

Decision file

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

oOo

In the matter of Applications 2399 and 2400 Permits 1487 and 1488
of Annie A. Scanlon to appropriate for power and mining
purposes respectively from North Fork of Merced River
and Applications 7794 and 7795 of N. M. Leoni
to appropriate for power and mining purposes
respectively from the same stream

oOo

DECISION A. 2399, 2400, 7794, 7795 D. 364

Decided - *December 19, 1934*

oOo

APPEARANCES AT HEARING HELD JUNE 19, 1934.

On Behalf of Applications 2399 and 2400

Annie A. Scanlon

On Behalf of Applications 7794 and 7795

N. M. Leoni

Examiner: Harold Conkling, Deputy in Charge of Water Rights.

oOo

Filed by *[illegible]*

O P I N I O N

The Matters at Issue

Applications 2399 and 2400 were filed by Annie A. Scanlon on June 22, 1921 and approved July 31, 1923. Under these approved applications (permits) Mrs. Scanlon was allowed appropriations of 3 cubic feet per second from North Fork of Merced River for power and mining purposes, diversion to be made in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 31, T 2 S, R 18 E, M.D.B.& M. and the water to be conveyed a distance of some 2 miles to the Scanlon mining claims in Section 7, T 3 S, R 18 E, and Section 12, T 3 S, R 17 E, M.D.B.& M., the cost of development being estimated by application at \$1000.

The time originally allowed within which to complete construction and make full beneficial use expired during the summer of 1924 and was thereafter extended first to July 1, 1926, then to December 1, 1929, then to December 1, 1931, and finally to December 1, 1934, upon a showing that the project was inaccessible, labor was difficult to employ, and fire and floods had delayed progress.

Applications 7794 and 7795 were filed on December 29, 1933 by N. M. Leoni. Under these applications Mr. Leoni also seeks to appropriate per second 3 cubic feet/for power purposes and 3 cubic feet per second for mining purposes by diversion at the same point and through the same canal, or at least over the same general route, as that described in the Scanlon applications. Mr. Leoni's applications were protested by Mrs. Scanlon upon the ground that the appropriations proposed thereby would take away the vested rights of protestant. The answer of applicant N. M. Leoni to this protest was a categorical denial that protestant had any rights as claimed which would be violated by the appropriations

sought under Applications 7794 and 7795, it being alleged in the answer that no use of water had ever been made under the Scanlon permits and that the rights thereunder were forfeited by lack of diligence.

Applications Set For Simultaneous Hearing

Applications 7794 and 7795 having been duly completed and advertised as prescribed by law and the rules and regulations of the Division, and having been protested, and the applicant in answer to said protest having alleged that the protestant, who claimed rights under Applications 2399 and 2400 Permits 1487 and 1488, had forfeited the rights under said permits because of failure to comply with the terms and conditions thereof, and because of lack of diligence, a hearing was called on Applications 7794 and 7795 under the provisions of Section 1a of the Water Commission Act for June 5, 1934, afterwards postponed to June 19, 1934, and simultaneously therewith a hearing was set under the provisions of Section 20 of the Water Commission Act on Applications 2399 and 2400 Permits 1487 and 1488 citing permittee to show cause why said permits should not be revoked because of failure to comply with the terms and conditions thereof.

Diligence Lacking Under Scanlon Permits

Permits 1487 and 1488, issued in approval of Applications 2399 and 2400 of Annie A. Scanlon, prescribe among other things as follows:

- "3. Actual construction work shall begin on or before October 15, 1923 and shall thereafter be prosecuted with reasonable diligence, and if not so commenced and prosecuted, this permit may be revoked.
- "4. Said construction work shall be completed on or before June 1, 1924.
- "5. Complete application of the water to the proposed use shall be made on or before July 1, 1924."

So long as there is no knowledge of an attempt to proceed with

development which would be jeopardized under a junior priority the Division is not critical of the showings which are made in the way of cause for extension under permits. Requests of Mrs. Scanlon, citing lack of available labor, fire, and floods as causes of delay, led from time to time to extensions of time within which to complete, without critical inquiry because no one else was apparently interested in the development and use of the waters which were involved.

The testimony introduced at the hearing of June 19, 1934 was too conflicting and uncertain for any satisfactory determination of the issues involved and the Division accordingly advised Mrs. Scanlon as follows under date of July 6, 1934.

".....action will be suspended until December 1, 1934, which will conclude the period which was heretofore allowed within which to complete construction and make full beneficial use of water under Applications 2399 and 2400, Permits 1487 and 1488. At that time some 11½ years will have elapsed since these two applications were approved which with reasonable diligence is deemed sufficient to have consummated the appropriation.

Completion of construction is construed to mean the construction and completion of canal, flumes, tunnels, penstock and other facilities sufficient to convey the water appropriated from the point of diversion through said conduit from the place of diversion at the head of Banderita Ditch, as described in said applications, to the places of use described in said applications, and also the installation of whatever facilities are required such as monitors, mill, power plant, etc., to place the diverted waters to beneficial use.

The Division is not favorably disposed toward further extensions under Applications 2399 and 2400 beyond December 1st next and Applications 7794 and 7795 will be considered for action on the basis of conditions as of that date."

On November 26, 1934 Mrs. Scanlon advised "Two months time under ordinary conditions will complete it" (referring to the project covered by Application 2399 Permit 7487) and that the additional construction required to complete this project and that covered by Application 2400 Permit 1488 would be complete February 15, 1935. With respect to construction work done

during the preceding 12 months she stated that some work had been done at the intake and opening up the ditch downstream for about 5000 feet, observing that the season had been dry and the river water extremely low. Mr. Leoni however under date of December 13th advises that "no move whatsoever has been made to start construction or to use the water since the hearing of June 19th."

It is immaterial whether or not Mr. Leoni's statement is correct. The fact is that Mrs. Scanlon on November 26th, or four days prior to the expiration of the time allowed within which to complete her construction and make full beneficial use, wrote that her construction was not complete, that only approximately half the length of her ditch had been opened up, and that she required until February 15th, 1935 within which to complete construction. No reason was given for failure to complete nor was any request made for extension. Neither was any statement made with respect to construction of the power house or the installation of machinery which would be required under Application 2399 Permit 1487, although this project, as has been cited by Mrs. Scanlon, lies in an inaccessible area where winter work is most difficult, and therefore it would be extremely difficult to carry on operations during the winter.

Permittees statement that the project will be completed by February 15, 1935 should be considered in connection with previous reports of a similar hopeful nature as follows:

- (1) On January 7, 1924 that construction would be completed "during the summer."
- (2) On January 4, 1925 that construction would be completed "on or about July."
- (3) On November 30, 1928 that construction would be completed in the "spring."
- (4) On November 14, 1929 that "we will have everything completed in a very short time."
- (5) On October 27, 1932 that construction would be completed "during early part of next year."

- (6) On October 24, 1935 that construction would be completed before the "end of next year."

While permittee claims that some use of water has been made by her it appears clear that this was not by diversion as proposed under these two applications and permits, but by pumping at some point near the property and even this use was apparently of a casual and desultory character. The Water Commission Act prescribes quite definitely that change in place of diversion under a permit of this office can be made only with the permission of this office after showing of no injury to other users and no petition for such a change was ever submitted in connection with these permits.

Doubtless Mrs. Scanlon has desired and intended to complete this development, and during the 11 $\frac{1}{2}$ years which have elapsed since permit was issued has done more or less work toward that end. It appears clear however that the project has not been pressed with that measure of diligence which the courts have laid down as necessary to preserve the right and in this connection we cannot do better than to quote from that celebrated case on diligence (Ophir Co. v. Carpenter, 4 Nevada 594, 97 Am. Dec. 550, Wiel on Water Rights in Western States, 3rd Edition 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 engaged in like enterprises, and who desire a speedy accomplishment of their designs. Such assiduity in the prosecution of the enterprises 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 workRose during this time may have dreamed of his canal completed, seen it with his mind's eye yielding him a great revenue; he may have indulged the hope of providential interference in his favor, but this cannot be called a diligent prosecution of his enterprise."

Mrs. Scanlon's own statements are evidence sufficient that she herself considered that this project could have been completed at any time within a period of a few months and yet with the knowledge that her time for completion was about to expire on December 1, 1934, and the knowledge that a junior appropriator was attacking her right on the basis of lack of diligence, seeking the use of the same water, she by her own admission accomplished between June 19, 1934 and November 26, 1934 considerably less than half of the construction necessary to begin operations. We are therefore of the opinion that diligence has not been exercised commensurate with the size of the project and that Permits 1487 and 1488 should be revoked.

Applications 7794 and 7795

These applications are protested only by Mrs. Scanlon who urges that they be denied because of interference with her use under her prior Applications 2399 and 2400. She also advances some claim of right under a prior appropriation, dating back in the seventies, covering this same project and use. It appears clear that if diligence has been insufficient to maintain the right initiated by Applications 2399 and 2400 on June 22, 1921, it has likewise been insufficient to preserve a right previously initiated for the same use. Applications 7794 and 7795 are for useful and beneficial purposes and with the Scanlon claims of adverse right eliminated we know of no reason why these applications should not be approved.

C O N C L U S I O N

In our opinion the rights claimed by Mrs. Scanlon under Applications 2399 and 2400, Permits 1487 and 1488 have been forfeited through lack of diligence and these permits should be revoked.

These claims of right having been eliminated and there appearing to be no substance to the claims by Mrs. Scanlon of prior right to the use of the

same water under older appropriations there is no obstacle to the approval of Applications 7794 and 7795 as no protest was received except that by Mrs. Scanlon.

ORDER

It appearing to the Division of Water Resources that development under Applications 2399 and 2400, Permits 1487 and 1488 was not being diligently prosecuted, and that permittee had failed to observe the terms and conditions of said permits, and a hearing having been held thereon after due notice to permittee, and Applications 7794 and 7795 having been completed and advertised, and a protest to the approval thereof having been received, and a hearing thereon having been held, and the Division being now fully advised in the premises:

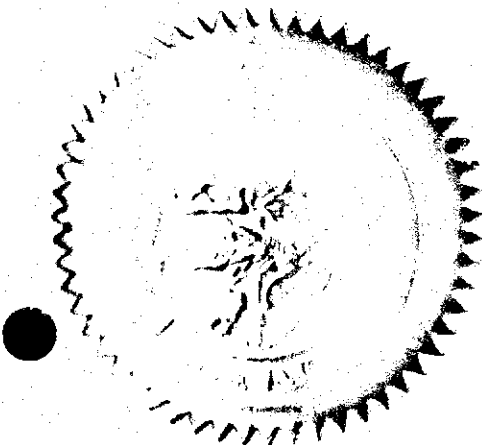
IT IS HEREBY ORDERED that Permits 1487 and 1488 be revoked, and,

IT IS HEREBY FURTHER ORDERED that Applications 7794 and 7795 be approved and that permits be granted to the applicant subject to the usual terms and conditions.

WITNESS my hand and the seal of the Department of Public Works of the State of California this 19th day of December, 1934.

EDWARD HYATT, State Engineer

By Harold Conkling
Deputy.



17613 1934 S.N.S.