

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 14977 by Maggie Muschetto to Appropriate
Water from Cripple Creek Tributary to Arcade Creek in Sacramento
County for Irrigation and Stockwatering Purposes.

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Decision A. 14977 D. 789

Decided March 12, 1954

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In Attendance at Investigation Conducted by the Division of Water
Resources at the Site of the Proposed Appropriation on April 14, 1953:

Maggie Muschetto	Applicant
Thomas E. Srednik	Applicant's Attorney
Frank Muschetto	Applicant's Husband
Guy P. Van Maren	Representing Protestant Catherine Van Maren
C. F. Van Maren	Protestant
A. S. Wheeler	Senior Hydraulic Engineer Division of Water Resources Department of Public Works Representing the State Engineer

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OPINION

General Description of the Project

The applicant seeks to appropriate 0.125 cubic foot per second from Cripple Creek, tributary via Arcade Creek to Sacramento River, from April 1 to November 1 at a point within the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 22, T10N R6E, MDB&M, for purposes of irrigation and stockwatering. Diversion is to be effected by means of a pump of a stated capacity of 250 gallons per minute, distribution by means of a portable sprinkling system. At the place of use, described as being located within the same quarter-quarter section as the point of diversion, it is proposed to water 22 head of livestock and to irrigate 10 acres of alfalfa and a half-acre domestic garden. The applicant asserts ownership of both point of diversion and place of use.

Protests

Catherine Van Maren protests, apprehending that the proposed appropriation will deprive her of the supply that she uses for stockwatering. She claims both a riparian and an appropriative right and states in that connection:

"First use of the water by riparian right was made by my parents in 1863. They used the stream flow for stock water to the approximate extent of 0.025 cubic foot per second. It has been in continuous use since 1863 by my parents and continuing by me to the present time in the same approximate amount The use is made in the natural stream by stock watering there and in water holes within the stream bed. The period March 1 each year is the approximate time use starts and continues until there is adequate rainfall in the winter months."

She describes her diversion point as being located within the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 27, T10N R6E, and states:

"This protest may be disregarded and dismissed if Maggie Muschetto ... will ... agree that a sufficient amount of water be allowed to continue to flow downstream so that my property will be furnished not less than 0.025 cubic foot per second, continuous flow each year from March 1 to the beginning of adequate rainfall in the winter months."

She describes her situation further as follows:

"There will be insufficient water flowing in the stream that runs through my property to allow Maggie Muschetto diversion of 0.125 cubic foot per second during the spring, summer and fall seasons of inadequate rainfall each year and provide for my requirements to adequately water livestock owned and maintained on my property of 120 acres. I have continuously used this source of water and it would deprive and injure me if its use should cease. This land owned by me is without another source of water supply It would be necessary for me to go to considerable expense to provide a compensating amount of water now being furnished. In addition, it would require an operating expense in providing power costs and plant depreciation. At present the flow of water is without any expense to me and provides by natural means the requirement of my livestock."

C. F. Van Maren also protests the application on substantially the same grounds as stated in the Catherine Van Maren protest, the main differences being that Protestant C. F. Van Maren describes his point of diversion as being located within the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 27, and states that his property is 40 acres in extent.

Answers

In answer to the two protests, the applicant and her husband deny that either of the protestants will be injured by the appropriation sought. They deny that the protestants have any right, either

riparian or appropriative, to divert from Cripple Creek at all. Specifically they deny that there was 0.025 cubic foot per second flowing in Cripple Creek during the summer months of years prior to 1930, and they deny that the protestants have acquired since 1930 any riparian or other right on that stream. In that connection the answer contains the following passage:

"As an affirmative allegation and defense to said protest, applicants allege that they acquired the property described in their application ... in the year 1930 and at that time the stream bed of Cripple Creek was dry during the summer months; that thereafter and during the years between 1930 and 1952, because of improvement of the lands adjacent to Cripple Creek and the use of irrigation water upon said lands by numerous land owners, percolating waters from said land have gradually increased and flowed into Cripple Creek so that all of the water which flows in Cripple Creek between July 1 and November 1 of each year is the result of percolating waters created by the irrigation of lands adjacent to Cripple Creek and above the lands of applicants. That without said percolating waters created by said irrigation as aforesaid, said Cripple Creek would be as dry during the summer months as it was at the time your applicants acquired their property in the year 1930."

Field Investigation

The applicant and the protestants with the approval of the Department, having stipulated to the submittal of the application and protests upon the official records of the Department, a field investigation was conducted at the site of the proposed appropriation on April 14, 1953, by an engineer of the Division. The applicant and the protestants were present or represented during the investigation.

Records Relied Upon

Applications 14434, 14476, 14977 and all data and information on file therewith.

Information Secured by Field Investigation

Extracts from the report of field investigation of April 14, 1953, are as follows:

"The source under this application is Cripple Creek which heads near Orangevale in the rolling plains along the eastern edge of the Sacramento Valley and flows southwesterly to Arcade Creek.

"The creek has a watershed area of about 12 square miles above protestants' projects of which about 10 square miles are above applicant's diversion point.

"The watershed has an average annual rainfall of about 20 inches and a high percentage of it is under irrigation with water from wells and water brought in from the American River.

"Flow in the creek at the time of this investigation was about 0.75 cubic foot per second at applicant's place and about 1.00 cubic foot per second at protestants' places. The accretion was from an unnamed branch of the creek on which applicant filed Application 14406.

"Protestants agreed that there was normally little natural flow in the creek except during the rainy seasons and that normally natural flow ceased by August 1. All other flow results from runoff from upper irrigated areas within the watershed. This flow is continuous but fluctuating. In the past 3 years this flow has been increasing and it is anticipated that there will be a considerable further increase when water from Folsom Reservoir is delivered to the area.

"Applicant claims that, commencing in 1951, she has been pumping from the creek to irrigate the area covered by Application 14977 and has not injured protestants by

such action. In response to this claim protestants admitted that they had not been deprived of sufficient water by such action on her part. Under the circumstances, unappropriated water appears to be available.

"Use by the protestants is for stockwatering purposes only with a maximum of 100 head of cattle being served by each protestant. Based on normal requirements for range cattle the total indicated use by protestants is 3,000 gpd or approximately 0.005 cfs.

"Stock use is directly from the creek and protestants claim that considerable flow in excess of the actual cattle requirements is necessary to keep the water safe for use by the cattle."

* * *

"Applicant has installed a 7½ hp. centrifugal pump delivering into a sprinkler irrigation system ... used to irrigate 10 acres of alfalfa and a 0.5 acre truck garden.

"A smaller area is irrigated without the sprinkler and a maximum of 22 head of cattle are watered.

"It appeared to the writer that applicant's use did not and would not exceed 0.075 cfs. and it was suggested that the amount applied for be reduced to that amount. Mr. Srednik, however, stated that if the application was to be approved he would prefer that any adjustment to be made in the amount be made at time of license consideration."

* * *

"At the time of the field investigation on Applications 14434 and 14476 ... these same protestants withdrew their protests because applicants agreed to a special clause in their permits providing for the by-passing of 0.05 cfs. at all times to meet protestants' needs. They requested that a similar clause be used in connection with Application 14977 ... since protestants based their protests on riparian claims and since such claims did not attach to waste and foreign waters, Mr. Srednik would not agree to the use of the clause."

Related Filings

Other applications to appropriate from Cripple Creek (also called Arcade Creek) include the following:

Application 14365, Permit 8779, Roy W. Peterson, 3 acre-feet per annum to be collected between November 1 and April 1 from Arcade Creek at a point within the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 27, T10N R6E, MDB&M, and used for irrigation and recreation within the same quarter-quarter section.

Application 14406, Permit 8810, Maggie Muschetto, 0.48 cubic foot per second to be diverted from April 1 to November 1 from an unnamed stream tributary to Arcade Creek at a point within the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 22, T10N R6E, MDB&M, for irrigation.

Application 14434, Permit 9138, Roy W. Peterson, 0.25 cubic foot per second to be diverted from April 1 to November 1 from Arcade Creek at a point within the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 27, T10N R6E, MDB&M, for irrigation.

Application 14476, Permit 9164, Elso and Antje Luppens, 0.11 cubic feet per second, to be diverted from Cripple Creek at a point within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 22, T10N R6E, MDB&M, from April 1 to November 1, for irrigation and throughout the year as required for stockwatering.

Of the points of diversion of the several parties mentioned -- applicant, protestants and permittees -- Protestant C. F. Van Maren's point of diversion is lowermost. Channel distances upstream from that protestant's point of diversion to the Protestant Catherine Van Maren's

diversion and to the other diversions under Applications 14434, 14365, 14476, 14406 and 14977 are roughly 0.2, 0.5, 0.5, 0.9, 1.0 and 1.2 miles respectively.

Applications 14406 and 14365 were unopposed. Applications 14434 and 14476 were opposed by both of the Van Maren's but those protests were voluntarily withdrawn subsequent to a field visit in connection with those applications by an engineer of the Division on July 29, 1952. The memorandum (filed in the folder relating to Application 14434) covering the field visit mentioned contains, among others, the following statements:

"Present were R. W. Peterson, applicant, Guy P. Van Maren for Protestant Catherine Van Maren, C. F. Van Maren, protestant, and Maggie Muschetto and her husband, upstream applicants. Applicants E. Luppens, et al. were not present

"The Peterson place was first visited and thereafter the Luppens and Muschetto places.

"All present agreed that there was little natural flow after the rainy season was over, that summer flow was almost entirely runoff from irrigated areas within the watershed which are mainly irrigated from wells and that the flow was irregular but that there was some flow at all times.

"The flow, as measured at the Peterson diversion point, was 0.27 cfs. which was said to be a little above average for the time of year. The flow at the Luppens place was approximately the same.

"Protestants' present use is only for watering 30 head of cattle but as many as 100 have been served.

"After considerable discussion, and since applicants in each case propose irrigation by spray methods, protestants agreed to withdraw their protests if a special clause was placed in any permits issued providing for by-passing of 1 miner's inch for each protestant, total 2 m.i. or 0.05 cfs. at all times or the full flow of the stream, whichever

is least, and that Application 14434 be reduced to 0.25 cfs. and Application 14476 to 0.11 cfs. "

* * *

"Mr. Peterson and each of the Van Marens complained about Muschetto diverting from Arcade Creek on the ground that the Muschetto filing, Application 14406, was on an unnamed branch of the creek. Mr. Muschetto stated that if the application did not cover pumping from the place he was pumping a mistake in filing had been made. He stated that at the time of filing the pump had been installed and was in use at its present location and the application was supposed to cover it. The unnamed branch shown as being filed on is dry all summer

"The latest map of the area shows the name of the source to be Cripple Creek, tributary to Arcade Creek, instead of Arcade Creek, Arcade Creek being the next stream south.

"Applicant's land is also riparian and he also uses water for stock

"He was watering about 15 head of cattle at time of investigation."

Discussion

The amounts authorized under approved applications to divert from Cripple (Arcade) Creek from April 1 to November 1, below the applicant and above the protestants, are, as above stated, 0.25 cubic foot per second under Application 14434 Permit 9138 (Peterson) and 0.11 cubic foot per second under Application 14476 Permit 9164 (Luppens). These amounts total 0.36 cubic foot per second. In addition is to be considered the entitlement of the protestants Van Maren, probably not in excess of 0.05 cubic foot per second, that being the amount which if allowed by the applicant

to reach them would result in the withdrawal of the Van Maren protests. Applicant Muschetto therefore, in view of the apparent lack of accretions to that reach of the source during April, May, June and July, could not rightfully divert under Application 14977 (when the downstream rights are exercised) except when flow at her diversion point exceeds approximately 0.36 plus 0.05 or 0.41 cubic foot per second. According to the report of field investigation of April 14, 1953, mentioned in an earlier paragraph, flow at the applicant's place at the time of that investigation was about 0.75 cubic foot per second, hence unappropriated water evidently existed at that time. However, according to the memorandum of field visit of July 29, 1952, also mentioned in an earlier paragraph, flow at the Peterson diversion point was on that date 0.27 cubic foot per second. That amount is slightly less than enough to satisfy Application 14434 plus the entitlement of the protestants Van Maren, yet that amount was said to be a little above average for that time of year. These circumstances indicate that if rights under the approved applications are fully exercised and if return flow is no more than at present, little if any unappropriated water is apt to exist in the source under discussion in late July. Unappropriated water may of course exist at that season at times when the rights referred to are not exercised in full.

Information as to flow conditions during August, September and October is limited to the statements contained in the report of

the field investigation of April 14, 1953 to the effect that flow after August 1 results from runoff from irrigated lands, that such flow is continuous, fluctuating and expected to increase further and that unappropriated water appears to be available. If natural flow does not occur in the reach under discussion during August, September and October, as appears to be the case, and if runoff from irrigated lands was not present earlier than 1930 as the applicant alleges and the protestants do not deny, it is not apparent that the protestants can have any valid objection to the appropriation by the applicant of such flow as may now occur during those months.

The amount of water applied for evidently is in excess of the applicant's needs and should be reduced if the application is to be approved. In this connection the statement in the report of the field investigation of April 14, 1953 that the applicant's use did not and would not exceed 0.075 cubic foot per second warrants reduction to that figure. Postponement of adjustment in amount until time of license action, as desired by the applicant's attorney, does not appear to be in the public interest in view of the very small amount, if any, of unappropriated water existing in summer and fall in Arcade Creek.

The employment of a permit clause of the sort the protestants desire - a clause requiring the applicant to by-pass a definite amount at all times - appears unwarranted. In fairness, any such clause should

protect not only the protestants but also the permittees Peterson and Luppens. The protestants apparently require a steady supply but the permittees' requirements are apt to range from nothing to the capacity of their pumps. A clause specifying exactly how much the applicant shall by-pass at all times would be unduly restrictive both to the permittees and to the applicant. The rights of all users, including the protestants, are sufficiently protected in this situation by the provision in every permit to the effect that the exercise thereof is subject to vested rights.

Summary and Conclusions

The applicant seeks to appropriate 0.125 cubic foot per second from Cripple Creek, in Sacramento County, from April 1 to November 1, for the irrigation of 10.5 acres and the watering of 22 head of cattle, diversion to be by pumping and distribution by portable sprinkling system. The project is already in operation.

The application is protested by two parties who assertedly use water for stockwatering at points some 1.0 and 1.2 miles downstream and state that their protests may be disregarded if applicant will agree to pass downstream 0.025 cubic foot per second to each of them from March 1 to the beginning of adequate rainfall. The protestants claim riparian rights and use since 1863.

The flow of Cripple Creek was estimated to be 0.75 cubic foot per second on April 14, 1953 at the applicant's intake and 0.27

cubic foot per second on July 29, 1952 at a point about 0.7 mile below the applicant's intake. At about 0.2 mile below the applicant's intake Permittees Luppens may divert 0.11 cubic foot per second, and about 0.5 mile farther downstream Permittee Peterson may divert 0.25 cubic foot per second. The estimated flow on April 14, 1953 was more than enough and that on July 29, 1952 was about enough to accommodate all of the parties concerned, below the points of measurement. No measurements of flow in other months are at hand. After August 1 the flow is said to be composed entirely of return flow from upstream irrigation. Such flow is said to be continuous, fluctuating and expected to increase. The field investigator gathered that unappropriated water, in small quantities, probably exists.

Field investigation on April 14, 1953 disclosed that use of water by the applicant did not and would not exceed 0.075 cubic foot per second. The amount of the appropriation should therefore be reduced from 0.125 to 0.075 cubic foot per second. In view of the probably small residue of unappropriated water during irrigation months the reduction in amount should be made in any permit issued.

In view of the circumstances summarized it is the opinion of this office that the application should be approved, subject to the usual terms and conditions, but with diversions thereunder limited in amount to 0.075 cubic foot per second.

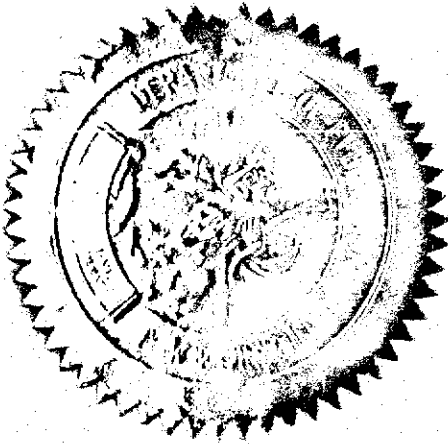
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ORDER

Application 14977 for a permit to appropriate water having been filed with the Division of Water Resources as above stated, protests having been filed, a field investigation having been conducted and the State Engineer now being fully informed in the premises:

IT IS HEREBY ORDERED that Application 14977 be approved except as to amount and that a permit in the reduced amount of 0.075 cubic foot per second 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 12th day of March, 1954.



A. D. Edmonston
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State Engineer