

BEFORE THE STATE ENGINEER OF THE STATE OF OREGON

Marion County.

IN THE MATTER OF THE PROTEST OF )  
THE G. A. MILLER DRAINAGE DISTRICT )  
AGAINST THE APPROVAL OF APPLICATION )  
NO. 10686, BY M. W. MAHONEY. )  
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O R D E R

Now, at this time, this matter coming on for consideration by the State Engineer, on the application and objections filed by the above parties, full hearing having been had, testimony taken, and briefs submitted by the attorneys for the respective parties, the facts appearing as follows:

On April 1, 1926, M. W. Mahoney filed Application No. 10686 with the State Engineer for permit to appropriate the waters of "Mission Creek";

On the 12th day of May, 1926, objections against the approval of said application were filed by the G. A. Miller Drainage District, alleging that said District is the owner of an artificial canal or channel constructed by it for the purpose of drainage, which channel is the "Mission Creek" referred to in the application of Mr. Mahoney, and that the water flowing therein is subject exclusively to control and regulation by said District;

On the 12th day of May, 1926, the G. A. Miller Drainage District filed application No. 10767 with the State Engineer for permit to appropriate water from said canal or drainage district for irrigation purposes.

The G. A. Miller Drainage District was organized in 1915 by several land owners, including Mr. Mahoney, for the purpose of constructing a canal to improve the drainage conditions along a more or less well defined channel. The testimony is not clear as to the conditions exist-

ing prior to the construction of the drainage canal, but it appears that the area included in the District contained some low, flat, swampy land that drained naturally in two directions, one part going south into the Willamette River directly, and the other following a natural depression or swale obstructed by beaver dams, and thence in a well defined channel northward into the Willamette River.

The canal was constructed soon after the organization of the District and thereafter operated as a drainage ditch by the District up to the time that M. W. Mahoney applied to the State Engineer for a permit to appropriate water flowing in the canal for the irrigation of his own land. It was the policy of the District to allow the individuals through which the canal flowed to place dams in the canal regulating the extent of the drainage through their individual farms so long as the obstructions did not interfere with the drainage of the lands of the next owner above. Removable dams were placed in the canal holding the water up during the summer time and causing it to sub-irrigate the adjoining lands. The dams were removed at times, usually at the request of the District, and by the individuals who had placed them in the canal, and the water allowed to flow through the District into channels leading to the Willamette River. The District's application for permit contemplates the use of the water flowing in the drainage canal for the irrigation of all of the lands irrigable within the District, including those of M. W. Mahoney.

Counsel for the Drainage District maintains that the canal is the property of the District and that the water flowing therein is not subject to general appropriation. The record does not show that the District owns title to the land on which the drainage canal is located; rather, it implies that the District merely owns an easement or right of way entitling it to maintain the canal and carry the

drainage water across the lands, the title to which is in the individual land owners in the District.

All water within the State from all sources of water supply belongs to the public. (Section 5715, Oregon Laws) Such water may be appropriated for beneficial use as provided in the water code and not otherwise. (Section 5716, Oregon Laws) It shall be the duty of the State Engineer to approve all applications made in proper form which contemplate the application of water to a beneficial use, but when the proposed use conflicts with determined rights, or is a menace to the safety and welfare of the public, it shall be the duty of the State Engineer to enter an order directing the refusal of such application, if, after full hearing, the public interest demands. (Section 5723, Oregon Laws)

The water flowing in the drainage canal is not the property of the Drainage District.

The District's right to control the flow of water so as to prevent it from damaging adjoining lands is unquestioned, and it probably has the right to operate the canal in a manner that would control the extent of the drainage so long as the water is not consumed, or so long as the flow of water is not decreased below the amount that would have flowed under natural conditions, such as existed prior to the construction of the drainage works.

It appears that the swale or slough constituted a natural water course and that the construction of the drainage canal was more in the nature of a channel improvement which caused the water to drain with more rapidity. The water was subject to appropriation before the construction of the drainage canal, and the District at the time of its organization entertained no thought of irrigating the land. The necessity of using water for the irrigation of lands in the district

did not occur to the land owners until after the canal had been in operation some years, and even then no move was made to comply with the law governing the appropriation of water for such purposes.

It does not appear that the approval of the Mahoney application is a menace to the safety or welfare of the public, or that it conflicts with determined rights. Its approval will only give Mahoney a prior right to use the water in the canal, which other individuals in the District desire to use also. The State Engineer can find no authority for denying the approval of the application, and it is therefore ORDERED that the permit be issued, as requested, with the exception that the quantity of water be limited to the use of 0.82 cubic feet per second.

Dated this 30th day of October, 1926, at Salem, Oregon.

  
RHEA LUPER  
State Engineer.