposes.

Applicant's answer to the protests declares that the purpose of Application 17194 is to clarify a long existing water right acquired by use for irrigation purposes on property purchased by him in 1939. In response to the Meltons' contention that his proposed appropriation would interfere with their water right, he asserts that as the Meltons have not filed an application pursuant to the Water Commission Act (now the Water Code) to appropriate from the spring in question, their protest is not valid under the provisions of Section 719.5 of the Board's rules and regulations.*

In response to the Smiths' protest, the applicant claims that he recalls suggesting to Mrs. Decker's attorney at the time of

*Said Section 719.5 provides as follows: "A protest based upon a claim of interference with an alleged appropriative or prescriptive right which has not been adjudicated and which is based solely upon use of water commenced since December 19, 1914, without compliance with statutory procedure, will not be accepted."

purchase of the property in question, that some protection to the use of water from the spring be reserved for Mrs. Decker and that such a reservation was made in the Indenture dated June 6, 1939. However, the applicant claims that this point is no longer of importance as the last paragraph of said Indenture provided as follows:

> "It is understood that if and when Grantees shall have a survey made of these granted premises, Grantor will execute, acknowledge, and deliver to Grantees or to their successors in interest a grant, bargain, and sale deed containing such correct and surveyed description."

The applicant then alleges that in compliance with the above-quoted understanding a quitclaim deed, dated August 26, 1940, was executed by Hattie H. Decker, et al., before a Notary Public on August 27, 1940, and that this deed gave the metes and bounds of the conveyed property together with reservations for rights of way and easements. He states that "this deed had no reservations on my property as far as Mrs. Decker's remaining property is concerned, hence she could not have made any valid riparian grant of water or right of way, some four years later to the Smiths."

Notice and Hearing

Application 17194 was completed in accordance with the Water Code and applicable administrative rules and regulations, and was set for public hearing under the provisions of the California Administrative Code, Title 23, Waters, before the State Water Rights Board (hereinafter referred to as "the Board"), on February 14, 1957, at 1:30 p.m., at Sacramento, California. Applicant and protestants were duly notified of the hearing.

Summary of the Evidence

By grant deed dated June 6, 1939 (Applicant's Exhibit 1) Hattie Hellena Decker conveyed to Bruce D. Richart (Applicant) and his wife a parcel of land consisting of a portion of a larger parcel owned and occupied by grantor. The land conveyed to applicant was situated on the south side of a county road. Mrs. Decker retained the portion to the north of the road upon which there was a house occupied by her. At the time of the conveyance and for many years prior thereto, water had been conveyed by a 1-3/4-inch pipeline from a spring or springs (the subject of this application and hereinafter referred to as "the unnamed spring") on the property south of the road which was conveyed to applicant to the land north of the road for domestic use at the house and irrigation of the surrounding yard and a large garden. Water had also been used in prior years to irrigate a pear orchard on the premises south of the road but whether this water came from the unnamed spring or from other springs was not clearly established (See R.T. 115). The Decker source of water supply also included a spring located some distance to the east upon land owned by Lee. Water from this spring (hereinafter referred to as the "Lee spring") was conveyed by a pipeline to a tank situated about 150 feet uphill from the unnamed spring. A 3/4-inch overflow pipeline led from the tank to the unnamed spring.

Applicant testified that at the time he purchased the property Mrs. Decker was also supplying water from the unnamed spring to other persons in the neighborhood for domestic purposes and that she continued this service for an unspecified period of time after he purchased the property until the Pacific Gas & Electric Company commenced serving water in the area (R.T. 14-16). According to the

testimony of Mrs. Bowen, daughter of Mrs. Decker, this water was probably supplied from other springs upon the property (R.T. 107).

The 1939 deed to applicant described the property conveyed as follows:

> "All that portion of the ranch owned by Grantor and lying within the Southeast corner thereof, and lying Southerly of the County Road running in a general Easterly and Westerly direction through said ranch near the old Decker home, and being Easterly from the Altamonte Mining Company property and West of the East line of Grantor's said property. The premises hereby granted being in the North Half of Section 36, Tp. 16 N., R. 10 E. M.D.B.&M.
>
> "Excepting and reserving therefrom, however, the two springs now active upon the property hereby conveyed, together with the water flowing therefrom and all buildings, pipe lines and other means of holding and conveying said water across the granted premises and the right to repair, replace, and maintain the whole thereof, and to remove said pipe lines, buildings and other means of holding and/or conveying said water.
>
> "TOGETHER with the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof."

The deed further provides as follows:

> "It is understood that if and when grantees shall have a survey made of these granted premises, grantor will execute, acknowledge and deliver to grantees or to their successors in interest a grant bargain and sale deed containing such correct and surveyed description."

In furtherance of the understanding expressed in the deed, a survey was subsequently made (R.T. 11) and a quitclaim deed (Applicant's Exhibit 2) dated August 26, 1940 was executed whereby Hattie Hellena Decker, widow, Jessie Wise Lee, widow, Donald Arthur Lee and Thelma Van Horn Lee, his wife, and Gerald Philip Lee and Ella L. Lee, his wife, "remised, released, and forever quitclaimed"

to Bruce D. Richart and Anna W. Richart, his wife, the land previously conveyed to the Richarts by Mrs. Decker.

The quitclaim deed was made subject to certain rights of way for public road purposes and utility lines and included the following provision:

> "TOGETHER with the tenements, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof."

The quitclaim deed did not express a reservation or exception of the springs and water flowing therefrom or of the pipelines and other works as provided in the 1939 deed and this omission gives rise to the principal dispute between applicant and protestants Smiths. Applicant contends that the quitclaim deed conveyed to him all of grantors' interest in and title to water arising from the springs which had been reserved and excepted by the 1939 deed. Protestant Smith contends that the only purpose of the quitclaim deed was to carry out the understanding of the parties at the time Richart purchased the land from Mrs. Decker that a survey would be made and a subsequent deed would be executed containing an adequate description of the land, and that the two deeds constitute in legal effect one transaction and should be read and construed together as one instrument; consequently that Richart's title remains subject to the reservation and exception of water rights.

There is no evidence that any further consideration passed from Richart to Mrs. Decker or to the other grantors named in the quitclaim deed at the time it was executed.

Mrs. Decker resided on the premises retained by her to the north of the county road until 1940. Thereafter, she rented

the premises. During all of this period water from the unnamed spring continued to be used at the house and to irrigate the surrounding yard and garden by means of the 1-3/4-inch pipeline in the same manner as previous to 1939 (R.T. 104, 105, 108). By deed dated March 28, 1944 (Smith Exhibit 3) Mrs. Decker conveyed all of the property retained by her north of the county road to protestants Earl and Mary Smith. The deed contains the following provision:

> "Together with all of the First Party's right, title and interest in and to the following rights excepted and reserved in the deed from Hattie Hellena Decker, a widow, to Bruce D. Richart and Anna T. Richart, his wife, dated June 6, 1939, recorded July 8, 1939, in Book 391 of Official Records at page 28, Placer County Records and being 'the two springs situated upon said property so conveyed to Bruce D. Richart, together with the water flowing therefrom and all buildings, pipe lines and other means of holding and conveying said water across the granted premises and the right to repair, replace, and maintain the whole thereof, and to remove said pipe lines, buildings and other means of holding and/or conveying said water, together with all water, pipeline and other rights appurtenant to or used in connection with the granted premises.'"

Smith continued his predecessor's use of water from the unnamed spring and from the Lee spring (R.T. 61, 62, 101). In 1952 the former earth dam and wooden box or trough in which the spring water had been collected and from which the 1-3/4-inch pipeline to the Smith property extended was replaced with a concrete dam forming a regulatory pool for the collection of water (R.T. 69, 70). This was a joint venture between Smith and Richart; Smith apparently contributed the materials and both parties contributed their personal labor (R.T. 79, 118, 119). An additional 3-inch pipeline was set in the dam and was extended by Smith across the Richart land and county road on a course somewhat parallel to the 1-3/4-inch line to the

Smith property (R.T. 61, 69). Water conveyed through the two lines has been used by Smith continuously to the present time for irrigation, domestic use and maintenance of a commercial fish pond (R.T. 61, 94, 98). Richart interposed no objection to the 3-inch pipeline being laid from the spring across his land (R.T. 99). Smith testified that Richart agreed to help construct the concrete dam in return for permission to use 3/4 of an inch of water from the spring; that instead Richart installed a 3-inch pipe and ran it out into his orchard; that Smith protested through a lawyer and Richart then removed the pipe (R.T. 80, 81).

Richart did not directly dispute this testimony. He testified that of the four pipes set in the dam, the highest was a 1-3/4-inch overflow pipe, the next highest was the 3-inch pipe, below this 3-inch pipe was the original 1-3/4-inch pipe, and near the bottom of the dam there was a drain pipe of approximately 3 inches equipped with a valve which he, Richart, never opened or used (R.T. 119).

According to the last-mentioned testimony, Richart has not used any water from the spring since construction of the concrete dam, except such as might have passed through the overflow pipe or seeped through or over the dam. It appears that a small amount of spring water has seeped into an old irrigation ditch and has been used intermittently by Richart for irrigation (R.T. 91).

The report of the field investigation of January 19, 1954 (Staff's Exhibit 1), which was made in connection with a former application by Richart for the same water, includes the following statements:

"The principal source of supply of water is several small springs...due to their proximity the source has been named in the application as an unnamed spring. A small regulatory pool is formed by a concrete dam...and water was observed flowing into the pool from two springs immediately above the dam and from an overflow pipe leading from protestants Smiths' regulatory tank located approximately 150 feet farther uphill. This portion of the protestants' water is obtained from the Lee spring located on property some distance east of the applicant's owned by Jesse Lee. Allegedly water was rising from a spring or springs located in the bottom of the pool itself..."

"At the time of the investigation measurement of the various sources of water flowing into and out of the pool (point of diversion) were as follows:

(1) Overflow from Smiths' tank carried by a 3/4" pipe and discharged directly into the pool: 2.5 gallons per minute (inflow to Smiths' tank was 4.3 g.p.m.)

(2) Flow from the easterly spring immediately above the pool: 9 g.p.m.

(3) Flow from the westerly spring immediately above pool: 4 g.p.m."

"Two pipe lines, one 1 3/4" and one 3" in diameter, lead from the dam, across the applicant's property and county road and onto the Smiths' property. Both lines were discharging into a 22 acre-foot lake recently constructed on Alta Ravine by the Smiths. This lake is stocked with fish for commercial purposes."

"Discharge of the two pipes was measured to be 6.7 g.p.m. and 18.0 g.p.m., respectively. This totals 24.7 g.p.m. or 9.2 g.p.m. more than inflow measured. As the applicant stated that the level of the pool had been constant for over 24 hours, it therefore may be concluded that the difference of outlow over inflow is derived from the alleged spring or springs in the bottom of the pool. An overflow pipe was installed in the dam approximately 2 feet above the water level which would indicate that the two pipe lines were flowing under almost maximum head."

* * *

"The principal domestic supply for protestants Smiths is obtained from the Lee Spring. Water from the unnamed spring carried through the 1 3/4" pipe is used for the irrigation of approximately two acres of garden and for an emergency domestic supply at such times as the Lee Spring is inadequate. These protestants propose to remove some

old fruit trees immediately downstream from their lake and seed approximately 5 acres of the land in potatoes. Since construction of the 3" pipe line, the amount carried through this line has been allowed to flow into the lake to offset evaporation and aerate the water for the maintenance of the fish."

Discussion of the Evidence

The foregoing summary of evidence produced at the hearing overwhelmingly negates Richart's assertion that the quitclaim deed was intended to convey to him all of Mrs. Decker's right and title to the springs and to the use of water therefrom. The conduct of the parties since the deed was executed is wholly inconsistent with Richart's contention. It is significant that although the quitclaim deed was executed in 1940, Mrs. Decker and her successors continued the former use of water from the spring under claim of right based upon the reservation and exception in the 1939 deed and that Smith increased this use in 1952 without objection by Richart, and that Richart did not interfere with such use and asserted no adverse right to the spring until 1953 when he filed his first application to appropriate water of the spring. In that application and throughout the proceedings conducted by the former Division of Water Resources, he made no mention of the quitclaim deed and asserted no rights thereunder. He explains this omission by stating that although he was aware of the quitclaim deed, he was unable to locate it or any record of it in the County Recorder's Office until after his former application had been denied, although it had been recorded in 1940 soon after its execution. However, according full weight to this testimony, it does not explain his recognition of and acquiescence in the continued use of water by Mrs. Decker and Smith for 13 years after the quitclaim

deed had been executed and his failure during all of that time to assert any right, title, or interest in the spring or water therefrom, except such water as was not used on the Decker-Smith land and was permitted to overflow or seep into the irrigation ditch.

It is concluded that the principle is applicable to this case that "several instruments between the same parties relative to the same subject matter are to be construed together when they are made as part of substantially one transaction," nor "is it necessary to the application of this rule that the several instruments be executed at the same time" (15 Cal Jur 2d, Deeds, Sec. 132). This rule is entirely apart from the doctrine of incorporation by reference. Furthermore, it has been held that "the subsequent acts of the parties which disclose the interpretation placed on an instrument by the parties themselves is an important element which may be considered by the trial court (Fresno Irrigation District v. Smith, 58 C. A. 2d 48; see Crane v. Stevinson, 5 Cal. 2d 387).

Following applicant's contention to its logical conclusion, if the quitclaim deed were given full effect as transferring to applicant all of Mrs. Decker's interest in the land described therein, including the springs, pipeline and other improvements that she had reserved and excepted in the 1939 deed, applicant would have succeeded to the right to the use of water of the spring upon his land by virtue of his ownership of such land. There would be no necessity that he secure a permit from the State authorizing such use.

In view of the conclusions hereinbefore expressed, the protest of William C. Melton and Louise D. Melton need not be given consideration, since to do so would not affect the Board's decision.

Summary and Conclusions

1. Application 17194 proposes to appropriate water of an unnamed spring situated upon the parcel of land south of the county road which was conveyed by Mrs. Hattie Decker to applicant in 1939. Prior to the conveyance, the land conveyed was a part of a larger parcel of land owned by Mrs. Decker and situated on both sides of the county road. The portion north of the county road was retained by Mrs. Decker until she conveyed it to protestants Smith in 1944.

2. By the provisions of the 1939 deed from Mrs. Decker to applicant, the entire right to the use of water of the spring was reserved and excepted from the grant and was retained by Mrs. Decker for use upon the land situated north of the county road. Protestants Smith have succeeded to ownership of the aforesaid water right.

3. Pursuant to agreement between the parties to the 1939 deed at the time it was executed, a survey was subsequently made of the premises conveyed to applicant and in 1940 a quitclaim deed was executed by Mrs. Decker and certain other parties to applicant, which quitclaim deed contained a detailed description by metes and bounds of the premises that had been conveyed to applicant by the 1939 deed. The quitclaim deed did not convey to applicant any of the property and property rights which had been reserved and excepted by the 1939 deed.

4. Substantially all of the water of the spring has been for many years prior to the hearing and is now being beneficially used by protestants Smith upon the land conveyed to them by Mrs. Decker.

5. In addition to the aforementioned water right, there was reserved and excepted from the conveyance to applicant the springs upon the land conveyed, together with all buildings, pipelines and other means of holding and conveying said water across the granted premises and the right to repair, replace, and maintain the whole thereof, and to remove said pipelines, buildings, and other means of holding and/or conveying said water, which property and property rights were subsequently conveyed to protestants Smith who are now the owners thereof.

6. There is no unappropriated water of the unnamed spring which is available to supply applicant at the point of diversion proposed in the application.

From the foregoing facts the Board concludes that Application 17194 should be denied.

O R D E R

Application 17194 for a permit to appropriate unappropriated water having been filed and a public hearing having been held by the State Water Rights Board, and said Board now being fully informed in the premises:

IT IS HEREBY ORDERED that said Application 17194 be, and the same is, hereby denied.

Adopted as the decision and order of the State Water Rights Board at a meeting duly called and held at Sacramento, California, this 4th day of June, 1957.

/s/ Henry Holsinger
Henry Holsinger, Chairman

/s/ John B. Evans
John B. Evans, Member

/s/ W. P. Rowe
W. P. Rowe, Member