

BEFORE THE DIVISION OF WATER RESOURCES  
DEPARTMENT OF PUBLIC WORKS  
STATE OF CALIFORNIA

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In the Matter of Applications 4264, 4969, 4970, 4990, 5011, 5073, 5093, 5147, 5286, 5328, 5336, 5407, 5418, 5419, 5526, 5733, 5971, of Edmond Sandoz, Lillie V. Roberts, E. B. Hilborn, Wm. Hyder, A. I. D'Arcy, H. W. Eichbaum, A. M. Johnson, Pacific Lead Mines Inc., J. Irving Crowell, John H. Thorndike, W. R. Wallace, Harvey Cluff, and Mary Frances (Bailes) Bird to appropriate water for various purposes from springs situated upon public lands of the United States in the State of California.

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DECISION 4264 etc. D 255

Decided - April 21, 1930.

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APPEARANCES AT HEARING HELD AT LOS ANGELES ON MAY 7, 1929.

For Applicants

E. B. Hilborn in propria persona  
H. W. Eichbaum by Jess Hession, Attorney at Law, Independence  
John H. Thorndike by H. V. Daley of Chandler, Wright & Ward,  
Attorneys at Law, 617 Bartlett Bldg., Los Angeles.  
Mary Frances (Bailes) Bird in propria persona  
Remaining applicants - no appearance.

For Protestants

No appearances.

Amici Curiae

J. H. Favorite, Chief of Field Investigations, Gen'l. Land Office,  
Customs House Bldg., San Francisco.  
J. J. Donovan, Chief Clerk, U. S. Land Office, Los Angeles.

EXAMINER: Harold Conkling, Chief of Division of Water Rights.

O P I N I O N

This group of seventeen applications to appropriate water from springs situated upon public lands of the United States was set for hearing at Los Angeles on May 7, 1929; together with Application 3391 for the purpose of developing information as to what action should be taken in the matter of requirements as to securing right of access, there having been entered an Executive Order of the President on April 17, 1926, by which "every smallest legal subdivision of the public land surveys which is vacant unappropriated, unreserved public land and contains a spring or water hole, and all land within one quarter of a mile of every spring or water hole located on unsurveyed public land \*\*\*\* (was) \*\*\*\* withdrawn from settlement, location, sale, or entry and reserved for public use \*\*\*\*\*".

Subsequent to the hearing on May 7, 1929, applicant in the case of Application 3391 submitted evidence that the spring named as a source therein was situated upon his own land and this application was therefore cleared for action by an earlier opinion (A 3391 D 237 - Sept. 13, 1929). Further reference to Application 3391 will accordingly be omitted in this opinion.

The details as to location, amount, purpose, etc., of these several filings are shown sufficiently for present purposes in the accompanying tabulation. The applications were all completed, advertised, and are now ready for action. As action is not governed by considerations evolving out of the protests which were received to the several applications this opinion will devote no attention to that phase of the matter. All parties received due notice of the hearing of May 7, 1929.

APPLICANTS TO APPROPRIATE WATER WITHIN PUBLIC WATER  
RESERVES MUST SATISFY REQUIREMENTS OF DIVISION WITH  
RESPECT TO SECURING RIGHT OF ACCESS.

Regulation 14 of the Division prescribes that:

"Access to the point of diversion is necessary before an appropriation can be consummated, and therefore an application will be rejected in those cases where the applicant fails to proceed with diligence toward securing rights of way or is unable to give satisfactory evidence of his ability to secure same. \*\*\*\*\* Where it becomes apparent that necessary easements cannot be secured upon public lands or reservations, the application will be rejected."

The origin and purpose of this rule will be found in the fact that unless an applicant can secure right of access to the source named in his application the issuance of a permit can serve no purpose, will lead to confusion, and may lead to abuse or evil. Obviously if right of access is denied the appropriation cannot be consummated. If permit is issued before doubt is removed as to securing right of access, dates for beginning and completing construction and completing beneficial use can not be intelligently fixed as required by law, and the existence of a permit issued by the State might be misconstrued by innocent parties to their loss and great misfortune as conferring right of access.

We take it that it is unnecessary and inappropriate here either to discuss the purpose of the withdrawal orders creating these public water reserves or to discuss the law out of which this Federal action arises. For those who are interested reference is made to Circular 1066 of the U. S. General Land Office which embodies to the general order of withdrawal heretofore referred to, and also to Circular 1028 of the U. S. General Land Office which embodies regulations relative to the use of lands withdrawn as public water reserves.

It is our opinion that the Act of 1866 (Section 2339 Revised Statutes of the U. S.) does not give a vested right to a right of way as against the Government of the United States upon the filing of an application to appropriate water upon the unreserved public domain. At any time prior to the consummation

of the appropriation of the water the Government can withdraw the lands necessary for the right of way and oust the appropriator no matter how diligent and no matter how much expense he has incurred. The following cases appear conclusive:

Bear Lake Irr. Co. v. Garland, 164 U.S. 1, 41 L. Ed. 327  
U. S. v. Rickey Land & Cattle Co., 164 Fed. 496  
Silver Lake Power & Irr. Co. v. Los Angeles, 176 Cal. 96

It is also clear that one attempting to appropriate cannot hope to obtain a right by prescription as against the Federal Government to continue his diversion works upon Federal lands. It therefore follows, in our opinion, that all applicants to appropriate upon public water reserves, whether their applications were filed prior to or subsequent to the date of the withdrawal, should secure from the Federal Government either a complete lifting of the withdrawal or an approved right of way before their applications to this office are approved. If this were not required the whole purpose of the withdrawals might be subverted by individual appropriators.

#### EFFORTS OF APPLICANTS TO SECURE FEDERAL EASEMENTS.

The attention of each of the applicants involved in the present proceedings was invited to the conflict of his filing with a Federal withdrawal order creating a public water reserve and each applicant was advised that before his application could be approved either the withdrawal order must be lifted or an approved right of way must be secured. There has ensued a long period of time and much correspondence in which this office has made every reasonable effort to assist the several applicants toward securing the necessary rights of way. In an effort to determine what difficulties were being encountered and what course was best to pursue the Division gave early notice of the hearing set for May 7, 1929, and invited the several applicants to join in making a common showing, and represen-

tatives of the U. S. Land Office were invited to and were present at that hearing.

Under similar circumstances approved rights of way were secured by O. W. Peterson (Application 6013) under the acts of March 3, 1891 and May 11, 1898; by John C. Baldrige (Application 5917); and by the American Potash & Chemical Co., (Applications 4933 etc.) under the act of February 15, 1901. It is clear then that the Division is not requiring of the applicants in this case something that is impossible. With this thought in mind we shall advert briefly to what has been done by each of the applicants concerned in the present proceeding.

Application 4264 by Edmond Sandoz was filed October 18, 1924. Under date of February 8, 1928, Mr. Sandoz advised he was filing with the local land office a reservoir declaratory statement. He failed to appear at the hearing of May 7, 1929, or show cause for failure to appear. On August 26, 1929, we received from him a request for copies of his map in order to make a filing of the same with the Department of the Interior as requested by that office and these were forwarded promptly. We have not had any communication from him since that date, although he was advised under date of March 8, 1930, that "Unless there is a prompt showing of progress, or that lack of progress is through no fault of your own, it will be necessary to cancel the application, in which case you may refile at a later date should the way be open for securing right of access." There having been no showing as requested it would appear in order to cancel this application because of failure to comply with Regulation 14.

Application 4969 by Lillie V. Roberts was filed March 23, 1926. Under date of January 18, 1927 she filed with the U. S. Land Office a request for clear listing. This was referred to the Geological Survey for report and this report appears to have been to the effect that the land was set aside for a public water reserve. The filing was contested by one Alvin K. Winslow who appears to have made an effort to homestead the land whereon the source was

situated. Applicant failed to attend the hearing on May 7, 1929, or show cause of failure to appear and has not previously or since that time shown any progress toward clearing up the situation although advised under date of March 8, 1930, that Application 4969 was held subject to cancellation unless a prompt showing were made in the matter. It is therefore appropriate to cancel this application under the provisions of Regulation 14.

Application 4970 by E. B. Hilborn was filed on March 24, 1926.

Under date of June 8, 1928, applicant advised that an application had been filed with the Sacramento Land Office for clear listing. An appearance was made by the applicant in person at the hearing on May 7, 1929, accompanied by one Mrs. H. E. Dyer, to whom and her husband this filing has since been assigned. No further showing was made by the applicant in the matter until our letter of March 10, 1930, went forward advising that "Unless there is a prompt showing of progress, or that lack of progress is through no fault of your own, it will be necessary to cancel the application, in which case you may refile at a later date should the way be open for securing right of access." A reply to this letter was received under date of March 15, 1930, stating that the project had been transferred to H. E. Dyer and Grace Dyer his wife, and that Mr. Hilborn, together with Mr. Dyer and a surveyor, had made a survey of the springs last fall in an effort to complete an application to the U. S. Land Office for the necessary rights of way. There has been some correspondence with Mr. Hilborn since the letter of March 15th and it appears in order that this application be carried forward for some further time awaiting a determination of whether or not necessary rights of way can be secured.

Application 4990 by William Hyder was filed April 9, 1926. Under date of June 8, 1926, applicant advised an application had been filed with the Land Office for clear listing. Applicant failed either to appear at the hearing of May 7, 1929, or to show cause for failure to appear, and has not either before that time or since shown any progress toward securing necessary rights of way,

although advised under date of March 8, 1930, that Application 4990 was held subject to cancellation unless a prompt showing were made. This application should therefore be cancelled because of failure to comply with the conditions of Regulation 14.

Application 5011 by A. I. D'Arcy was filed on May 6, 1926. Under date of February 12, 1927, applicant advised that he had filed with the U. S. General Land Office an application for clear listing and under date of May 27, 1927, applicant advised that he had been instructed by the Department of the Interior that he should file an application under the Act of February 15, 1901. There was no appearance by the applicant at the time of the hearing on May 7, 1929, and the applicant has failed to show any cause for failure to appear. There has in fact been no showing of progress in the matter since the letter of May 27, 1927, although the applicant was advised under date of March 8, 1930, that "Unless there is a prompt showing of progress, or that lack of progress is through no fault of your own it will be necessary to cancel the application in which case you may refile at a later date should the way be open for securing right of access." In view of the circumstances it would appear appropriate that this application should be cancelled because of failure to comply with the requirements of Regulation 14.

Applications 5073 and 5336 by H. W. Eichbaum were filed on June 28, 1926, and January 28, 1927, respectively. An appearance was made on behalf of applicant at the hearing on May 7, 1929, and from the record it would appear that applicant has been diligent both prior to the hearing and since that time in his effort to secure the necessary rights of way. Advices from the applicant under dates of March 17 and 18 and orally from the Sacramento Land Office by phone on April 16, indicate that Mr. Eichbaum is about to receive permits from the Federal Government which will assure him right of access. When satisfactory evidence is received that such permits have been issued, it will be in order to approve the applications to appropriate.

Application 5093 by A. M. Johnson was filed on July 10, 1926.

Under date of February 26, 1927, applicant advised that an application had been filed with the U. S. Land Office at Visalia and that same had been forwarded to Washington. Applicant later set up the claim that there was a possibility that the spring from which he sought to appropriate was situated upon his own land. Applicant failed to enter an appearance at the time of the hearing on May 7, 1929, setting forth as his reason the fact that there was a possibility that he owned the land upon which the spring was situated and that he was waiting for survey by the U. S. Cadastral Engineer, which survey would determine the point. There was no further evidence of progress in the matter and therefore on March 8, 1930, applicant was advised that "Unless there is a prompt showing of progress or that lack of progress is through no fault of your own it will be necessary to cancel the application in which case you may refile at a later date should the way be open for securing right of access." To this letter a reply was received under date of March 28 that the point was still unsettled as to the location of the spring and the applicant was still waiting for a survey by the U. S. Cadastral Engineer. It would appear that ample time has been afforded this applicant within which to determine this point and that the application should be cancelled in accordance with the provisions of Regulation 14 because there is no assurance as to when, if ever, the survey proposed will be made.

Application 5147 by Pacific Lead Mines Inc., was filed on August 10, 1926. It appears that the applicant filed with the U. S. Land Office on June 8, 1927, an application for clear listing and we are not advised what if any progress has been made by the applicant in the matter since that time. There was no appearance at the hearing on May 7, 1929, and no cause for failure to appear has been shown. Our latest attempt to communicate with the applicant, which was on March 8, 1930, has brought no results, although the applicant was at that time advised that "Unless there is a prompt showing of progress, or that lack of progress is through no fault of your own, it will be necessary to cancel the



application, in which case you may refile at a later date should the way be open for securing right of access." It would therefore appear appropriate that this application should be cancelled because of failure to comply with the provisions of Regulation 14.

Application 5286 by J. Irving Crowell was filed on November 29, 1926. There is nothing in the record showing that any effort had been made by the applicant to secure necessary rights of way, although the applicant had been advised as to the necessity therefor. No appearance was made on behalf of applicant at the hearing on May 7th and no cause for failure to appear has been shown since that time. Under date of March 8, 1930, applicant was advised that "Unless there is a prompt showing of progress, or that lack of progress is through no fault of your own, it will be necessary to cancel the application, in which case you may refile at a later date should the way be open for securing right of access." To this letter a reply was received under date of April 3, 1930, to the effect that applicant was expecting to visit the property in a few months and would make an effort to comply with our requirement of securing right of access. It is appropriate that the application should be cancelled in accordance with the provisions of Regulation 14.

Applications 5328 and 5407 by W. R. Wallace were filed on January 11, 1927, and April 7, 1927, respectively. These applications were completed, advertised and protests thereto were received from Wagner Assets Realization Corp., and Theo Peterson and Alex Ruona, "Trustees". A hearing was held upon these protests on August 23, 1928, and thereafter an order was entered (A-5328-5407 D207) to the effect that unless satisfactory evidence was submitted of the ability of the applicant to secure right of access the applications would be cancelled. The applicant was advised of the ruling of the office in this connection under date of December 27, 1928, and he was advised under date of March 2, 1929, of our intention to include these applications for rehearing along with the other

applications involved in the current proceedings. There was no appearance on behalf of applicant at this hearing and no cause has been shown since for failure to appear. Although there has been some correspondence passing between the applicant and this office there has been no evidence of intent on the part of applicant to attempt to meet the requirements of Regulation 14 and on that account it would appear appropriate to cancel Applications 5328 and 5407.

Applications 5418, 5419 and 5526 by John H. Thorndike were filed on April 15, 1927, April 15, 1927, and June 9, 1927, respectively. Application 5419 was cancelled on September 23, 1929, at the request of applicant and Application 5526 was cancelled on October 30, 1929, at the request of the applicant. Although incomplete at the time of the hearing on May 7, 1929, these applications were included for hearing because action thereon involved the question of right of access upon public water reserves. At this hearing applicant was represented by Mr. H. V. Daley of Chandler, Wright & Ward, Attorneys at Law. Recent communications have been received from the attorneys which indicate failure to make satisfactory progress in the matter of securing right of access is probably due to inattention on the part of applicant's engineer and attorney. The attorney who was handling the matter in the office of Chandler, Wright and Ward appears to have left the firm and the surveyor who made the surveys and attempted to prepare the maps left the State without completing the job. The applicant himself appears to have been proceeding in good faith and therefore it is in order that some further time be allowed within which to clear up the question of right of access.

Application 5733 by Harvey Cluff was filed on October 24, 1927. Although repeatedly advised of the necessity of securing right of access by appropriate application to the United States Land Office, the applicant has failed to show any progress in the matter. There was no appearance on his behalf at the hearing on May 7, 1929, and no cause for failure to appear has been shown. He was advised under date of March 10, 1930, that "Unless there is a prompt showing of progress or that lack of progress is through no fault of your own it will

be necessary to cancel the application in which case you may refile at a later date should the way be open for securing right of access." There has been no showing that the applicant was making an effort to comply with Regulation 14 of the Division and it would therefore appear appropriate that Application 5733 be cancelled.

Application 5971 by Mary Frances (Bailes) Bird was filed on July 5, 1928. It appears that the applicant filed with the U. S. Land Office prior to the hearing on May 7, 1929, and she herself attended the hearing on that date and made a showing that she was endeavoring to comply with the requirements of the Division with respect to the matter of securing right of access. Subsequent to the hearing the application was protested by F. M. Quiroz who set up a claim that the springs from which it was sought to appropriate were situated upon his private property. Subsequent efforts to obtain a showing from the applicant in the way of progress towards securing right of access have met with no success. Under date of March 10, 1930, applicant was advised that "Unless there is a prompt showing of progress in the matter of clearing up the question of right of access to your point of diversion, or that lack of progress is through no fault of your own, it will be necessary to cancel the application, in which case you may refile at a later date should the way be open for securing right of access." No reply to this letter has been received and it therefore appears that Application 5971 should be cancelled because of failure to comply with the provisions of Regulation 14.

#### SUMMARY AND CONCLUSION

It is our opinion that, in those cases where applications are filed to appropriate within Public Water Reserves, permits should not be issued until there is a showing that the purpose of the reservation or withdrawal will not be subverted by the proposed appropriations. The General Land Office of the U. S. Department of the Interior has promulgated rules and regulations (Circular No. 1028, August 27, 1925 ) whereby use of these lands not incompatible with the purpose of

the withdrawal, may be secured by application to the Land Office either for clearing or for simple easement under suitable restrictions and conditions, as the circumstances surrounding the particular case may warrant. Applicants to this office in these cases should be afforded every reasonable opportunity to complete an appropriate application to the U. S. Land Office for necessary rights of way, and if necessary rights of way are secured approval of the applications to appropriate is in order providing there is unappropriated water available and the use proposed is a beneficial one. In those cases where either the necessary rights of way are denied by the U. S. Land Office or applicants fail to proceed diligently to complete their applications to the U. S. Land Office permits should be denied by this office and the applications cancelled upon the ground of failure to complete as required by Regulation 14.

In this proceeding it appears that Applications 4970, 5073, 5336 and 5418 involve appropriations from springs situated within Public Water Reserves and that applicants are proceeding with reasonable diligence in their efforts to secure necessary rights of way from the U. S. Land Office. Action may therefore be continued for some further time. If necessary rights of way are secured these applications may be approved and if necessary rights of way are denied by the U. S. Land Office or applicants fail to press diligently the necessary applications to the U. S. Land Office these applications should be cancelled upon the grounds of failure to complete in accordance with Regulation 14.

Applications 4264, 4969, 4990, 5011, 5093, 5147, 5286, 5328, 5407, 5733, and 5971 also involve appropriations from springs situated within Public Water Reserves and it appears that reasonable diligence has not been exercised by applicants in pressing the necessary applications to the U. S. Land Office. It is therefore in order now to cancel said applications because of failure to complete in accordance with Regulation 14.

O R D E R

Applications 4264, 4969, 4970, 4990, 5011, 5073, 5093, 5147, 5286, 5328, 5336, 5407, 5418, 5733 and 5971 having been filed with the Division of Water Resources to appropriate from springs situated within Public Water Reserves as above stated, the rules of the Division requiring that as a condition precedent to the approval of his application an applicant must either secure right of access or demonstrate his ability to secure same, the above noted applicants having been duly advised of this requirement, and said requirement not having been satisfied,

IT IS HEREBY ORDERED that further time be allowed within which to complete Applications 4970, 5073, 5336, and 5418 and

IT IS HEREBY FURTHER ORDERED that Applications 4264, 4969, 4990, 5011, 5093, 5147, 5286, 5328, 5407, 5733, and 5971 be cancelled upon the grounds of failure to complete as required by Regulation 14.

Witness my hand and the seal of this department the 21st day of April, 1930.

EDWARD HYATT, State Engineer

By Harold Conkling  
Deputy

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