

Decision No. 17793

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

Milton A. SMITH REALTY COMPANY,  
Incorporated, (a corporation)

Complainant,

vs.

SAN DIEGUITO WATER COMPANY,  
(a corporation)

Defendant.

ORIGINAL

Case No. 2059.

Clay Carpenter, for Complainants.

O'Melveny, Millikin, Tuller & Macneil,  
by William W. Clary and Henry J. Stevens,  
for Defendant.

Wright & McKee, by Leroy A. Wright, for  
Santa Fe Irrigation District, Intervenor.

T. J. Reynolds, for Del Mar Water, Light  
and Power Company, Intervenor.

S. J. Higgins, City Attorney, and F.M. Downer,  
Deputy City Attorney, for City of San Diego.

W. A. Sloane, for San Dieguito Irrigation  
District.

BY THE COMMISSION:

OPINION

The complaint herein alleges that complainant is the owner of 850 acres of irrigable agricultural land in San Diego County, which land is alleged to be under the irrigation water system installed and maintained by defendant, whose conduit

runs through complainant's land. The pleadings include an answer to the original complaint, an amended complaint, a document containing objections to said amended complaint, an amended answer, and certain pleadings in intervention on the part of the Del Mar Water, Light and Power Company and the Santa Fe Irrigation District. Without outlining in extenso the allegations, denials and contentions contained in these numerous pleadings, suffice it to say that the issues raised are as follows:

1. Is the defendant--a corporation organized under the laws of the State of Nevada--a public utility corporation in the sense that its waters, or any of them, have been dedicated to public use?
2. If there has been such a dedication, do the lands of this complainant fall within the area as to which service may reasonably and lawfully be required?
3. If there has been such a dedication and the lands of complainant fall within the "area of dedication," has the defendant such a supply of water, or could it reasonably develop such a supply as to allow for service upon complainant's lands?

Public hearings in this matter were held before Commissioners Squires and Seavey and Examiner Satterwhite in San Diego and Los Angeles. Later, hearings were held before Commissioners Decoto, Seavey and Whitsell in San Diego, and a final hearing, for the purpose of listening to argument, was held before the Commission en banc at San Francisco. A very large body of testimony was produced at these several hearings by all parties to this proceeding, and numerous exhibits were filed covering every possible phase of the history of this company which might possibly

concern the question of any duty on its part to serve the public as a public utility water company. It was the position of the company throughout these proceedings that it has never dedicated or devoted its properties, or any of them, to public use; that in any event the lands of this complainant cannot reasonably be considered to be within any presumed area of dedication, and that the water supply now owned or available to defendant through reasonable development or operation is insufficient to allow for service to complainant's lands.

#### HISTORY OF SAN DIEGUITO WATER PROJECT

In view of the importance of the matters herein under consideration, we deem it proper to trace in some detail the history of this defendant and its predecessors, before announcing our conclusions upon the issues above enumerated.

It appears from the testimony before us that bordering on the lower portion of the San Dieguito River and about ten miles from the coast in San Diego County there lies a tract of approximately 9,000 acres, originally known as the San Dieguito Rancho and Grant. Prior to the year 1907 title to this Rancho became vested in the Santa Fe Land Improvement Company, a corporation, subsidiary to The Atchison, Topeka and Santa Fe Railway Company, the tract being thereafter variously known as the "San Dieguito Ranch," and at the present time the "Rancho Santa Fe." On June 13, 1907, the Santa Fe Land Improvement Company posted a notice of appropriation covering 1200 miner's inches, measured under a 4-inch pressure, of the waters of the Bernardo and San Dieguito rivers, the purpose being for irrigation, domestic and live stock uses upon the San Dieguito Rancho.

Between the said Rancho and the ocean lies another tract of land, approximating 1500 acres, adjacent to, but not bordering upon, the San Dieguito River, which was controlled by a syndicate, composed of Wm. G. Henshaw, Payne Whitney and Harry Payne Whitney, each holding equal shares. This tract was known

as the Henshaw-Whitney Syndicate Lands, and for some years was in charge of one Ed Fletcher at San Diego, as agent for the owners, in leasing and developing this land.

On February 21, 1914, one E. Taylor, son-in-law of said Fletcher, posted a notice of appropriation, claiming 10,000 inches measured under a 4-inch pressure, in the channel of the San Dieguito River, to be used upon the "Bernardo Rancho," San Dieguito Rancho, Agua Hedionda Rancho and Los Penasquitos Rancho, on lands included in the Linda Vista Irrigation District; on lands in the City of San Diego, and on lands in fractional townships described as follows:

Township 12, South Range 4 West,  
Township 13, South Range 4 West,  
Township 14, South Range 3 West, and  
Township 14, South Range 2 West,  
San Bernardino Meridian.

The rights covered by this appropriation were assigned to Fletcher on February 25, 1914.

It appears that both the Syndicate and the Land Company were desirous of developing water for their lands, but that the Land Company deemed that its water was insufficient and that the Syndicate did not desire to expend sufficient capital to develop the water properly. An agreement was accordingly entered into between these parties looking toward the construction of certain dams, reservoirs, pumping plants and distributing systems--

"For the purpose of securing such supply of water, of constructing the aforesaid works and thereafter distributing the water to the land above mentioned, the parties hereto have caused the incorporation and organization of a corporation under the laws of the State of California, known as the San Dieguito Mutual Water Company (hereinafter called the 'Water Company'), and have agreed to convey to said Water Company, water, water rights, dams and reservoir sites and all necessary rights of way for the development, collection, storage and distribution of water for the irrigation of the lands above mentioned, so far as such rights of way lie upon the lands of either of the parties hereto; and conditioned upon the execution of and full compliance with this

agreement by the second party, the Land Company has made an agreement with the Water Company, of even date herewith, whereby the Water Company is enabled to construct the aforesaid work."  
(Italics ours.)

In this agreement it was provided that all waters, water rights, dams and reservoir sites of both parties should be transferred to said San Dieguito Mutual Water Company, when organized, and that the Land Company would advance the necessary moneys up to \$750,000 to construct the necessary works, the Land Company to hold the whole of the capital stock of the Water Company except the five qualifying shares. After reimbursement of the Land Company and with the exception of the said qualifying shares, it was provided that 35 per cent of the stock should be owned and held by the Syndicate, and 65 per cent by the Santa Fe Land Improvement Company.

The San Dieguito Mutual Water Company was thereupon incorporated for three million dollars, divided into twenty thousand shares of \$150.00 par value. The incorporators and original directors, each taking one share of the stock, were E. O. Faulkner, W. E. Hodges, S. C. Payson, Wm. G. Henshaw and Ed Fletcher, the first three representing the Land Company, and the latter two representing Henshaw and his associates. The Land Company then entered into an agreement with the Mutual Water Company to advance moneys necessary to accomplish the construction of the contemplated works, the Water Company agreeing to sell all of its capital stock, except its five directors' shares, to the Land Company for such advanced moneys. Ed Fletcher then assigned to the Water Company his right, title and interest in the Taylor water appropriation.

The San Dieguito Mutual Water Company thus came into possession of all the water, water rights, dam and reservoir sites of both the Land Company and the Henshaw Syndicate on the

San Dieguito River. Construction of the main impounding reservoir (Lake Hodges) was commenced in the spring of 1917, about five miles northeasterly from the complainant's lands. It was completed in January, 1919.

The uncontradicted evidence before us shows that under the agreements above-mentioned the desire and purpose of the parties constructing this reservoir was to bring sufficient water to their respective lands,--to develop them without any dedication of said water to public use. This was to be accomplished through the Mutual Water Company, shares of stock in which were to be sold to purchasers of land from these two parties.

There was already in existence in this general vicinity a small irrigation district composed of about 600 acres of land along the ocean front west of the San Dieguito Ranch and north of the Syndicate lands known as the Cardiff Irrigation District. For the purpose of enlarging this district a plan was evolved to take over the whole Henshaw land company project, and in order to raise sufficient funds for this purpose, proceedings were begun to enlarge the irrigation district's bounds to include both the San Dieguito Ranch and the Syndicate Lands. As this plan would also accomplish the end sought by the original projectors, they assented to the proposal, and for some time made no effort to sell any shares of stock of the Mutual Water Company. Litigation held up the enlargement of the district's boundaries, however, and all plans were held in abeyance for some time. In February, 1924, however, the District Court of Appeal declared the enlargement proceedings invalid. (People v. Cardiff, Irrigation District, 51 Cal. App. 307.)

It also appears from the decision of the California Supreme Court in the case of Del Mar Water, Light and Power Co. v. Eshleman, 167 Cal. 663, that in 1908 the South Coast Land Company, a corporation owning a townsite known as Del Mar, and

certain other neighboring real estate, had contracts with the Santa Fe Land Improvement Company to lease from the latter certain water-bearing lands on the San Dieguito Ranch for the production of a maximum of fifty miner's inches per day for the lessee, or 50,000 gallons per day for use on the San Dieguito Ranch. Certain waters were also to be delivered by the lessee to The Atchison, Topeka and Santa Fe Railway Company at Del Mar. The Del Mar Water, Light and Power Company was formed as a subsidiary of this lessee to supply water, light and power to purchasers of land from the South Coast Land Company. The lease was then assigned to the new corporation. Wells were sunk and a distributing system was constructed, leading from the leased lands which were riparian to the San Dieguito River and below the site of the then non-existent Lake Hodges in 1917. In order to cover this particular water development an agreement was entered into whereby the South Coast Land Company consented to the construction and maintenance of a dam and the perpetual collection, impounding and diversion of all water of the river in the resulting reservoir, it being provided that the contemplated Mutual Water Company would execute a contract granting the South Coast Company a 5-year option to purchase a sufficient number of shares of stock to entitle it to 50 miner's inches of such impounded water.

The Cardiff Irrigation plan having failed, a new contract was entered into between the Del Mar Water, Light and Power Company and the Santa Fe Land Improvement Company, reciting that the water company "as a private corporation and not as a public utility," supplies water in the Town of Del Mar, and that the Land Company "is not engaged in, and does not intend to engage in, the distribution or delivery of water to the public, or any portion thereof, or to any municipality, district, region, or neighborhood; and has not, and does not intend to, set aside, appropriate or dedicate any water to which it is entitled or has the right or owns

for sale, rental or distribution to the public"; but that it has the right to receive a certain quantity of water from the Mutual Company's system in excess of its own needs and solely to enable the water company to continue supplying its consumers during temporary repairs of its lands, the Land Company would permit it to use this surplus on stated terms. Pipe lines were to be built to carry such water and 10 cents per 1000 gallons was to be paid to the Land Company. It was provided that this was strictly a temporary arrangement which either party might terminate by giving stated notice.

The testimony before us indicates, and the contract itself shows, that this agreement was intended by the parties to take care of a temporary situation at Del Mar, and it was in no sense the intent of any of the parties to take the place of the contract of the Del Mar Company with Henshaw to obtain 50 inches of water for the purchase of the Mutual Water Company's stock.

Lake Hodges dam being completed and water having accumulated behind it since the Cardiff Irrigation District proceedings were pending in the court, the Mutual Water Company found itself with a large supply of water to dispose of but with no inclination to sell stock. The policy was then adopted of putting the water to use on the San Dieguito Rancho and upon the Syndicate Lands, the tenants of the latter being allowed to purchase water through the Land Improvement Company in its own name.

In the year 1920 the City of San Diego was confronted with a water shortage, and it executed a contract with Henshaw and Fletcher, above mentioned, whereby the latter obligated themselves to construct certain pipe lines and to deliver to the city, for the period of ten years, three million gallons of water daily at the rate of 10 cents per 1,000 gallons. Henshaw and Fletcher then contracted to purchase from the Santa Fe Land



Improvement Company the same amount of water for the same term at the rate of 8 cents per 1,000 gallons. These contracts contained express provisions that the waters were not, and are not, intended to be dedicated to any public use, but that the agreements were meant solely for the purpose of relieving a temporary shortage in San Diego. These contracts have been assigned to the present defendant, and water is still being supplied to the City of San Diego under them.

After the Cardiff Irrigation District had been declared void a new plan had to be evolved for the disposition of the waters of Lake Hodges. The plan of selling stock in the Mutual Water Company had been abandoned because it was found that the price per share necessary to be charged in order to get back the investment rendered the plan impracticable, and therefore it was determined by the various parties in interest to organize separate irrigation districts to purchase and distribute the water.

In consummation of this final plan the San Dieguito Irrigation District, comprising the lands then in the former Cardiff Irrigation District, together with some contiguous land, was organized in 1922, and the Santa Fe Land Improvement Company agreed, in March, 1923, to sell to said newly organized district until September 30, 1950, an amount of water not in excess of 3200 acre-feet, delivered at the distributing reservoir on the San Dieguito Ranch. In February, 1923, the Santa Fe Irrigation District, comprising approximately three-fourths of the San Dieguito Ranch and all of the Henshaw-Whitney Syndicate Lands, together with certain smaller adjacent tracts, was organized, and an agreement was entered into with the Santa Fe Land Improvement Company for the sale and purchase, until July 1, 1952, of an amount of water not in excess of 6576 acre-feet delivered at certain stipulated points. These two agreements respectively disclaim all intention of dedication of these waters, or any of them, to public use or

sale, and they have since been assigned by the Santa Fe Land Improvement Company to the present defendant, which is now supplying these irrigation districts in accordance with their terms.

The situation in 1923 was, therefore, that the Santa Fe Land Improvement Company, sole stockholder of the San Dieguito Mutual Water Company (Henshaw having, in 1922, sold all his interest in the Mutual Company to the Land Improvement Company), was supplying water under the two contracts with these irrigation districts, and also other water, as follows:

To Del Mar Water, Light & Power Company, 724 acre-feet.  
To Henshaw and Fletcher, 3,000,000 gallons daily.

It appears also that an already existing corporation known as the San Diego County Water Company, owned by Henshaw, controlled certain valuable property and water rights upon the upper reaches of the San Diego River above Lake Hodges. This company had for a time held an option upon all the Lake Hodges properties owned by the San Dieguito Mutual Water Company and the San Dieguito Water Company, the present defendants, was organized during the year 1924 under the laws of Nevada for the purpose of taking over all of these properties.

On July 25, 1924, the San Dieguito Mutual Water Company and said San Dieguito Water Company filed a joint application with this Commission (Application No. 10318) praying for an order of this Commission authorizing and permitting the sale and transfer of all the properties of the former to the latter, and in which both parties disclaimed any public utility status, and stated that the application was made only through precaution, and that by making it, neither admitted or conceded that the properties were impressed with a public use, or that the Commission had any jurisdiction with respect to them.

Subsequently, an agreement was entered into between the Santa Fe Land Improvement Company and the San Dieguito Water Company, whereby the former agreed to the proposed purchase by

the latter of all the properties of the San Dieguito Mutual Water Company, and which agreement contained the following recital:

"First party hereby represents and agrees that no other person or persons are entitled to receive water from the properties transferred by San Dieguito Mutual Water Company to second party, save and except:

- (a) Santa Fe Irrigation District:
- (b) San Dieguito Irrigation District:
- (c) Del Mar Light, Water & Power Company: and
- (d) Assigns of the so-called Fletcher-Henshaw contract.

"First party represents and agrees that said Del Mar Light, Water & Power Company is not entitled to receive more than seven hundred twenty-five (725) acre feet of water per annum from said properties, which amount, however, is subject to reduction in years of drought to the same extent that the rights of San Dieguito Irrigation District and Santa Fe Irrigation District to deliveries of water, are subject to reduction during such periods of drought."

And on July 26, 1924, the Santa Fe Land Improvement Company assigned to the San Dieguito Water Company all of its right, title and interest in and to the four water contracts above described, and Henshaw and Fletcher assigned all their right, title and interest in and to the contract between themselves and the City of San Diego to the San Diego County Water Company, which in turn assigned the same to the present defendant.

On order of this Commission (Decision No. 13857) dated July 31, 1924, the sale of the properties of the San Dieguito Mutual Water Company to the San Dieguito Water Company as requested in said Application No. 10318 was approved and authorized, and a deed dated July 1, 1924 covering the entire transfer was later submitted and approved.

In June, 1925, San Dieguito Water Company and the Del Mar Water, Light and Power Company entered into a contract, whereby the former agreed to sell to the latter an amount of water not to exceed 720 acre-feet per year from November 1, 1924, to October 31, 1957, to be delivered at a point to be agreed

upon by the parties. From the record it appears that this contract was entered into for the purpose of reflecting the arrangement which was agreed upon at this time to supersede and to carry out the two prior contracts that had been entered into between the Del Mar Water Company and Henshaw concerning riparian rights, and between the Del Mar Water Company and the Santa Fe Land Improvement Company concerning a temporary supply during repair and enlargement of the Del Mar system. It is under this contract that defendant, San Dieguito Water Company, is now supplying water to the Del Mar Water, Light and Power Company.

Thus far we have traced a complete chronological history of the development and operation of this water system as disclosed by the record now before us, and, except for the few facts taken from the Supreme Court's opinion above referred to relative to the Del Mar Water, Light and Power Company, it is based on the uncontradicted oral and documentary evidence introduced herein.

It seems evident that at all times this defendant and its predecessors in interest have not only disclaimed any intent to dedicate these properties or waters to the lands covered in this complaint, but that their acts have been uniformly consistent with such expressed lack of intent. We should add that at no time has water been sold or delivered to plaintiff or any of its predecessors in interest upon any of the lands covered by this complaint.

At the conclusion of the preliminary hearings had herein, it was agreed that the Commission would consider the question of jurisdiction and dedication, and that if it came to the conclusion that there was probable cause upon any ground to take jurisdiction over this matter, it would set the case for further hearing. A thorough and careful consideration of the facts then before the Commission, as outlined above, lead us to the conclusion that no evidence had, up to that time, been introduced in this proceeding upon which could be predicated a determination that this defendant

or its predecessors in interest had at any time dedicated their waters to public use, and particularly to the lands covered in the present complaint. It was the Commission's position, however, that probable cause existed for it to take jurisdiction over this matter for these and certain other reasons, and the case was, therefore, set for further hearing.

At said further hearing a statement was read by the presiding Commissioner declaring it to be the sense of the Commission that while the record then before us did not disclose substantial evidence showing a dedication of its water and water system to public use under the generally accepted significance of that term, it was forced, nevertheless, under sub-section (dd) of section 2 of the Public Utilities Act, to assume jurisdiction and to set this matter for further hearing, since the evidence disclosed sales of water both directly to the Del Mar Water, Light and Power Company serving public utility consumers and others of the public in the Town of Del Mar, and also sales indirectly to the City of San Diego, which resold to its own citizens within its limits. Additional hearings were had in San Diego, and the matter was argued before the Commission en banc.

At these hearings the position was taken by the defendant that the sub-section above mentioned did not apply to its operations; that if it did apply, it is unconstitutional; and further, that in any event, its application could not be extended to predicate a dedication of these waters or any of them to the lands mentioned in this complaint. It was the further position of the defendant that its water supply, both present and potential, is insufficient to allow it to render service to the lands mentioned in this complaint in addition to the other lands to be served under the contracts for water service above mentioned.

Testimony was introduced in an effort to substantiate this claim. The plaintiff did not appear and argue orally at

the time of the argument en banc, but the defendant, together with certain other persons, appeared and argued orally to the effect mentioned above. A petition on the part of R. C. Townsend and C. W. L'Ecluse was presented to the Commission before the time of oral argument, but upon motion of defendants, the Commission ruled that it could not be received at that time.

The principal points made by defendants at the time of the oral argument were, first,-- assuming that the sales to San Diego and to the Town of Del Mar through the City of San Diego and the Del Mar Company, constituted a dedication to public use under sub-section (dd), nevertheless, the plaintiff's land is not within the scope of said dedication, and plaintiff's lands are, therefore, not entitled to water supply; and, secondly, that assuming that San Dieguito Water Company is in fact operating a public utility, it cannot be required to take on such new consumers as would be the result of an order requiring service to plaintiff's lands, because so doing would injuriously withdraw the water supply to its present consumers. A third point discussed by defendant was that the Supreme Court of California has, in effect, already construed the sub-section above mentioned to apply only to properties which in fact have been dedicated to develop a public use at the time of the sale covered in said sub-section. The argument was reiterated that the properties of the San Dieguito Water Company have never been dedicated to public use.

Upon further consideration of the testimony adduced in this matter, we must adhere to our former conclusion that no substantial testimony has been adduced herein upon which we could reach a conclusion that the properties of this utility have been dedicated to public use, unless such dedication is imputed under the provisions of sub-section (dd), section 2 of the Public Utilities Act. We are, however, of the opinion that if this provision of the Public Utilities Act is to be given any meaning

whatsoever, we must hold that the defendant company is a public utility under said section, although upon the record before us we believe it evident that there has been no dedication of water service by defendant to lands of this plaintiff, and that the plaintiff is, therefore, not entitled to an order directing the service requested herein.

It thus becomes unnecessary for us to discuss the question of water supply at this time. We must, therefore, dismiss this complaint.

#### ORDER

Complaint having been made, as above entitled, against San Dieguito Water Company asking for an order of this Commission requiring said Company to render public utility water service to certain lands mentioned in said complaint, hearings having been held, arguments having been heard, and the Commission being now fully advised in the premises,

IT IS HEREBY FOUND AS A FACT that the defendant, San Dieguito Water Company, is operating a public utility water company in this State under the definition of that term as expressed in Section 2, sub-sections (w), (x), and (dd) of the Public Utilities Act, and

IT IS HEREBY FURTHER FOUND AS A FACT that said company has not dedicated its properties so used, nor its water service to the lands covered in the within complaint, or any of them, and basing its order upon the said findings of fact, and upon such other findings of fact as are contained in the opinion preceding

this order,

IT IS HEREBY ORDERED that the complaint herein  
be and the same is hereby dismissed.

Dated at San Francisco, California, this 24<sup>th</sup> day of  
December, 1926.

W. B. Boudige  
C. J. Seaman  
Edward J. O'Connell  
Geo. Whitwell  
Thos. J. O'Connell  
Commissioners