

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

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In the Matter of Revocation of Permit 3281 heretofore issued upon Application 5984 of Bart Sweeney, allowing the appropriation of ten cubic feet per second from Logan Canyon, tributary to South Yuba River in Nevada County for Mining Purposes and in the matter of Application 6776 of Blue Lead Consolidated Mining Company to appropriate from said Logan Canyon for Mining Purposes.

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DECISION A 5984, 6776 D 324

Decided

*July 13, 1932*

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APPEARANCES AT HEARING HELD AT SACRAMENTO, APRIL 1, 1931, and RECONVENED AND CONTINUED TO SEPTEMBER 28, 1931.

For Permittee and Protestant

Bart Sweeney

E. H. Armstrong

For Applicant

Blue Lead Consolidated Mining Company

Francis Dunn

EXAMINER: Everett N. Bryan, Supervising Hydraulic Engineer, for Harold Conkling, Deputy in Charge of Water Rights, Division of Water Resources, Department of Public Works, State of California.

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O P I N I O N

GENERAL DESCRIPTION OF PROJECTS

On July 1, 1929, Application 5984 of Bart Sweeney was approved after hearing and Permit 3281 issued for an amount of water not to exceed 10 cubic feet per second to be diverted throughout the year from Logan Canyon at a point within the NE $\frac{1}{4}$  of NE $\frac{1}{4}$  of Section 4, T 17 N, R 10 E,

M.D.B.&M. to be used for mining purposes at the "Morning Glory Placer Mines" within the fractional eastern portion of the SE $\frac{1}{4}$  of SE $\frac{1}{4}$  of Section 4, T 17 N, R 10 E, M.D.B.&M. Relative to right of access the applicant stated that the consent of the owner had been obtained. According to the terms of the permit actual construction work was to commence on or before October 1, 1929, to be completed on or before December 1, 1930, and the water applied to beneficial use on or before December 1, 1931.

Consolidated

On August 23, 1930, Application 6776 of Blue Lead/Mining Company was filed seeking to appropriate two cubic feet per second of the waters of Logan Canyon to be diverted at a point within the NE $\frac{1}{4}$  of NE $\frac{1}{4}$  of Section 4, T 17 N, R 10 E, M.D.B.&M. (which point was identical with the point of diversion described in Application 5984, Permit 3281) to be diverted throughout the year for mining purposes within the NE $\frac{1}{4}$  of SE $\frac{1}{4}$  of Section 4, T 17 N, R 10 E, M.D.B.&M. The water will be returned to Logan Creek after use within the NE $\frac{1}{4}$  of SE $\frac{1}{4}$  of said Section 4. Applicant states that right of access was held under option. The application was protested by Bart Sweeney.

#### PROTESTS

As Bart Sweeney was unable to complete his construction work within the specified time, on November 6, 1930, an extension of time was requested which request was protested by the Blue Lead Consolidated Mining Company which claimed that Sweeney's point of diversion and a large portion of his conduit system were upon the Company's lands and therefore permittee was not in a position to proceed with the development.

Mr. Sweeney on the other hand protested the approval of Application 6776 of the Blue Lead Consolidated Mining Company on the grounds that the Company had no right to divert water at his point of diversion thereby

interfering with his prior right under Application 5984, Permit 3281.

HEARINGS SET IN ACCORDANCE WITH SECTION 1a  
AND SECTION 20 OF THE WATER COMMISSION ACT

Application 6776 of Blue Lead Consolidated Mining Company was completed in accordance with the Water Commission Act and the requirements of the Rules and Regulations of the Division of Water Resources, and being protested was set for hearing in accordance with Section 1a of the Water Commission Act on April 1, 1931, at 10:00 o'clock A.M. in Room 401 Public Works Building, Sacramento, and reconvened and continued on September 28, 1931.

The request for an extension of time to complete construction work under Application 5984, Permit 3281 of Bart Sweeney having been protested by the Blue Lead Consolidated Mining Company and it appearing that the permittee had failed to comply with the terms and conditions of the permit, Application 5984, Permit 3281 was also set for public hearing on the same dates and at the same place in accordance with Section 20 of the Water Commission Act.

Of these hearings applicant, permittee and protestants were duly notified.

GENERAL DISCUSSION

At the hearing held on April 1, 1931, it appeared from the testimony submitted that a decision in the matter depended upon determination of the ownership of the ditch and of the land at the point of diversion rather than upon a determination of the existence or otherwise of unappropriated water. Therefore as court action appeared necessary and probable a continuance of ninety days was taken within which to allow the parties at interest to institute suit for the purpose of determining the ownership of the ditch and point of diversion.

There was the injunction to the parties at this time that if such action was not instituted within the specified time and actively pressed thereafter, the hearing would be continued at the first convenient opportunity thereafter. At the termination of the ninety day period a further continuance of sixty days was granted. At the expiration of the extended time, no action having been initiated by either of the interested parties the hearing was reconvened on September 28, 1931.

Considerable testimony was presented at the hearing relative to the matter of right of way and ownership of the lands in question but as the decision hereafter is based upon subsequent court action it is not deemed necessary to discuss the arguments presented. Suffice it to say that at the close of the hearing we were still further convinced that the question was one that this office was without jurisdiction to decide and one which should properly be decided by the courts.

On October 3, 1931, five days subsequent to the reconvened hearing Bart Sweeney instituted suit in the superior court of Nevada County to enjoin the Blue Lead Consolidated Mining Company from interfering with his diversion works and use of water and his attorney advised this office to the effect that should the suit be lost, Mr. Sweeney would not be in a position to further contest the matter and this office might then issue permit to the Blue Lead Consolidated Mining Company. Action has been withheld in the matter by this office pending the outcome of this litigation.

On March 9, 1932, Judge Tuttle of the Superior Court of Nevada County entered a decree quieting title in favor of Blue Lead Consolidated Mining Company as lessee of one C. E. Landsburg to those certain lands upon which the point of diversion common to both applications is located and

ordered, adjudged, and decreed that plaintiff was not entitled to the use of the waters of Logan Creek and that plaintiff be forever barred and enjoined from asserting any claim whatsoever in or to said lands and in or to the use of the waters of Logan Creek adverse to defendant and that during the term of the lease defendant was entitled to the exclusive possession and use of said lands for mining purposes and that as surface occupant of said lands, defendant was entitled to the reasonable use of the waters of Logan Creek flowing through said lands for mining purposes.

Under date of May 20, 1932, Mr. Sweeney's attorney advised this office that the court on that date had denied a motion for a new trial and had reiterated in the denial his former opinion that the Division had no authority to grant a permit to Mr. Sweeney. He also stated that no appeal would be made by Mr. Sweeney on account of lack of funds.

The thirty day period allowed for appeal subsequent to the denial of motion for a new trial has expired and on June 28, 1932, this office received a statement from the County Clerk of Nevada County that no notice of appeal had been filed. The decision of Judge Tuttle therefore is final and this office has no alternative but to revoke Permit 3281 heretofore issued in approval of Application 5984 and to dismiss Mr. Sweeney's protest against Application 6776.

#### CONCLUSION

On March 9, 1932, the Superior Court of the State of California in and for the County of Nevada in the case of Bart Sweeney v. Blue Lead Consolidated Mining Company entered its decree quieting title of an adverse claimant to the lands whereon was situated the point of diversion proposed under Application 5984, Permit 3281, and to the ditch which it was proposed

to use under said application and permit, which decree has now become final. Permittee is therefore without right of access and more than three years after approval of the application and more than six months after the time allowed for completion of use has no visible or probable means of proceeding with the development. Meantime an adverse claimant, to wit, the Blue Lead Consolidated Mining Company, the title of which was quieted by the decree referred to above both to the lands whereon the point of diversion was situated and to the ditch which it was proposed to use, has filed its own Application 6776 for the waters previously allowed under Application 5984, Permit 3281, and there are no counter claimants other than Bart Sweeney under his said Application 5984, Permit 3281. Under the circumstances it appears appropriate to revoke said Permit 3281 on the grounds of failure to comply with the terms and conditions thereof because of failure to complete as required, and to approve Application 6776 of Blue Lead Consolidated Mining Company.

O R D E R

Permit 3281 having been heretofore issued in approval of Application 5984 and it appearing to the Division that permittee had failed to comply with the terms and conditions thereof, and permittee after due notice and a hearing thereon having failed to show cause why said permit should not be revoked, and,

Application 6776 for a permit to appropriate water having been filed with the Division of Water Resources, a protest to the approval thereof having been received, the matter having been duly noticed and heard, and the Division of Water Resources now being fully informed in the premises,

IT IS HEREBY ORDERED that Permit 3281 heretofore issued in approval of Application 5984 be revoked and cancelled upon the records of the Division of Water Resources, and

IT IS HEREBY FURTHER ORDERED that Application 6776 be approved subject to such of the usual terms and conditions as are appropriate.

WITNESS my hand and the seal of the Department of Public Works of the State of California this 13<sup>th</sup> day of July, 1932.

EDWARD HYATT, State Engineer

BY Harold Conkling  
Deputy

ENB:MP  
WES:

