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

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In the Matter of Permit 688 Heretofore Issued in Approval of Application 1149 of Sutter Butte Canal Company, a Corporation, to Appropriate from Feather River in Butte County for Irrigation Purposes.

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Decision A 1149 D 430

Decided October 1, 1938

APPEARANCE AT HEARING HELD AT SACRAMENTO, FEBRUARY 15, 1938

For Permittee
Sutter Butte Canal Company, a corporation — Seth Millington, Att'y
Norton Ware, Engineer

EXAMINER: Harold Conkling, Deputy in Charge of Water Rights, Division of Water Resources, Department of Public Works, State of California.

O P I N I O N

General Description of Project

Application 1149 of Sutter Butte Canal Company, a corporation, was filed with the Division of Water Resources on December 28, 1918 and approved on March 4, 1920 for an amount of water "not to exceed 500 cubic feet per second nor an amount which together with water delivered to the land from any source exceeds the rate of one cubic foot per second to 44 acres for land planted to rice and one cubic foot per second to 80 acres for land planted to general crops," to be diverted from the Feather River at a point approximately 58 miles upstream from its mouth for the irrigation of 27,500 acres of land. By order of August 11, 1925, a change in place of use was granted by which 3175 acres were excluded and 3050 acres were included, making the permit area to be served under the permit 27,375 acres lying within T. 16 N. R. 2 E., T. 15 N. R. 3 E., T. 15 N. R. 2 E., T. 14 N. R. 3 E., and T. 13 N. R. 2 E., M.D.B. & M.

According to the terms of the permit, construction work was to commence on or before July 1, 1920 and both construction work and use of water were to be completed on or before July 1, 1921. On several occasions extensions of time were granted within which to complete construction and use, the last one having expired on December 1, 1931.

Soon after the approval of Application 1149, permittee constructed its "Sunset Pumping Plant" at the point of diversion proposed in Application 1149, Permit 688. This plant was equipped with two 42" pumps and one 24" pump, having a total capacity of about 300 second feet. An additional unit consisting of another 42" pump which it was proposed to install has never been placed.

Reports filed by the permittee and by the Sacramento-San Joaquin Supervisor indicated that no use of water had been made under Application 1149, Permit 688 since the year 1931 and consequently under date of December 8, 1937 permittee was advised that in view of the provisions of Section 20a of the Water Commission Act, Permit 688 should be withdrawn.

As no action resulted from this suggestion, permittee was cited to appear and show cause why the permit should not be revoked for failure to comply with the terms and conditions thereof, the matter being scheduled for hearing in accordance with Section 20 of the Water Commission Act on February 15, 1938, at 11:00 o'clock A.M. in Room 401, Public Works Building, Sacramento, California.

The facts surrounding the case as they appear from the transcript, brief, letters of permittee and other portions of the record indicate as follows:

Under claim of an appropriative right to 2,000 cubic feet per second initiated prior to the effective date of the Water Commission Act the Sutter Butte Canal Company, a public utility, diverts water by gravity from the Feather River at a point approximately 20 miles upstream from the Sunset Pumping Plant.

On December 28, 1918, apparently with the intention at that time to serve additional lands, Application 1149 was filed to appropriate from the Feather River at a point on the main canal of the Company known as the "Cox Spillway" about 14 miles downstream from the point where the Company obtains its gravity supply but on account of right of way difficulties the point of diversion was moved downstream a distance of approximately 6 miles to the point at which the Sunset Pumping Plant is located. That an additional supply was contemplated at the time is indicated by the following statement which appears in the supplement which was attached to and made a part of the application:

> "The owners of land aggregating about twenty-seven thousand five hundred (27,500) acres have applied for the use of this additional water and there are many additional large holdings in Sutter County which are likely to apply in the near future, all for agricultural purposes". (underscoring ours)

There was nothing in the application which indicated that it was intended to utilize the water thereunder for stand-by purposes only and had it been known that such was the case at that time we are of the opinion Application 1149 should not have been approved.

We have found no satisfactory or conclusive court decisions (nor has any been cited by permittee in its brief) which are applicable to an acquisition of a right to a secondary or reserve source of supply which will be utilized only at such rare intervals as an ordinarily adequate primary source shall become inadequate. Nor does there seem to be any statutory provisions relative to such an acquisition. Indeed, a strict application of the provisions of Section 18 would seem to negative acquisition of such a right beyond that quantity actually applied to beneficial use and the provisions of Section 20a would seem to defeat maintenance of such a right to the extent of non-use for 3 consecutive years.

The yearly progress reports of both the permittee and of the Sacramento-San Joaquin Water Supervisors and reports rendered by engineers of this office who have inspected the projects indicate that use of water from the Sunset Plant

has been as follows:

Diversions at Sunset Pumping Plant

Year	Area Irrigated (acres)	Remarks
1920	5,000 (all rice)	
1921	12,419 (Includes 12,294 rice)	Only 10% of water obtained under Permit 688
1922	12,761 (Incl. 12,643 rice)	Only 5% of water obtained under Permit 688
1923	10,106 (Incl. 9,488 rice)	
1924	4,170 (Incl. 2,730 rice)	
1925	none	
1926	2,525 (Incl. 2,505 rice)	Only 30 acre-feet obtained under Permit 688
1927	none	
1928	none	
1929	none	
1930	none	
1931	?	Approx. 200 or 300 A.F. pumped
1932	none	
1933	none	
1934	none	
1935	none	
1936-	none	
1937	none	

In Smith v. Hawkins 110 Cal. 122, 120 Cal. 86, it was laid down as a general proposition in California that in all cases the right is lost by forfeiture if there is a failure for five years to apply the water to beneficial use. Section 20a of the Water Commission Act prescribes a loss of appropriative right after three years non-use. In the instant case there has been no use whatsoever under the permit during the last 8 years, and in only one year of the last eleven was there any diversion, the amount diverted in that season being altogether negligible and there being no evidence that it was used for any beneficial use. We find no merit in the contention of permittee that Section 20a does not apply because a right had not vested, presumably because no license has yet been issued.

The right we believe vests as use is made and the effect of the license is merely confirmatory of the fact.

Permittee has not been diligent with the use of water under the permit. The last extension granted expired December 1, 1931 and no use of water has since been made.

If, as is further urged by permittee, Application 1149 were filed merely to consummate a change in point of diversion under an old right, it is unnecessary. Section 1412 of the Civil Code provides that the person entitled to the use of water may change the place of diversion if others are not injured by such change and may extend the ditch, flume, pipe or aqueduct by which the diversion is made to places beyond that where the first use was made. This rule has been definitely established by decisions of the Courts. Application 1149 therefore cannot be accepted as anything other than an application to initiate a right to appropriate surplus or unappropriated water as of the date filed, and it is subject to the customary rules and requirements with respect to diligence which applies in the case of other similar applications.

In its action upon applications and permits of public utilities as in all other cases the Division must be governed by the customary and usual conditions surrounding such cases. While the permittee foresees that in the future it may be necessary to utilize the Sunset Plant the fact remains that not since 1931 has any use been made under Application 1149, Permit 688 and it appears entirely clear that since 1924 development under the permit has not been pressed with that measure of diligence which the courts have laid down as necessary to preserve an appropriative water right. In this connection we cannot do better than to quote from that celebrated case on diligence (Ophir Co. v. Carpenter, 4 Nevada 534, 97 Am. Dec. 550, Weil on Water Rights in Western States, 3rd. Ed. p. 383) wherein the Court well said:

"Diligence is defined to be the 'steady application to business of any kind, constant effort to accomplish any undertaking'. The law does not require any unusual or extraordinary effort, but only that which is usual, ordinary and reasonable. The diligence required in cases of this kind is that constancy and steadiness of purpose or labor which is usual with men enjoyed in like enterprises and who desire a speedy accomplishment of their designs. Such assiduity in the prosecution of the enterprise as will manifest to the world a bona fide intention to complete it within a reasonable time. It is the doing of an act, or series of acts with all practical expedition with no delay except such as may be incident to the work."

In the brief filed by the permittee subsequent to the hearing, permittee in effect holds:

(1) That the Railroad Commission of the State of California in its order of April 21, 1920, which was subsequently upheld by the State Supreme Court, approved the use of the Sunset Plant.

(2) That the Railroad Commission being a constitutionally created Commission is superior in its authority to the State Water Commission which was created by legislative act, and as the Railroad Commission has approved, ordered and directed the use of the Sunset Plant strictly as an auxilliary supply, its order cannot be overruled by the State Water Commission.

(3) That all of the water is dedicated to the public use and must be supplied in the most economical method possible and that should the Sunset Plant be utilized at such times as would result in increasing the expense unnecessarily the Company would undoubtedly be cited by the Railroad Commission to discontinue the extravagance.

(4) That normally there is ample water from the gravity diversion to supply all of its consumers but that when this water is not available, the Company, under order of the Railroad Commission must utilize the water over which it has control and that this can be done cheaper and more effectively from the Sunset Plant.

We find nothing in this order of the Railroad Commission which directs the use of the Sunset Plant. Mention is made that the Sutter Butte Canal Company had a permit from the State Water Commission for the diversion of 500 second feet additional at a point below its operating gravity intake at which lower point there was a quantity of water available even when the entire flow of the Feather River was diverted at the upper point but use of water from the Sunset Plant was neither ordered as an auxilliary supply or approved as the

brief of permittee would tend to imply. (Vol. 18 Opinions and Orders of the Railroad Commission of California, p. 105) (Butte County Water Utility Assoc. v. Railroad Commission, 185 Cal. 218).

Section 1g of the Water Commission Act prescribes that "No right to appropriate or use water which is subject to the provisions of this act shall be initiated or acquired by any person, firm, association or corporation except upon compliance with the provisions of this act." While the Railroad Commission may require that a utility provide an adequate water supply for its consumers this should not be taken to over-ride the procedure laid down by the legislature whereby the necessary rights for such water supply may be initiated and acquired, or to imply that a utility may anticipate its ultimate requirements for extraordinary lengths of time and by application to the Division of Water Resources make reservations for such ultimate requirements upon an entirely different basis than other appropriators.

SUMMARY AND CONCLUSIONS

Application 1149 was filed under the Water Commission Act and is therefore subject to the provisions of said Act. Any right which has vested thereunder has been lost by non-user for a period of six years and insufficient diligence has been manifested to warrant further extension. The permittee has failed to comply with the terms and conditions of the permit and it should therefore be revoked.

ORDER

Permit 688 having heretofore been issued in approval of Application 1149; it appearing to the Division of Water Resources that the terms and conditions of said permit were not being complied with, the permittee having been duly cited to show cause why said permit should not be revoked because of failure to comply with the terms and conditions thereof, a public hearing having been held and the Division of Water Resources now being fully advised in the premises:

IT IS HEREBY ORDERED that said Permit 638, heretofore issued in approval of Application 1149, be revoked and cancelled 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 1st day of Oct. 1938.

EDWARD HYATT, State Engineer

By HAROLD CONKLING
Deputy

(Seal)

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