

IN THE MATTER OF APPLICATION NO. 12161)
IN NAME OF W. F. SAUER TO APPROPRIATE :
THE WATERS OF AN UNNAMED SPRING IN : RULING
WASHOE COUNTY, NEVADA.)

Application No. 12161 was filed January 8, 1948 by W. F. Sauer to appropriate 0.04 c.f.s. of the waters from an Unnamed Spring located in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ Section 4, T. 16 N., R. 19 E. The water is to be used for domestic purposes on 6.5 acres of land owned by the applicant and located within the NW $\frac{1}{4}$ NW $\frac{1}{4}$ Section 10, T. 16 N., R. 19 E. On May 12, 1948 the said application was protested by R. F. I. Raymond.

On October 8, 1948 Mr. J. A. Millar, Field Engineer, made a field investigation on this application. Mr. Millar was accompanied by Robert Guinn, representative of Protestant Raymond, and Mr. M. A. Diskin, Attorney for Protestant, and Mr. Sauer, the Applicant. On March 16, 1949 a hearing was held at the office of State Engineer. Appearances were as follows:

For the State Engineer - Hugh A. Shanberger,
Assistant State Engineer.
J. A. Millar,
Field Engineer.

For the Applicant: - W. F. Sauer, Applicant.

For the Protestant: - R. F. I. Raymond, Protestant.
M. A. Diskin, Attorney.
Robert Guinn, Engineer & Witness.
George Pettic, Witness.
Henry Anderson, Witness.

The protest of Mr. Raymond is based on the grounds that (1) the applicant has never at any time appropriated or applied to beneficial use any of the waters of said spring and (2) that protestant has been the sole appropriator of all the waters of said spring for more than five years last past and has applied same to beneficial use, and by reason thereof has a vested right to all the waters of said spring.

The history leading up to the present controversy is about as follows: On December 4, 1941, William F. Sauer, (applicant in this case) together with his wife, Alice E. Sauer, Frank J. Sauer, and Viola M. Sauer, deeded to Raymond Frank Isles Raymond and his wife, Edith Young Raymond, a certain parcel of land containing 380 acres, more or less, together with appurtenances, etc. including all water rights, ditches and ditch rights. Mr. Sauer, et al, in said deed excepted therefrom a tract of land containing

6.5 acres, more or less, but not reserving any Franktown Creek water for irrigation, it being understood and agreed that said reserved tract of land has never been irrigated and that no water rights are appurtenant thereto.

Mr. Sauer, the Applicant, lives on the 6.5 acres of land excepted from the transfer to protestant. He now seeks, by means of Application No. 12161, to appropriate water for domestic use only. In the above mentioned deed he expressly stated that no water rights were appurtenant to the 6.5 acre tract. By this he no doubt meant that no vested water rights existed on this land. Having no present water right, he now seeks to acquire by means of this application, a new water right for domestic use. As we view the situation, this is his only recourse, and the whole question is dependant upon whether or not the source of water applied for contains unappropriated water.

The extent of the water rights owned by Mr. R. F. I. Raymond and appurtenant to the 280 acres of land is limited to the extent of such water rights that were owned by his predecessors, W. F. Sauer and others, on such lands, all of which rights were conveyed by the heretofore mentioned deed dated November 4, 1941.

It appears to us that the whole question involves as to whether or not the water applied for is a part of the waters of Franktown Creek. If so, such water would be vested in Protestant R. F. I. Raymond. On the other hand, if the waters applied for were not tributary to Franktown Creek, such waters could in this instance, be construed as being unappropriated and subject to appropriation.

As a result of the hearing held on March 16, 1949, and field investigation on October 8, 1948 and June 9, 1949, the various physical factors involved appear to be about as follows:

The water source consists of a spring that rises in a canyon and which is located several hundred feet northorly of a point where the channel carrying the water crosses the road that goes up Franktown Creek Canyon. The proposed point of diversion is near this road crossing. The road going up Franktown Creek Canyon was constructed in about 1918 and at the time the Ryter power plant was constructed on Franktown Creek. Prior to this road construction, the water under consideration no doubt flowed down a natural channel into the Dahl ditch which takes out of Franktown Creek a few feet above. Following the construction of the road, the water was conveyed across the road by a culvert and then instead of allowing it to flow directly down a rather steep slope to the Dahl ditch, was conveyed alongside of the road about 40 feet and then dropped down the slope to a small flat area. This ditch is plainly evident for about 100 feet from the road crossing but in the remainder of the distance to the Dahl ditch, about 75 feet, no sign of any ditch is discernible. Over

this area there is a heavy growth of brush and fallen trees.

Following the purchase of the property by Mr. Raymond and in about 1944 or 1945, he constructed a wood "V" shaped flume that picks up the water right after it crosses the road and empties into the Dahl ditch. This flume is about 120 feet long. Right above the point where this water reaches the Dahl ditch is a concrete diversion box which divides the waters of Franktown Creek between Mr. Raymond and the Jackson property, Mr. Raymond receiving one-fourth of the flow.

The Dahl ditch was constructed in about 1870 and there is no doubt in our mind but where thereafter the spring water applied for by Mr. Sauer supplemented the water in the Dahl ditch. It is our belief that the ditch constructed after the road was built conveyed the water to the Dahl ditch. This ditch has not been used since Mr. Raymond put the flume in. Appearances would indicate that there had been no maintenance for a number of years, even perhaps prior to the flume construction. Mr. Sauer stated that he made no physical effort to gain any benefits from this water during the period he owned the property. No doubt it was during this period and since the time Mr. Raymond constructed the flume the last 75 feet of the ditch has been covered up by erosion action.

On June 9, 1949 the flow from this source measured 60 gallons per minute. This stream is typical of streams formed by mountain springs and fed by snow water. The maximum flow usually occurs in April and May and then decreases until summer time when there is probably no flow. In this respect, the flow of Franktown Creek is similar. In most years during June and July there is a deficiency of water flowing in Franktown Creek for present irrigated lands. The flow of water from the source applied for, small as it may be, adds just that much to the Franktown Creek water and therefore would ordinarily not be wasted.

Subsequent to the construction of the flume, full use has been made of this water by Mr. Raymond. Prior to that time and with the ditch in its present condition, the beneficial use was partial. However, we feel that this water has to some extent always been tributary to Franktown Creek water and such right of use was conveyed from Mr. Sauer to Mr. Raymond. Any diversion from such source as contemplated under Application No. 12161 would effect the amount of water reaching the Dahl ditch and therefore would be detrimental to the rights of Mr. Raymond.

It is therefore the opinion of the State Engineer that the protest of R. F. I. Raymond should be sustained and Application No. 12161 denied on the grounds that the granting thereof would be detrimental to existing rights.

Respectfully submitted,

ALFRED MERRITT SMITH
State Engineer

Dated this 6th day of July, 1949.

