

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 11655 of Edward A. and Blanche G. Eberle to Appropriate Water from Mescal Creek, tributary to Mojave Desert in Los Angeles County for Irrigation and Domestic Purposes.

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Decision A. 11655 D. 620

Decided September 16, 1949

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Appearances at Hearing Held at Los Angeles, October 9, 1947:

For the Applicants

Edward A. and Blanche G. Eberle (Shafer & Grimm
(By: W. Earl Shafer

For the Protestants

Arthur Romayne Moberg)
T. B. Winnett) (Earle L. Winnett
(John H. Klenke

EXAMINER - GORDON ZANDER, Principal Hydraulic Engineer, Division of Water Resources, Department of Public Works, for EDWARD HYATT, State Engineer.

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OPINION

General Description of the Project

Application 11655 was filed by Edward A. and Blanche G. Eberle on December 10, 1946. It contemplates a diversion of 3.0 cubic feet per second, year-round, to be applied directly and a diversion of 3.2 acre-feet per annum to be collected between October 1 and March 31 of each season and stored for

later use. Both diversions are described as heading at the same location, which is within the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 21, T 4 N, R 8 W, S.B.B. & M. The source named is Mescal Creek, located in Los Angeles County, and tributary to Mojave Desert. Diversion is proposed by means of a concrete and earth dam, 55 feet in height and 120 feet in top length. This structure is referred to in the application as a submerged dam, extending 50 feet below surface (presumably ground surface) and 5 feet above. It will create a reservoir of a stated capacity of 3.2 acre-feet, and water is to be conveyed therefrom by an 8 inch diameter steel pipe line, 1700 feet long, to the place of use. As to the location of the place of use the application mentions domestic use and stockwatering within all 40-acre subdivisions of the NE $\frac{1}{4}$, the SE $\frac{1}{4}$ and the NW $\frac{1}{4}$ of Section 16, T 4 N, R 8 W, S.B.B. & M. Within this Section 16, irrigation is contemplated, of general crops, from about April 15 to about October 15 of each season, distributed as follows:

19.09	acres	within	the	NE $\frac{1}{4}$	NE $\frac{1}{4}$
19.26	"	"	"	SE $\frac{1}{4}$	NE $\frac{1}{4}$
19.28	"	"	"	NE $\frac{1}{4}$	SE $\frac{1}{4}$
14.62	"	"	"	SE $\frac{1}{4}$	SE $\frac{1}{4}$
9.66	"	"	"	NW $\frac{1}{4}$	SE $\frac{1}{4}$

Proposed use for domestic purposes and stockwatering includes that incidental to the occupancy, by families, of 175 subdivision lots, each of one acre or less, in size. Such use will extend year round. The applicants assert ownership of the land whereon use of water will be made. They disclaim ownership of the diversion site but state that a Special Use Permit has been obtained.

PROTESTS

Protests against Application 11655 are two in number, but both relate to the same property and to the same circumstances. The protestants are respectively the former owner and the present owner of the property represented

in the protests, title thereto having recently passed, or being in process of passing, from the one to the other.

T. B. WINNETT protests that the proposed appropriation will injure him by diverting Mescal Creek water upon which he has been dependent for many years for the development of certain orchard and other lands. He states that his claim to the right to use waters of Mescal Creek is based upon a Commissioner's Deed, dated December 30, 1932 which in turn is based upon the foreclosure of a mortgage against certain lands and "all of the water of Mescal Creek". He contends that a right to the use of the waters of Mescal Creek was established by one Alexis Lemonton prior to enactment of the Water Commission Act, that this right passed to numerous claimants, and from the latter to him, by a Decree of Foreclosure action in the Los Angeles Superior Court, filed in June of 1931. He states that his point of diversion is the same as that which the applicants propose to utilize under Application 11655. The protest is silent as to the extent of present and past use of water, but according to a letter written on behalf of this protestant on June 2, 1947 the use appears to have been substantial, mention having been made therein of the irrigation of 2000 or more pear and apple trees, developments pertaining to a "home place", alfalfa plantings and other farming projects utilizing water. The protest is also silent as to conditions under which it may be disregarded and dismissed.

In answer to the Winnett protest the applicants deny that the proposed diversion will injure the protestant; deny that the protestant is dependent for the development of orchard or other lands upon the waters of Mescal Creek to which he has had the right of use; and contends that the rights to the use of water of Mescal Creek, if once held, have been transferred to Arthur Romaine Moberg, another protestant. The applicants state further that at the time

Application 11655 was filed, the applicants and this protestant each held an undivided half interest in certain waters of Mescal Creek, such interest in all not exceeding 8 statute miner's inches, and that subsequently this protestant sold his interest in these waters to Arthur Romaine Moberg. They allege that they were at no time since 1942 joint users, with the protestant, of waters of Mescal Creek, and allege that at the time of filing the application, the parties in question were tenants in common with respect to the uses of certain waters. The applicants contend that the protestant's rights to the waters in question insofar as once held by him or by his predecessors or successors has been abandoned, excepting only for approximately 8 miners inches, and that any right in excess thereof has been lost by non-use.

ARTHUR ROMAYNE MOBERG protests that the proposed appropriation will deplete a water supply now privately owned and being used for domestic and irrigation purposes and developments under way, and that such depletion will cause him great financial loss. This protestant claims a right to the use of water from the source from which the applicant proposes to divert, basing such right upon an asserted Commissioner's Deed to "all the water of Mescal Creek", dated December 30, 1932. He explains that the claimed right was initiated by a former owner, one Alexis Lemonton, who filed claims to waters of Mescal Creek, at the Los Angeles County Recorder's Office on November 9, 1909, February 21, 1911 and January 8, 1913, respectively. As to the extent of present and past use of water by this protestant or by his predecessors in interest, the protest is silent. The protest contains no statement of conditions under which it may be disregarded and dismissed.

In answer to the Moberg protest the applicants deny that the proposed appropriation will injure this protestant; deny the protestant's claim of right to waters of Mescal Creek other than that based upon an undivided half interest

in a certain portion thereof which since 1942 has not exceeded 8 miners inches; assert that the purpose of the application is to file upon waters at the proposed point of diversion to the extent named in the application, but over and above the approximately 8 miners inches, the rights to which are considered to have already vested. The applicants next complain that the protestant does not distinguish in his protest between the water claimed to be usable by him by assignment from T. B. Winnett and the water named in the application. The applicants finally argue that the protestant has lost by non-use any right previously held by him or by his predecessors in interest, from the source in question, excepting only the 8 miners inches, approximately, earlier referred to.

HEARING HELD IN ACCORDANCE WITH THE WATER CODE

Application 11655 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 Article 13, Section 733(a) of the California Administrative Code on Thursday, October 9, 1947, at 10:00 o'clock A.M. in Room 803, California State Building, Los Angeles, California. Of this hearing, the applicants and the protestants were duly notified.

General Discussion

Information as to the yield of the watershed tributary to the point of diversion proposed by the applicant is fragmentary, but it points to the availability of somewhat more water than has been utilized in the past. The watershed, according to the U.S.G.S. San Geronio Quadrangle, is approximately six and one-quarter ($6\frac{1}{4}$) square miles in extent. It is almost entirely mountainous and very rugged. Elevations range from about 4900 feet to about 7800 feet. Mescal Creek flows northerly; it debouches upon Mojave Desert. According to the map, its lowermost reach is a sand wash which extends several miles onto the desert, indicative of considerable, though not necessarily frequent, outpourings of flood

waters. To a limited extent runoff from this watershed is arrested by and stored in the sand and gravel accumulation in the streambed at the vicinity of the applicant's proposed point of diversion, and, as established by testimony at the hearing, a tunnel was driven at or near this point, in order to recover some of the water thus accumulating. According to a report by F. C. Finkle, Consulting Engineer (appended to the transcript) the amount of water flowing in this tunnel measured 1.376 cubic feet per second. The date of this measurement, not stated in the report but established by testimony at the hearing, was in early March, 1941. According to further testimony a flood occurred in January, 1943, which damaged this tunnel and reduced the flow therefrom to from 6 to 8 statute inches.

The Finkle report, dated March 14, 1941, and mentioned in the preceding paragraph, contains other information based, apparently, upon actual measurements and upon considered analysis. According to that report, on the same date that the flow in the tunnel measured 1.376 cubic feet per second (above quoted), the stream flow near the mouth of the tunnel measured 12.9 cubic feet per second, of which 1.97 cubic feet per second were being diverted into the system's concrete ditch. The report states that a computation based on the available data leads to the conclusion that the seasonal runoff from Mescal Creek watershed, exclusive of surface flow, has averaged 6732 acre-feet for the 48 years immediately preceding 1941. The thought is expressed that much of this surface flow can be made available only by storage; that surface runoff is prolonged enough by snow storage in the higher levels to afford a steady draft of some three cubic feet per second for six months of each year; and that by effecting certain improvements, enumerated in the report, the ground water supply will provide a like amount for the remaining six months. The Finkle report makes no mention of acreages irrigated or other water consumption, but remarks that a small portion only, of the Mescal Creek runoff had, up to the date thereof, been utilized.

Water rights claimed by one or another of the parties are based, mainly, upon notices posted and with one exception, filed prior to the effective date of the Water Commission Act. These postings and filings appear to have been made by one Alexis Lemonton and are mentioned in some detail in the complaint, appended as a protestant's exhibit to the transcript. It appears that Lemonton, then the owner of the property involved filed, in 1909, on all the water flowing in Mescal Creek to the extent of 400 miners inches; initiated a further appropriation during 1911, amount unstated; filed again in 1913 on 100 miners inches of "underflowing water"; and initiated an additional appropriation of 75 old California miners inches on March 2, 1918, by the filing of Application 939 with the State Water Commission. Diversion points mentioned in connection with one or another of these filings were 700 feet south, 260 yards south, and 900 feet south of the north boundary of San Gabriel Forest Reserve. In all instances the places of use mentioned were lands situated in T 4 N, R 8 W, S.B.E. & M., and the purposes to be served were named as agricultural and domestic. While the same document states further that "the said Alexis Lemonton constructed various ditches, tunnels, and other facilities for conveying said waters to various tracts of lands in said T 4 N, R 8 W, S.B.E. & M., and did convey said waters to said various tracts of lands from the appropriations made by him", that source fails to describe the works constructed and to state the extent to which the appropriations were perfected by application of the water filed upon to beneficial use. Information as to progress under the filing initiated on March 2, 1918, is available in part from records relating to Application 939, on which a permit and a license were subsequently issued. The license issued on this application, in February 1923, recognized the right as of that date to divert 0.49 cubic foot per second, from about April 1 to about June 15 of each season from Mescal Creek and underflow at a point 668 feet south of the north line of Section 21, T 4 N, R 8 W, S.B.E. & M.

for the purpose of irrigating 39 acres within the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 4 of the same township. This licensed application, since June 21, 1934, has stood in the names of T. B. Winnett, Edward A. Eberle and Blanche G. Eberle.

The individuals to whom the rights belong, insofar as the latter have matured through beneficial use and have not been lost by extended non-use or abandonment, is a matter of controversy. According to the testimony and related documents, the Eberles claim an undivided half interest; but Protestants Winnett and Moberg do not concede this claim, contending that it was contingent upon the fulfillment by Applicant Eberle of a certain contract. Litigation, now in progress may to some extent resolve these conflicting claims.

The extent to which the rights, initiated at various times, have been perfected, by the construction of appropriate works and application of water to beneficial use, while not known definitely, may nevertheless be presumed, from the data, to lie within certain rough limits.

The establishment of an appropriative water right depends upon the initiation of that right, prosecution of the work necessarily involved with reasonable diligence, and application of the water to beneficial use, up to or within the amount named when the right was initiated.

According to the Finkle report, the flow of Mescal Creek averages 6782 acre-feet per year, equivalent to about 9 $\frac{1}{4}$ cubic feet per second, hence the aggregate of vested rights cannot ordinarily exceed that total. However, the Finkle report estimates that the natural flow of Mescal Creek will not support a continuous draft of over 3 cubic feet per second without resort to storage, and the latter does not appear to have been contemplated, beyond the 13,000,000 gallons (about 40 acre-feet) storage thus far installed. Thus, vested rights in all, can scarcely exceed an average flow of 3 cubic feet per second. All water utilized passes, according to the data, through the main reservoir, and before entering the reservoir passes through some 490 lineal feet of 8 inch steel

pipe laid on a 0.005 slope. The capacity of such a pipe is of the order of 1 cubic foot per second, which would seem a further limitation on the total of rights logically claimed.

Beneficial use, during 1947, according to the report of an investigation made by Engineer Heacock on January 15, 1948, amounted to the irrigation of 23 acres of deciduous fruits by Protestant Moberg in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 31, T 5 N, R 8 W,; 5 acres of orchard and garden in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 6, T 4 N, R 8 W, by Applicant Eberle; and 8 acres, crop unstated, within the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 5, T 4 N, R 8 W, by Protestants Moberg and Winnett. These figures add up to 36 acres, in all, irrigated in 1947. The same report states that in 1943 approximately 40 acres of alfalfa were irrigated within the NW $\frac{1}{4}$ of the same Section 4. The protests are silent as to the extent of beneficial use. The hearing testimony places the extent of irrigation up to the present by Applicant Eberle at 6 acres and by Protestant Moberg at some 30 acres, although it contains assertions of intention to irrigate considerably more land and to utilize water for rabbit culture, and establishes that past use has included limited domestic consumption. The briefs assert irrigation of the Eberle homesite of some 6 acres in Section 6, irrigation by Protestant Winnett of a 23 acre pear and apple orchard in Section 31, a 10 acre homesite in Section 5 and 8 acres of alfalfa in Section 4. Beneficial use to date thus would appear to have been made to the extent of irrigating up to possibly from 36 to 47 acres and supplying the domestic wants of the limited number of persons residing thereon. Experience suggests that such uses may have required a net average supply of some $\frac{47}{80}$, say 0.6 cubic foot per second, or 23.5 statute miners inches. While not conclusively established, it seems probable that aggregate rights to approximately such amount,

possibly increased somewhat to allow for reasonable transmission losses, could be defended on the basis of legal initiation, exercise of reasonable diligence and application to beneficial use.

As to whether a right to expand further the project initiated by the original Lemonton filings should be recognized in connection with action on the pending application, it is felt that the lapse of time has been too great and that such showing of diligence as has been made is insufficient to warrant such recognition by this Division. Certainly a right to further expansion under Mr. Lemonton's fourth filing cannot be recognized, as that filing was Application 939 and it was reported complete before being licensed in the amount of 0.49 cubic foot per second in 1923. With respect to Mr. Lemonton's three earlier filings which were made prior to the effective date of the Water Commission Act, it is noteworthy that no application by Mr. Lemonton or by his successors in interest, under Section 12 of the Water Commission Act, is of record, for recognition of a right to extend the work done under such filings, if the intention to so extend, existed. It is presumed that such rights as once existed to expand to a greater extent than has been realized, have been lost by non-exercise of those rights.

SUMMARY AND CONCLUSIONS


Inasmuch as the data indicate the reasonably recoverable supply afforded by Mescal Creek to average some 3 cubic feet per second and the total of recognizable vested rights to be of the order of 0.6 cubic foot per second, it is concluded that surplus unappropriated waters exist in that stream. Rights in excess of 0.6 cubic foot per second or thereabouts have been asserted but appear to have been lost by failure of the initiator or the initiator's successors in interest to exercise reasonable diligence in applying the water in question to beneficial use. Under the circumstances, Application 11655 should be approved.

O-R-D-E-R

Application 11655 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 11655 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 16th day of Sept., 1949.


Edward Hyatt, State Engineer

