

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 14998 by William E. Smith to Appropriate Water from Mescal Spring Tributary to Ivanpah Valley in San Bernardino County for Domestic Purposes.

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Decision A 14998 D 819

Decided January 24, 1955

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Appearances at Hearing Held at Los Angeles on April 19, 1954

For the Applicant

William E. Smith

In propria persona

For the Protestant

Nowland MacFarlane

Martin Forrest, Attorney at Law

EXAMINER - L. C. JOPSON, Principal Hydraulic Engineer, Division of Water Resources, Department of Public Works, for A. D. Edmonston, State Engineer.

Assistant to Examiner - J. J. Heacock, Senior Hydraulic Engineer, Division of Water Resources.

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OPINION

General Description of the Project

The applicant seeks to appropriate 600 gallons per day, year-round, from a source designated as Mescal Spring, tributary to Ivanpah Valley in San Bernardino County. The spring is described as being

located within the SW $\frac{1}{4}$ of NE $\frac{1}{4}$ of Section 24, T16N R13E, SBB&M. Diversion is to be by gravity, the conduit a pipe 2 inches in diameter, 100 feet long. The water is wanted for domestic purposes at a place of use described as "four houses with seven permanent residents, garage, cafe, service station", located within the SE $\frac{1}{4}$ of Section 23, T16N R14E, SBB&M. The applicant states that he owns the place of use but not the land at the proposed point of diversion. A supplement to the application contains the following statement:

"I had been using the water from Mescal Spring periodically since 1946 up to 1949, then I started using it regularly up to July 31, 1952, and I was informed then by Mr. Baily of the Molybdenum Corporation that I was not to get any more water from the spring, and he informed my wife and me that we were not to get any more water. I was sent a registered letter by N. MacFarlane, M.D. ... that he was leasing this water to the Molybdenum Corporation and that for a future supply of water I would have to see the said Corporation. After this happened I checked and the information as it appears in the Tax Assessor's office is that they have no right to claim the water. I had paid Mr. MacFarlane \$6.00 per month with the understanding that he was to put in a new pipe line from the spring with the money we paid the last six months to him and then I paid to the Molybdenum Corporation \$6.00 per month from January 1 to July 31, 1952, at which time I was cut off."

Protest

The application is protested by Nowland MacFarlane, M.D.

The protest contains, among others, the following passages:

"I, NOWLAND MacFARLANE, M.D., ... have read carefully a notice relative to Application 14998 of William E. Smith to appropriate from the Mollusk Millsite Well, which is erroneously described and alleged in the application as Mescal Spring

"The proposed appropriation would constitute a trespass upon my privately owned lands, access to which is denied applicant. Said lands have been owned by me and my predecessors in interest ... since 1878, and were

patented to me by the United States Government in 1911, and are no longer a part of the public domain. It would also be an unwarranted infringement of my rights to the water of the Mollusk Millsite Well. Said source of water is in fact a well developed by my uncle in 1882, as there is no water percolating naturally to the surface at the alleged point of diversion. The underground source of the water is not a subterranean stream flowing through known and definite channels. The well is not tributary to Ivanpah Valley. I am the overlying owner, and no surplus water is available for appropriation.

"Protestant claims a right to the use of water from the source which applicant proposed to divert, which right is based upon ownership of the overlying land by patent from the United States dated October 12, 1911 and by appropriation of such water by protestant and his predecessors in interest continuously since 1882.

"Since 1882, protestant, his predecessors in interest, and their permissive users have continuously required the water from the well at Mollusk Millsite. Protestant personally uses water therefrom for domestic purposes in a house adjacent to the well and for the watering of trees and vegetation nearby. In addition protestant has, for a number of years last past, granted permission to various persons to enter upon protestant's lands and take water therefrom for use in nearby premises. Applicant, William E. Smith, from time to time, was permitted by protestant to take water from the well and said William E. Smith paid protestant for such privilege. At the present time, and for some months last past, the land upon which the Mollusk Millsite well is located is leased to Molybdenum Corporation of America, which uses all of the water in connection with its nearby Mountain Pass mine and mill and associated dwellings and buildings.

"No diversion takes place at the site of Mollusk Millsite well, or elsewhere.

"Protestant is the owner of the land upon which the alleged point of diversion exists, and applicant has no right of access thereto.

"The water sought to be appropriated is not surface water nor a subterranean stream flowing through known and definite channels, and the Division of Water Resources has no jurisdiction to grant a permit as to such water.

"Protestant is entitled to the water as the overlying owner and he and his predecessors have appropriated the same continuously since 1882.

"By United States Patent No. Independence 01360, dated October 12, 1911, the Mollusk lode mining and Mollusk Millsite claims (upon which millsite claim is located the Mollusk Millsite well) were patented to protestant, Nowland MacFarlane. The mining claims were developed as a silver mine and the millsite was patented for use in connection with the mine because water could be made available thereon. Although applicant erroneously designates the source of water as the Mescal spring, instead of Mollusk Millsite well, the source of which water was below the surface of the land and it was necessary for protestant's uncle to excavate a tunnel to gravitate the water from the well site to the mill, both of which were located on Mollusk Millsite. Since that time this source of water, which was developed by protestant's uncle, has been used continuously by protestant, his predecessors in interest, and their licensees and lessees. For a considerable period of time the water was used in connection with the operations of the silver mine, operated upon the property here in question. When the silver mine suspended operation, protestant continued in use the premises as a vacation site, using the water from the well for domestic purposes in connection with a dwelling or cabin on the site and for the watering of trees and other vegetation nearby. At the present time, and for some months last past, the patented Mollusk Millsite claim has been leased to Molybdenum Corporation of America"

Answer

In answer to the protest the applicant stated:

"I do hereby, as listed:

Request proof of the legal and lawful owner or owners of said land in my application

Request a field investigation on the location of Mescal Springs and the said Mollusk Well.

Request the investigation be made as to the protestant's right to any past, present or future use of said water.

Request that a field investigation be made

Request a hearing

Request that access and right of way be granted to
the Mescal Springs

A true and duplicate copy ... has been served"

Hearing Held in Accordance with the Water Code

Application 14998 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 the California Administrative Code, Title 23, Waters, on April 19, 1954 at 1:30 o'clock p.m., in Room 803, State Building, Los Angeles, California. Of the hearing the applicant and the protestant were duly notified.

Hearing Testimony

The substance of the testimony at the hearing of April 19, 1954, was as follows:

William E. Smith, the applicant, testified (pages 6 to 35 of transcript) to the effect that the water he seeks to appropriate is to be taken from a filler standpipe located near Mescal Spring, that when the application was filed there was a two-inch standpipe near the spring, that it took approximately 20 minutes to fill a 600 gallon tank, that the standpipe was used by various persons of the vicinity for the supply of service stations, that "we" had been obtaining water in the manner stated since

1922, that the standpipe was equipped with a valve, that his interests at Desert City include a garage, service station, grocery store, cafe, home, that he drilled a well on his property in August 1953 to a depth of 544 feet, that the well produces 4 gallons per minute, that the water is pumped into a 4200 gallon tank, that the tank is generally about half full, that he uses or sells to tourists all the water obtained from the well, that he would use more water if he had it for purposes such as watering shade trees, that water was available at the standpipe when he filed Application 14998, for several years before that time and for some time afterward, when someone destroyed the "box" and "the pipe that was in the spring".

William C. Sterling, testified (pages 35 to 50 of transcript) to the effect that he lives at the Mollusk Mine, that he is employed by the Molybdenum Company of America as an electrician, that he has been so employed for three years, that he has lived at the Mollusk Mine about eight months, that there is no water on the MacFarlane property now, that there is a tunnel on the Mollusk millsite, that the tunnel extends about 150 feet into the hill, that at the end of the tunnel there is an open mine shaft, that when he visited the tunnel (about 6 months before the hearing) both tunnel and shaft were dry, that there is another tunnel and well "on the other side" belonging to the Molybdenum Company, that he believes the Molybdenum Company well lowers the water table and dries up the MacFarlane well, that the millsite is surrounded by barbed wire

fence, that there is a gate at the entrance, that the gate is closed sometimes but not always, that the well is about three-quarters of a mile up the canyon from the gate, that he (the witness) hauls his own water from the mine, that he depends upon that source of supply indefinitely, that the Molybdenum Corporation is on the other side of the hill from the Mollusk millsite, that the Molybdenum Corporation pumps its water "out of the shafts that they have over there", that the pipe from which Applicant Smith obtained water headed at a wooden box about 300 feet from the concrete bulkhead at the tunnel, that there is still a valve at the end of the pipe line but that the standpipe was removed when the Molybdenum Company leased the MacFarlane property, that the valve is on the Mollusk mining claim inside the fence.

Nowland MacFarlane, testified (pages 51 to 80 of transcript) to the effect that he owns the property described in the patent in evidence and has paid taxes on it continuously, that he first visited the property in 1895, that he is 77 years old, that in 1895 the claims belonged to a company of which Dan MacFarlane was part owner, that his (the witness') father in 1878 bought an interest in the properties now called Mollusk, that in 1882 his (the witness') mother sold her interest (her husband having died) to W. A. MacFarlane (witness' uncle) and one Charles Loomis, that the new owners developed the mine, then sold it, that just prior to selling they dug the well which is still there, that the well is about 150 feet from the mouth of the tunnel,

to the north, that the well was sunk and used as a well, that they used a windlass to lift water from the well, that when they erected the mill, prior to 1895, "my uncle drove the tunnel in to connect with the well so that they would have a greater flow; drove this tunnel in 150 feet, and they tapped this well", that he observed that condition in about 1895, that the grade of the tunnel is upward from entrance to well, that on the other side of the hill from Mollusk Mine there is another well dug by witness' uncle in the early 80's, that water was obtained from the well by windlass, that his well now is totally dry, that he visits the Mollusk mining property frequently with his family for pleasure purposes, that that property is fenced, the location of the fence conforming to the mineral survey monuments, that the fence was built about 20 years ago, that the well is on the millsite property, that the well never produced 600 gallons per 20 minutes, that it produced not over 2,500 gallons in 24 hours, that he had an arrangement with the Molybdenum Corporation of America for use of water from the well by the latter, that the arrangement was terminated in August 1953, that the Corporation did not get as much water as it had expected and therefore drilled a well on Ivanpah Dry Lake, near Desert City, that the well on his property was actually a well, not a spring, that the water was needed and used at the mill which was a silver mill, that the mill produced in all about a quarter of a million dollars, that he has never previously seen Applicant Smith but once wrote him a letter directing him not to take any more water from his (the witness') well, that he sold water to

people who used it commercially, that when the mill was running it required all the water available, that the yield of the well was not quite enough, that after the mill ceased operating the well was used for watering native vegetation and for watering cattle and to supply anyone who wanted water for domestic purposes and later for supply to the Molybdenum Corporation, that the well was never dry until recently, that the yield fluctuated some but usually ran about 2,500 gallons per day, that the road into his property was always a private road, never a county road, that when people wanted water for commercial purposes it was his habit to charge them for it.

Hearing Exhibits

Applicant's Exhibit A: Purported copy of patent to Mollusk Lode Mining and Mollusk Millsite claims, dated October 12, 1911.

Applicant's Exhibit B: Receipt and canceled check indicating payment on November 27, 1951, by William E. Smith to John McFarlane for water from Mollusk Well.

Protestant's Exhibit A: Photograph of tunnel outlet.

Protestant's Exhibit B: Purported copy of patent issued to Nowland MacFarlane, October 12, 1911.

Protestant's Exhibit C: Six tax certificates relating to Mollusk Mine and Mollusk Millsite.

Motion for Dismissal

Upon conclusion of the applicant's presentation of his case protestant's counsel moved for a dismissal, arguing that no evidence had been introduced in proof of the issues raised by the application. The Examiner indicated that the motion for dismissal would be considered at time of review of record.

Other Available Information

A memorandum dated September 14, 1953, covering observations by an engineer of the Division during a visit to the protestant's property on September 8, 1953, in company with Applicant Smith, contains statements as follows:

"The spring is at the toe of the right bank of a ravine on the northeasterly slopes of the Mescal Range of the Ivanpah Mountains and the drainage area is tributary to the Ivanpah Valley, to the east."

"The general drainage in the area is to the northeast, with the ground sloping away from the spring with a fall of 300 or 400 feet per mile; to the southwest the grade steepens gradually for about one-half mile thence rises abruptly to the top of the Mescal Range. A granitic dike, striking about north 45 degrees west cuts through the area, and Mescal Spring emits from the lower side of this dike. Four photographs are attached that show the general conditions and character of the area."

"The spring has been developed by two short tunnels; the lower one is at about the bottom of and roughly parallels the ravine, it is about three feet wide by five feet high by 12 feet long. A concrete bulkhead about four feet wide by four feet high has been constructed across the adit, with a 2" pipe through the bottom for outlet. The other tunnel is a small coyote hole at about the top of the bulkhead and is five or six feet long. Until very recently a pipe-line led about 200 feet to a standpipe."

"Approximately 200 feet up the ravine is an old mine shaft, about six feet square and of unknown depth. Water was standing in the shaft at about the same level as the spring, or 25 or 30 feet below the ground surface."

"There is no visible connection between the spring and the shaft, and Mr. Smith did not know of any underground connection."

"At the time of the visit there was not enough flow of water to measure. ... W. S. P. 450 gave the flow as about 8600 gpd prior to 1919. Mr Smith stated that in the late summer of both 1951 and 1952, he was hauling six 600-gallon loads per day from the spring, and three or four other parties were hauling about the same amount, showing a production of over 7000 gpd."

It appears that the source is a spring, and a formal hearing will be necessary"

Discussion

The source filed upon, called Mescal Spring in the application, appears to be the same source that Protestant MacFarlane called Mollusk Millsite Well in his protest and in his testimony, that Witness Sterling called a tunnel on the Mollusk millsite and that is referred to as "the spring" in the memorandum covering the visit by an engineer of the Division to the project on September 8, 1953.

That source, according to the evidence, yielded substantially for several years but has stopped flowing and may or may not resume. In that connection the applicant testified that he and/or others obtained water from it from 1922 to 1952; the protestant testified that use commenced prior to 1895, that for some months prior to the hearing the

land upon which the source is located was under lease to the Molybdenum Corporation which used all the water it could get, for mining purposes, that the arrangement with the Molybdenum Corporation was terminated in August, 1953, that at present (at time of hearing) the well is totally dry; Witness Sterling testified that there is no water "now" on the MacFarlane property, that he believes that the Molybdenum Corporation operations dry up the MacFarlane well; the engineer who visited the site on September 8, 1953 reported that the flow from the spring was not enough to measure.

A prerequisite to the issuance of a permit to appropriate water is that unappropriated water must be available. In the case at issue evidence is lacking that there is any yield at all, currently, from the source filed upon, that yield therefrom will be resumed, or that such yield as may occur in future falls properly within the category of unappropriated water.

Summary and Conclusion

The applicant seeks to appropriate 600 gallons per day, year-round, from a source designated as Mescal Spring, in San Bernardino County, for domestic purposes.

The application is protested by one Nowland MacFarlane, M.D. who asserts in effect that the source filed upon is actually the Mollusk Millsite Well, located upon land which he owns, that the water that has issued from the well has been beneficially used, that none of it is

unappropriated, that the applicant has no right of access, that protestant is entitled to such water as issued from the spring both as overlying owner and as appropriator, continuously, since 1882, that the Division is without jurisdiction over the issues involved, that the Mollusk Millsite is under lease (as of date of protest) to Molybdenum Corporation of America.

In answer to the protest the applicant questions the legality of the protestant's claim of ownership of the source, requests both field investigation and hearing, requests that he be granted right of access to Mescal Spring.

The matter of Application 14998 was investigated by an engineer of the Division on September 8, 1953; it was heard at Los Angeles on April 19, 1954. The investigator reported that the source appears to be a spring, that its yield at time of investigation was immeasurably small. At the hearing the applicant testified that he and others had been obtaining water from the spring since 1922, that the spring was equipped with a standpipe, that his interests include a garage, service station, store, cafe, home, that he has a well that produces 4 gallons per minute, that that amount is not enough, that subsequent to filing Application 14998 the facilities for obtaining water at the spring were destroyed; Witness Sterling, an employee of Molybdenum Corporation, testified that there is no water now on the MacFarlane property, that he believes that a certain well belonging

to the Molybdenum Company (Corporation) dries up the MacFarlane well, that the Mollusk Millsite is fenced, that there is an entrance gate which is sometimes closed, sometimes open, that there is still a valve at the end of the pipeline, that the standpipe was removed when the Molybdenum Company leased the MacFarlane property; Protestant MacFarlane testified that he has known the Mollusk properties since 1895, that the well was in existence prior to that time, that there is another well on the other side of the hill from Mollusk Mine, that his own well is now totally dry, that the fence around the millsite property was built 20 years ago, that the well used to produce about 2500 gallons per day, that he had an arrangement with the Molybdenum Corporation of America as to use of water from the well by that concern, that the arrangement was terminated in August, 1953, that a silver mill once operated on the property and required all the water available, that after the mill ceased operating the water from the well was used for watering native vegetation, for watering livestock and for supplying water for domestic purposes, that the road into his property is a private road, that when people wanted water for commercial purposes it was his practice to charge them for it.

The circumstances in the matter at issue point to the conclusion that unappropriated water in the source filed upon by the applicant is non-existent. Both at the time of the field investigation and at the time of the hearing there appears to have been no

yield from that source at all. Should the source recover and yield water again it may be presumed that such yield will be utilized beneficially by the protestant as the testimony indicates that it has been in the past. Because of the apparent non-existence of unappropriated water it is the opinion of this office that Application 14998 should be denied.

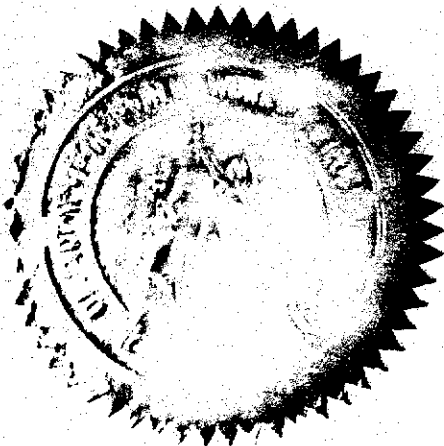
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ORDER

Application 14998 for a permit to appropriate water having been filed with the Division of Water Resources as above stated, a protest having been filed, a hearing having been held and the State Engineer now being fully informed in the premises:

IT IS HEREBY ORDERED that Application 14998 be rejected and canceled 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 24th day of January, 1955.



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