

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

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In the Matter of Application 8097, Permit 5079, of
L. F. Moulton & Company to Appropriate From
Aliso Creek in Orange County for Irriga-
tion and Domestic Purposes.

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Decision A 8097, D-420
Decided *June 20, 1938*

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APPEARANCES AT HEARING HELD MAY 2, 1938.

For Applicant

L. F. Moulton & Company

James G. Scarborough of
Scarborough & Bowen, Attys.
at Law, Los Angeles, Calif.

For Protestant

El Toro Company

Victor Ford Collins,
Attorney at Law, Los Angeles
and Hyde Forbes, Engineer
and Geologist,
San Francisco, Calif.

EXAMINER: Everett N. Bryan, Acting Deputy in Charge of Water Rights,
Division of Water Resources, Department of Public Works.

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OPINION

In this proceeding there is pending before the Division a request for
an extension of time within which to begin construction under Application
8097, Permit 5079, and simultaneously a petition to change point of diversion
and make other less significant changes under said application and permit.
The circumstances surrounding the case are briefly as follows:

On September 11, 1934, L. F. Moulton and Company filed Application 8097 seeking to appropriate 2,500 acre feet from Aliso Creek for irrigation and domestic purposes, diversion to be made at a point within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 4, T. 7 S., R. 8 W., S.B.B. & M., and use to be made upon 2,965 acres in Sections 26, 27, 28, 33, 34 and 35 of T. 6 S., R. 8 W. and Sections 3, 4, 9, 10, 15, 16, 21 and 22 of T. 7 S., R. 8 W., of same base and meridian.

There was pending at the time a prior application (7901) of A. J. Stead seeking a permit for the same water. Until this earlier application was cancelled on September 27, 1937, it was not feasible to proceed with Application 8097 of L. F. Moulton and Company and said application was accordingly allowed to pend. This application was therefore not approved until December 30, 1937.

Notice of its approval and of the fees then due and payable was forwarded to permittee on January 3, 1938, and the record indicates that the Moulton Company made immediate efforts to contact C.R. Browning, the engineer who originally completed Application 8097 and prepared the necessary maps to accompany it. There was some delay in reaching Mr. Browning but it appears the permittee had a meeting with him on January 13, 1938, at which time he was engaged by permittee and consented to proceed at once with completion of plans for the dam proposed. On the same day Mr. Browning advised this office of his instructions and permittee forwarded permit fees in the amount of \$71.30.

There were unusual storms immediately following which occasioned some delay in connection with field work and, becoming dissatisfied with the progress which he was making, L. F. Moulton and Company discharged Mr. Brown-

ing on February 25, 1938. Some inquiry and investigation was required to find another engineer to take his place but on March 7, 1938, permittee engaged the services of J. A. Woolley and instructed him to proceed with plans to satisfy the requirements of the Division.

It appears that in October 1937 a group of land owners on Aliso Creek above L. F. Moulton and Company became interested in the development of storage on that creek. After some investigation of the matter they approached L. F. Moulton and Company on January 26, 1938, with a proposition that they undertake a joint storage development approximately two miles upstream from the reservoir originally proposed by permittee. There followed numerous conferences between L.F. Moulton and Company (the permittee under Application 8097) and this group of land owners. We shall hereafter refer to them as the "El Toro group", but they should not be confused with the El Toro Company whose Application 9116 is pending before the Division also seeking an appropriation from Aliso Creek under a later priority than Application 8097.

These conferences terminated in an agreement dated April 6, 1938, by and between L.F. Moulton and Company, party of the first part, on the one hand, and "such owners of lands within the watershed of Aliso Creek in Orange County, California, who may execute this agreement, second parties," on the other hand. As parties of the second part to this agreement there were forty signatures annexed, representing ownership of 456.96 acres outside the original permit area. The substance of this agreement is to the effect that if the Division of Water Resources would grant an extension of time and allow a change in point of diversion to the new reservoir site referred to above,

and a change in place of use to include the lands of the El Toro group, the latter would pay one-half the cost of a reservoir of a maximum capacity of 1,600 acre feet at the new point, and share equally with L. F. Moulton and Company in the cost of operation and the stored waters made available by such reservoir.

Simultaneously with the execution of this agreement the two parties forwarded a formal petition to the Division asking permission to make the necessary changes to accomplish the purpose of said agreement, this petition having been received by the Division on April 11, 1938.

The El Toro Company, applicant under Application 9116, protest any extension of time within which to begin construction under Application 8097, Permit 5079, alleging that lack of diligence has forfeited all rights under the permit, and alleging that the petition to change was in effect an abandonment of all rights under Application 8097 such that whatever development proceeds under the revised plan should proceed under a later priority and subordinate to the rights of El Toro Company under Application 9116.

We have indicated above very briefly the steps taken by L. F. Moulton and Company in the time which elapsed between receipt of notice of approval of Application 8097 on or about January 6, 1938, and the engagement of Engineer J. A. Wooley on March 7th. When Engineer Wooley was engaged L. F. Moulton and Company had before it the proposition of the El Toro group for a revised project in which they would participate. Mr. Wooley's instructions were to investigate this proposal as an alternative to the original project.

The uncontroverted testimony of both Mr. Wooley and George L. Bates, an engineer originally engaged by the El Toro group who assisted Mr. Wooley after his engagement by the Moultons, is to the effect that the heavy storms prevailing during the months of February and March prevented successful exploration of the two dam sites sufficient for the preparation of plans for a dam at either site. Nevertheless Mr. Wooley proceeded with his investigations immediately and on March 27th, or twenty days after his engagement, recommended joint development of the upper dam site by the Moulton Company and the El Toro group to a capacity of some 1,600 acre feet.

Anticipating the possibility of delays which would make it difficult if not impossible for L. F. Moulton and Company to begin construction on or before April 1, 1938, as prescribed in their permit, and the possible desirability of changes or modification of the original plans to conform to the suggestions of the El Toro group, Mr. Wooley on March 14th, or seven days after his engagement, wrote to the Division for information, particularly inquiring as to the possibility of obtaining an extension of time within which to begin construction and permission to change the dam site or construct two dams instead of one.

The Division was at the time mindful of the earlier application (No. 9116) by El Toro Company on which action was then and is now pending. It is not practicable for the El Toro Company to proceed with development under Application 9116 if development proceeds under Application 8097 by L. F. Moulton and Company. In this connection The Whiting Company (predecessors in interest of El Toro Company) had on November 22, 1937, urged that the L. F. Moulton and Company be held to strict accountability

in the matter of diligence under their application. For that reason when approving the Moulton application the Division had called applicant's attention to the peculiar responsibility which rested upon it, to proceed promptly. Therefore, in response to Mr. Woolley's request for information as to the possibility of obtaining an extension, the Division cited him to this admonition, which in part stated "Unless an application for approval of the plans for the dam is filed promptly or there is some other showing that the matter is being pressed, we shall be obliged at the expiration of the time allowed for beginning construction to cite permittees to show cause why the permit should not be revoked upon the grounds of failure to comply with the terms and conditions thereof."

Under date of March 24th, or seventeen days following his engagement by L. F. Moulton and Company, Mr. Woolley wrote to the Division again at considerable length indicating his tentative conclusion that it was desirable for the Company to proceed with a joint storage development in cooperation with the El Toro group. He stated that the time allowed him within which to complete his studies had been insufficient and that more time was necessary to complete his study. He asked again for an extension of time within which to begin construction, remarking however that "rather than risk the loss of appropriative rights under the permit issued we could proceed according to your letter of March 16th, 1938, and submit plans on the original site of the application."

The Division it will be observed was confronted with an unusual situation. The time originally allowed within which to begin construction under the Moulton permit was about to expire. Permittees had not commenced construction, and was evidently not prepared to begin construction within the time allowed. In fact permittee was asking an extension in order to further

develop its construction plans and make changes which would provide for the irrigation of lands not originally embraced within the application or included for service under the permit issued. At the same time there was pending before the Division an application of later priority which conflicted with the Moulton permit and under which the applicant could hope to take nothing if the Moultons proceeded with their intended development. This later applicant was urging upon the Division that L. F. Moulton and Company be held to strict accountability in the matter of diligence and the Division felt that it could not appropriately grant an extension to L. F. Moulton and Company as requested upon their ex parte showing and without hearing the objections of the El Toro Company. Mr. Wooley was therefore so advised in response to his request for an extension and the matter was scheduled for hearing accordingly with notice to the two parties. At the time of the hearing by stipulation of the parties it was agreed to consider also the petition to change, which had been filed and to which El Toro Company was objecting.

The fact that the time allowed within which to begin construction expired on April 1, 1938, and permittee, L.F. Moulton and Company, had not begun construction, or received an extension of time, did not necessarily forfeit the right under Permit 5079 as contended by El Toro Company. The request for extension was before the Division supported by an effort to show cause. The Division withheld action upon the request, as stated above, in order that El Toro Company, which was an interested party, might have an opportunity to also make a showing in the matter.

Neither is there any evidence of abandonment of the project contemplated under the Moulton application and permit as urged by El Toro Company. On the contrary the letters by Mr. Wooley and both his testimony and that of

Mrs. Moulton given at the hearing, indicate there was no intention to abandon. These letters and the testimony indicate a definite intention on the part of permittee to proceed with the development under Permit 5079. The evidence is clear that if unable to proceed with development at the upper dam site and to include the additional lands of the El Toro group, the Moultons wished to proceed with development at the lower site to the fullest extent practicable.

That the right of an applicant or permittee of this office under an application to appropriate is a property right and that the same is subject to assignment in whole or in part is so well established that we shall not undertake to cite cases in support of the statement. There was therefore no abandonment or forfeiture of rights under Application 8097, Permit 5079, by reason of the negotiations for assignment of a part interest in this right to the El Toro group, and neither will consummation of such an assignment in itself forfeit any of the rights under this application and permit.

Likewise, there was no forfeiture of rights under the application and permit by reason of the proposal to move to a new dam site and include additional lands for service. The law provides (Section 16 Chap. 586, Stats. 1913, as amended), and the rule is well established, that permission may be granted to an applicant or permittee to change his point of diversion and place of use provided other users are not injured by the change. El Toro Company has not shown, or attempted to show, that a change in point of diversion to the new site, or the irrigation of the additional lands would injure it in any way. Rather the effort of contestant has been to show that the original project of L.F. Moulton and Company under Application 8097 was infeasible and that if unable to make the desired changes in this project, said company must abandon its development

thereby leaving the way open for development by El Toro Company under its later Application 9116.

CONCLUSION

After careful consideration of the circumstances surrounding this case and of the evidence presented, we are of the opinion that L. F. Moulton and Company exercised reasonable diligence following the issuance of permit on Application 8097; that circumstances constituting good cause prevented a beginning of construction under the permit within the time prescribed therein; that there was no abandonment of the intention to proceed with development under this permit; that permittee has submitted a petition in due form to change point of diversion and place of use under said permit and has established to the satisfaction of this office that other users will not be injured by the change. The petition to change should be allowed and a reasonable extension of time granted within which to begin construction.

ORDER

For reasons deemed sufficient, the permitte under Application 8097, Permit 5079, having been cited to show cause why said permit should not be revoked upon the grounds of failure to comply with the terms and conditions thereof; the permittee and other interested parties having received due notice of hearing upon this issue; the parties in interest by stipulation at time of hearing having consented to hearing upon the issue as to whether or not other users would be injured by changes in point of diversion and place of use under said Permit 5079 as petitioned on April 11, 1938; a full and complete hearing of the interested parties upon these issues having been had, and the Division of Water Resources being now fully

advised in the premises;

IT IS HEREBY ORDERED that the petition to change point of diversion and place of use under Application 8097, Permit 5079, on April 11, 1938, be approved, and

IT IS HEREBY FURTHER ORDERED that under such terms and conditions as may be deemed appropriate an order be entered extending the time within which to begin construction under said application and permit.

WITNESS my hand and the seal of the Department of Public Works of the State of California this *20th* day of June, 1938.

EDWARD HYATT, State Engineer

(Seal)
ZNB:CG

By Harold Conkling

Deputy.