

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 7865 of W. R. Wallace to Appropriate Water from Darwin Wash in Inyo County for Mining and Domestic Purposes.

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Decision A. 7865 D. 694

Decided February 14, 1951

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O P I N I O N

General Description of the Project

Under Application 7865 filed March 7, 1934, W. R. Wallace seeks to appropriate 1 cubic foot per second, year-round, from Darwin Wash, in Inyo County, for mining and domestic purposes. He proposes to divert at a point within the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of projected Section 17, T 19 S, R 41 E, M.D.B. & M., by means of a pumping plant, 448 gallons per minute in capacity. The project includes a 6 inch pipe line, 11,000 feet long. The domestic supply is wanted for camp purposes, the mining supply for concentration, flotation and related operations. According to the application the water will not be polluted by chemicals or otherwise and will be returned to Darwin Wash within the SW $\frac{1}{4}$ of the same Section 17.

Protest

The Wagner Assets Realization Corporation (predecessor in interest of Anaconda Copper Mining Company) protested the application,

asserting that the diversion therein proposed, some 500 feet upstream from its own, would prevent it from diverting the water to which it is entitled under its prior Application 2359. It asserted that Darwin Wash does not and cannot be made to supply as much as 2 cubic feet per second. It alleged that Application 7865 was not filed in good faith but was filed as a measure of spite and retaliation.

Answer

The applicant answered to the effect that the appropriation sought would not injure the protestant, that the protestant has not made use of the water covered by the permit which it holds since about 1927, except for domestic purposes, the mines having been idle, that use since that time has not exceeded 1000 gallons per week, the domestic requirements of 2 watchmen. The applicant asserted that his application is made in good faith, that his mineral holdings are better than the protestant's, and that his holdings require water.

Hearing of October 11, 1934

Application 7865 having been duly completed and having been protested, was set for public hearing in Los Angeles on October 11, 1934. In view of the applicant's allegations, in his answer to the protest, that diligence had not been maintained in connection with the protestant's Application 2359, the project under that application was also heard at the same time and place. The hearing led to the promulgation of Decision 369, on January 22, 1935, to the effect that action upon both Application 2359 (Permit 1086) and Application 7865 would be withheld pending entry of further order. The reasons expressed in Decision 369 for temporarily withholding action were that water supply

appeared to be the determining factor, that Applicant Wallace professed inability to proceed while Application 2359 is in force, that the project under that application had not been abandoned, that the time within which to complete construction and to apply the water had been recently extended, and that cause was not apparent for voiding that extension. For the reasons stated it appeared in order to suspend action on Application 7865 pending disposition of the earlier application and permit, and to hold the permittee under Application 2359 to strict accountability in the matter of diligence.

Events Subsequent to Decision 369

By letter of February 4, 1935 Applicant Wallace's attorney reasserted that the Wagner Assets Realization Corporation had not put the water of Darwin Wash to beneficial use for some 8 years, disputed that the amounts of money alleged have been expended on its property or that its equipment is being maintained, and argued that the granting of further time to the protestant is a speculation that holds up, meanwhile, work that is ready to go ahead. That writer reasserted that it is impossible to proceed under Application 7865 as long as rights under Application 2359 are maintained. He recommended the assignment of an investigator to investigate the physical properties of both of the parties. He recommended thereafter that Application 7865 be granted and that rights under Application 2539 be made subordinate thereto.

By letter of February 6, 1935 this office informed Applicant Wallace's attorney that the Water Commission Act makes no provision for

review of decisions thereunder as that attorney had suggested. It mentioned however that redress might be had by court action.

By letter of October 27, 1936 Applicant Wallace's Attorney objected to a further time extension requested by Wagner Assets Realization Corporation, and requested a hearing in the matter, preceded by an unannounced inspection of the corporation's properties.

By letter of November 16, 1936, Wagner Assets Realization Corporation's attorney submitted categorical answers to Applicant Wallace's objections to the requested time extension.

On April 20, 1937 Engineer Kibbey of the Division of Water Resources visited the projects in controversy. According to the report of Mr. Kibbey's visit, diligence in perfecting the appropriation under Application 2359 had not been lacking.

Under date of May 13, 1937 an order was issued granting an extension of time within which to complete construction and beneficial application of water under Application 2359, Permit 1086, until December 1, 1940.

By office letter of May 16, 1938 Applicant Wallace was asked whether he desires to maintain his application pending full development under Application 2359. That applicant replied that he wished his application to stand. He stated that he cannot understand how "Wagner Assets" can hold the water without putting it to beneficial use.

On May 27, 1938 this office wrote Applicant Wallace:

"In view of your statements that use is not being maintained, if you desire to take a permit subject to the prior rights of the Wagner Realization Corporation pending resump-

tion of use by that permittee, please advise and steps will be taken toward that end."

No reply appears to have been received to the letter just mentioned.

On February 11, 1941 an order was issued, extending the time within which to complete construction and application of the water to beneficial use to December 1, 1943. (Application 2359)

On January 17, 1944 a similar order was issued, further extending the time within which to complete to December 1, 1947.

A notice of assignment, received November 22, 1945 announced a change in ownership of Application 2359 from Wagner Assets Realization Corporation to Anaconda Sales Company. Title passed shortly afterward from Anaconda Sales Company to Anaconda Copper Mining Company.

On November 18, 1946 an order was issued extending the time within which to complete construction and application of the water to beneficial use to December 1, 1949.

On January 15, 1947 this office wrote Applicant Wallace:

"We will be pleased to receive any reason which you may have for wishing to continue with Application 7865. If, however, you believe that under existing conditions the proposed development under Application 7865 is no longer feasible, your courtesy in requesting the cancellation of the application will be appreciated."

By letter dated January 27, 1947 Applicant Wallace's attorney replied in part:

". . . we believe the Wallace Application 7865 should be granted, and a permit issued, and that any water used under Application 2359, Permit 1086 would be subject to and subordinate thereto . . ." * * * * *

"Mr. Wallace does not consent to the cancellation of his application."

On May 6, 1947 Engineer Kibbey (of the Division) again visited the project under Application 2359. According to the report upon that visit, no lack of diligence was in evidence.

On March 22, 1949 this office wrote Applicant Wallace:

"It appears from recent reports that construction work and use of water (under Application 2359, Permit 1086) are proceeding as rapidly as manpower and available materials will permit, and unless further hearing is desired and requested by either you or the permittee within 15 days from date, the matter will stand submitted and further order will be entered cancelling without prejudice Application 7865 upon the records of this office."

By letter dated March 28, 1949 Applicant Wallace's Attorney answered our letter of March 22, 1949, in part as follows:

". . . we object to any adjudication, other than as the evidence disclosed in 1934, and suggest that a hearing on this matter be held at Darwin, Inyo County, California, at a date convenient to the Commission."

On November 16, 1949 an order was issued extending the time within which to complete construction and application of the water to beneficial use to December 1, 1952.

By letter dated March 24, 1950 this office informed Applicant Wallace:

"Notwithstanding a statement in our letter of March 22, to the effect that a further hearing could be requested by either you

or the Anaconda Copper Mining Company, a complete examination supports the contention that a further hearing on both of these applications would accomplish little or nothing in the matter. . ."

By letter dated April 24, 1950 Applicant Wallace's attorney answered in part:

"In order that this matter may be properly settled and determined, may I suggest that the Department investigate this matter on the ground at Darwin Wash by sending an engineer to the property and have the Company use their pumps continuously, whereupon, I think it will be ascertained that they are unable to lower the water in said well below the point hereinbefore mentioned; and if that is the fact then the well is producing more water than the company can use; even with a larger pump Darwin Wash will produce more water than is allowed under Permit No. 1086."

On November 3, 1950 Engineer Heacock of the Division of Water Resources conducted a field investigation of the general nature requested by Applicant Wallace's attorney. Present during the investigation also were Messrs. Droubay, Whitman and Peterson, respectively manager, surface foreman and mill superintendent for the Anaconda Copper Mining Company's project, Applicant Wallace and Mrs. Reid, holder of licensed applications 8950 and 9792. According to the report of investigation the existing facilities for the production of water from Darwin Wash include 4 dug wells from 27 to 30 feet deep and a 12-inch cased well, 57 feet deep. The report states that 3 of

the dug wells and the drilled well are equipped with electrically driven pumps of a capacity of 60 gallons per minute. The report mentions also a 30,000 gallon tank and a 4-inch pipe line, some 4 miles long. It evidently was impracticable for the investigating engineer to determine directly the gross yield of the source, as had been suggested by Applicant Wallace's attorney. The investigating engineer gathered, however, that the pumps run, on average, 16 hours per day, 7 days per week and that the continuous flow equivalent to their combined flow is of the order of 0.192 cubic foot per second. The water was noted to be standing about 18 feet below streambed at the time of the investigation. It is reported to have stood at about the same relative position on April 28, 1925 and about 10 feet below streambed on April 20, 1937. The pump operator was of the opinion that there had been little changes in ground water level in recent years. The report states that all possible water is salvaged for re-use, that no water is available for sprinkling in the mines, that 400 people are dependent upon the water supply, that several times during the summer it was necessary to interrupt the use of air conditioning equipment to conserve water. Complete records of quantities pumped and of ground water levels appear not to have been kept. The report also states that at Darwin Falls, 4 miles downstream from the project under consideration, the subsurface flow of Darwin Wash is brought to the surface by an impervious barrier and that the flow there measured a little over 100 gallons per minute. It was stated by Mrs. Reid and by the Company representatives that operation of the pumping plant at the mine over long periods has caused the flow at Darwin Falls to decrease.

Additional Information

Pages 5 to 8 of the report by Reaburn & Bowen, Consulting Engineers, dated June 27, 1928 and filed as Protestant's Exhibit No. 1 at the hearing of October 11, 1934, contain a discussion of the probable safe yield of the Darwin Wash catchment area. The last paragraph of that discussion, which is not inconsistent with later observations of flow of Darwin Wash, is as follows:

"In the light of these measurements and in view of the present diversion of water from the canyon . . . it is our opinion that the total underflow of Darwin Wash, under existing condition, does not exceed one-half second foot."

The following extracts from reports by permittee of progress under Application 2359 are significant:

From report for 1949:

"At present a pumping program of 120 g.p.m., 15 hours per day, seven days a week supplies minimum water requirements for plant and domestic purposes without any water for such things as trees, flower gardens, desert air conditioners, and mine dust. When the supply of water at our wells in Darwin Wash permits an increase in pumping during summer months, when water is low, more water will be pumped for mine and camp use. Considerable work was done in deepening wells and in sinking a new 11-inch churn-drill well to bed-rock for the purpose of keeping a full supply of water

available for the large pump during the dry season. The main factor in not having pumped more water is the fact that more water was not available for the pumps in the individual wells during the summer months. Next summer should reveal whether it is practical to do more work on our wells or whether we are to the practical limits of the water supply."

From report for 1950:

"Our wells since being deepened and improved last year, held up the water supply during the dry months this summer; therefore we will allow people to use more water next year for purposes other than direct necessity."

Discussion

That the permittee (Anaconda Copper Mining Company) may not yet have fully exploited the underflow of Darwin Wash reaching its point of diversion is indicated by the reported flow at Darwin Falls, where the underflow is brought to the surface, of some 100 gallons per minute, at the time of Engineer Heacock's investigation.

That the permittee will increase its exploitation of underflow to the limits of economy is probable, according to the statements contained in recent progress reports.

The gross yield of Darwin Wash, exclusive of surface flow too intermittent to be of practical value, appears to be of the order of 75 gallons per minute (the amount pumped currently by the

permittee) plus 100 gallons per minute (the residue brought to the surface at Darwin Falls), a total of some 175 gallons per minute or roughly 0.39 cubic foot per second. Inasmuch as that amount is but a fraction of the amount covered by approved Application 2359, it follows that the waters of Darwin Wash at the locality considered and exclusive of such surface flow as may occur are fully appropriated.

Applicant Wallace's contention that rights under Application 2359 were lost by non-use and that Application 7865 should therefore be approved and take precedence over Application 2359 is not seen to possess merit. Application 2359 being unopposed was approved and Permit 1086 issued. While progress under that approved application has been slow, cause has been shown, to the satisfaction of the Division, why Permit 1086 should not be revoked and the time within which to complete construction and application of the water to beneficial use under that permit has been extended by a succession of orders, on showing of good cause in each instance, until the present time, in fact until December 1, 1952. Application 2359, Permit 1086, thus is in good standing and as long as it enjoys that status it must, under the law, take precedence over Application 7865.

Had the delay in the development of the project under Application 2359 been foreseen and had Applicant Wallace so desired, Application 7865 might have been approved subject to prior rights and Applicant Wallace might have had the use of the waters of Darwin Wash or a portion thereof for some years. Applicant Wallace took the position however (page 12 of Decision 369) that he could not

proceed while the rights under Application 2359 were maintained.

Inasmuch as Application 2359 has been maintained and development thereunder has proceeded to the point where all or nearly all of the available supply is being utilized it is not apparent that the approval of Application 7865, even on a temporary basis, is longer warranted.

Summary and Conclusions

The underflow of Darwin Wash at the protestant's point of diversion, according to the available information, is of the order of 0.39 cubic foot per second.

The protestant has recently been diverting at the rate of 120 gallons per minute (0.27 cubic foot per second) and in view of definite needs will probably soon increase its diversions to the limit of economic feasibility. The protestant under Application 2359, Permit 1086, is authorized to divert up to 2 cubic feet per second.

A diversion as proposed by the applicant, upstream from the protestant's point of diversion, would be in direct conflict with the protestant's endeavors to perfect its prior appropriation.

Unappropriated water being non-existent in the reach of Darwin Wash in question, it is the opinion of this office that the approval of Application 7867 is unjustified and that the application should be denied.

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O R D E R

Application 7865 having been filed with the Division of Water Resources as above stated, a protest having been filed, a public hearing having been held, supplemental field investigations having been made and the State Engineer now being fully informed in the premises:

IT IS HEREBY ORDERED that Application 7865 be rejected and cancelled upon the records of the Division of Water Resources.

WITNESS my hand and the seal of the Department of Public Works of the State of California this 14th day of February, 1951.



A. D. Edmonston
A. D. Edmonston, State Engineer