

ORIGINAL

Decision No. 21249

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

In the Matter of the Application of
FOOTHILL DITCH COMPANY, a corporation,
to increase rates for water supply. } Application No. 14272.

Power and McFadzean, and D.E. Perkins,
for Applicant.
H.A. Savage, for Protestants.
H.B. McClure and J.A. McLaughlin,
for Wallace Ranch Water Company and
California Citrus Lands and Packing Company,
Petitioners for Rehearing.

BY THE COMMISSION:

OPINION ON REHEARING

On the twenty-ninth day of June, 1928, the Commission issued its Decision No. 19964 establishing a revised schedule of rates for all water supplied by the Foothill Ditch Company to its consumers on and after the first day of July, 1928. This decision fixed a uniform rate for all service and specifically directed the applicant herein to charge said uniform rate for all service rendered for use on the so-called Wallace Ranch which heretofore had enjoyed a much cheaper and highly preferential rate. A petition for rehearing was filed by the Wallace Ranch Water Company, a corporation, and California Citrus Lands and Packing Company, a corporation, upon the grounds that said Wallace Ranch Water Company had never at any time received due notice of a hearing in the application of the Foothill Ditch Company for an increase in rates and was, therefore, not represented in any way during the hearings held thereon, and that California Citrus Lands and Packing

Company is seriously affected by reason of the fact that it is one of the stockholders of Wallace Ranch Water Company and receives its water and rights to irrigate its lands, which comprise a part of the old Wallace Ranch, from the Wallace Ranch Water Company. Said Wallace Ranch Water Company further alleges that it is the owner of an undivided one-third interest in a portion of the Foothill Ditch and the right-of-way therefor. Upon the above grounds, these two companies allege that the rates established by the Commission for water service delivered to the Wallace Ranch Water Company are unlawful and unfair and request that an opportunity be permitted said companies to present evidence to the Commission to establish their respective rights in connection with water supplied to them through the Foothill Ditch. As a result of the above petition, the Commission issued its order granting a rehearing herein and at the same time directed the suspension of the effectiveness of the rates as established in said Decision No. 19964, pending the determination of the matters to be presented upon rehearing.

Public rehearings were held in this proceeding before Examiner Satterwhite at Visalia.

The Wallace Ranch Water Company contends that it has an adjudicated right to use three cubic feet of water per second from the waters of the Kaweah River and the right to convey said three cubic feet of water free of charge through the present Foothill Ditch a distance of approximately three miles; that, through its predecessors in interest, said Wallace Ranch Water Company, under a final judgment of the Superior Court of the County of Tulare, made and entered November 21, 1883, is the owner of an undivided one-third interest in the said ditch and right-of-way therefor from the Kaweah River to certain lands to which it now distributes water as a mutual water company and that, as to this same section of the Foothill Ditch, the present

Foothill Ditch Company is the owner of not to exceed the remaining undivided two-thirds thereof and has the right to convey its water therein to points below the lands served by the Wallace Ranch Water Company. Claiming the ownership of the above three second feet of water and also the ownership, as co-tenant, of a one-third undivided interest in a portion of the Foothill Ditch, the Wallace Ranch Water Company contends that the Commission has exceeded its jurisdiction in undertaking to adjudicate the extent of the water rights and ditch rights of the Foothill Ditch Company and the Wallace Ranch Water Company and that the Commission furthermore has no jurisdiction to impose any charges whatsoever upon said latter company for the waters which it has received and is entitled to receive through said Foothill Ditch.

In connection with petitioners' allegations involving the title and ownership to the ditch system and the water rights, a consideration of our Decision No. 19964 establishing the rates involved in this proceeding fails to disclose any attempt upon the part of the Commission to adjudicate or to determine in any manner whatsoever the title to all or any part of the ditch, rights-of-way, or easements of the present Foothill Ditch from its point of diversion on the Kaweah River to its lower terminus. Neither has the Commission, by inference or otherwise, made any finding or ruling as to the title or ownership of any of the waters diverted by the Foothill Ditch Company and transported through its canal system. The statements as to water rights in the former decisions of the Commission involving this utility are based solely upon the mutually conceded and admitted rights to water and upon the uncontradicted evidence and testimony in the record which in this proceeding show that there is no controversy involved to any extent whatsoever as to the actual

rights to divert water and the rights to use the same upon diversion. As to the ditch itself, however, applicant disputes the claims of petitioners to ownership of a portion thereof and claims title in fee to the entire Foothill Ditch.

The evidence presented on rehearing of this matter shows that in the suit brought by J.W.C. Pogue the final judgment of the Superior Court of Tulare County, made in the year 1883, partitioned certain lands between the said Pogue and certain predecessors in interest of the Wallace Ranch Water Company, wherein said predecessors were granted, in the language of said judgment, "perpetual easements and right-of-way, on and across the said lands hereinbefore adjudged and allotted to said plaintiff J.W.C. Pogue, to flow and convey over and across the said lands, in that certain irrigating ditch, situate thereon and referred to in said Referee's report one-third of all the water appurtenant to said ditch and which said ditch may lawfully divert from the Kaweah River." There is no dispute in this proceeding as to the right of Wallace Ranch Water Company to use the said three second feet of water from the Kaweah River at certain stages of said river, nor as to its right to have such water conveyed by and through the Foothill Ditch. The principal problem in this case arises through the claim of Wallace Ranch Water Company that, by reason of its rights to the above three second feet of water and by reason of its claim to the ownership of an undivided one-third interest in a portion of the Foothill Ditch, and also by the terms of a certain written agreement, it is entitled to free water service from the Foothill Ditch Company.

It may well be pointed out at this time that the question of the ownership of all or any portion of this ditch is

wholly immaterial to the establishment of a proper rate to be charged by this utility for the service rendered to its consumers in transporting water. The final rate must be based primarily upon due consideration of the fair value of all of the used and useful utility properties devoted to the particular public use, together with the reasonable costs incurred and to be incurred in operating and maintaining them. In so doing, it is obvious that the question of the individual ownership of such properties is not controlling. It is equally clear that, where an owner or a part owner of a utility is also a large consumer of the commodity supplied by it, fairness to the other patrons demands that such consumer is not entitled to free or preferential service by reason of such ownership. Assuming that the Wallace Ranch Water Company is the owner of a portion of the present Foothill Ditch, it very probably would be entitled to participate, as such, in any profits accruing by reason of the operation of said canal and also would be under the obligation to pay for its proportionate share of the burden of upkeep, maintenance and operation thereof. Whatever arrangements may become necessary in the future to effect a settlement between the applicant and the petitioners herein because of the latter's purported ownership of a portion of the Foothill Ditch is strictly a private matter and one subject to agreement between the contending parties or settlement in the proper courts of record in the event of a failure to amicably adjust their differences.

Throwing additional light on the operations of the Foothill Ditch, formerly known as and called the Pogue, Wallace & Crocker Ditch and also sometimes called Pogue's Lower Ditch, it is a significant fact that the Foothill Ditch Company has, at least since 1914, continuously operated, repaired and maintained the entire Foothill Ditch from the headworks to the lower terminus

thereof, a distance of some seventeen or eighteen miles, wholly at its own expense without the Wallace Ranch Water Company or any of its allied companies or corporations bearing any portion of such costs, and the record herein furthermore conclusively shows that said Foothill Ditch Company has had at all times during such period the complete charge of the diversion, transportation and delivery of all waters carried in said ditch, including the waters supplied to the Wallace Ranch Water Company. Furthermore, at the time application was made to the Railroad Commission for authority to transfer the property of the Foothill Ditch Company to the Lindsay-Strathmore Irrigation District, which property included the entire ditch from the headworks to the lower extremity, neither petitioner for rehearing herein was party to the contract between the Foothill Ditch Company and the District to transfer the company's properties to said District, but, although making formal appearance through counsel and C.E. Goodale, as Vice-President of said company, at the proceedings held therein before this Commission, presented no claim at that time to ownership of any part of the Foothill Ditch.

Wallace Ranch Water Company contends that, as it is a mutual water company, the Commission has no jurisdiction to fix the charges which it must pay for water, and further claims that, by reason of that certain contract entered into by and between Cora Wallace Morton and J.H. Morton, her husband, and the Central California Water and Irrigation Company, a corporation, said parties being predecessors in interest to the Wallace Ranch Water Company and the Foothill Ditch Company, respectively, said Wallace Ranch Water Company is entitled to free water service from the ditch. As to the first contention, it is obvious that the Commission is making no effort to fix the charges which this

petitioner as a mutual water company assesses its share or stockholders for the water which it distributes locally to them, but, on the other hand, is establishing only the rates which shall be paid by the consumers served by the public utility, of which consumers, said petitioner is unquestionably one. The mere fact that the Wallace Ranch Water Company purports to be a mutual water company as to its own consumers does not for that reason exempt it from paying as a consumer the lawfully established rates and charges fixed by this Commission for the public utility serving it.

This contract referred to above gave to the Central California Water and Irrigation Company, which was then operating the ditch system, the right to construct a flume through and across certain lands of the Wallace Ranch then owned by the Mortons, and also permitted the operation and maintenance of the flume over said lands and granted to the company a right-of-way therefor thirty-three feet in width. In consideration of the above rights, the company agreed, on demand of said Mortons, to conduct the three second feet of water, which said Mortons claimed the right in said contract to divert from the Kaweah River, into and through said flume to the lands of the Mortons "at the cost and expense" of the company and also agreed to build and maintain at its own expense three bridges or wagon crossings over said flume.

The record in this proceeding is somewhat indefinite as to the original operating methods of certain of the former companies and individuals controlling and managing this ditch. For this reason, it is difficult to determine a specific date during the early history of this irrigation system when it could be positively said that there was a definite dedication of the trans-

porting of the waters in the Foothill Ditch to the public use. Until recent years, the ditch was usually linked with some land-selling scheme or project and it is evident that in most instances the ditch waters originally were transported by the ditch operators for the various water users under written agreements setting forth specific rates per miner's inch or second foot. However, it is clear that the transportation of water by and through this irrigation ditch has been dedicated to the public use at least since April 20, 1915, at which time the Commission fixed rates therefor at the request of the owners of the property and of the consumers entitled to receive water service, all of whom voluntarily submitted to the jurisdiction of the Railroad Commission.

The Central California Water Company, while owning and operating this ditch, became insolvent and the ditch properties were acquired under foreclosure proceedings by one Rosa S. Spaulding. For several years during this period, the system had deteriorated so badly that none of the consumers could obtain any adequate water service whatsoever and it was for the purpose of reorganizing the company and placing the ditch once more in an operating condition that R.C. Merryman, a large water user, purchased the entire ditch and appurtenant rights in 1914 from said Rosa S. Spaulding and, in turn during the same year, conveyed them to the Foothill Ditch Company which he had caused to be formed and organized to operate the system. The plan was to eliminate the former contract charges for water service which were too low to enable the company to pay operating expenses and thereafter conduct the company on a paying basis as a public utility and to submit the entangled affairs of the system to the Railroad Commission to assist in establishing order out of the chaos then prevailing. The record shows that all the consumers willingly and gladly so submitted to the jurisdiction of the

Commission as to the rates for transporting and delivering of water. On April 20, 1915, the Commission, after a public hearing held thereon, established the following schedule of rates for service to be rendered by the Foothill Ditch Company. A special rate was established in this decision for the waters to be delivered for use on the so-called Wallace Ranch:

RATE SCHEDULE

12¢ per miner's inch (1/50 second foot) 24 hours.

For all water transported for use at the Wallace Ranch-----\$5.00 per sec. ft. per mo.

In Decision No. 9759, decided November 17, 1921, rates were again established by the Commission and the charge for water delivered to the Wallace Ranch was changed as set out below in the schedule of rates established therein:

RATE SCHEDULE

For each miner's inch flow of water for 24 hours--\$0.14
(The miner's inch referred to above shall be a flow equivalent to 1/50 of one cubic foot per second.)

Carrying charge for water used at the Wallace (Goodale) ranch, per second-foot per month----\$6.00

On the same date rates were established for this company, the Commission also issued its Decision No. 2308 (6 C.R.C. 678) authorizing Rosa S. Spaulding to transfer the Foothill Ditch System to R.C. Merryman, as trustee, and said Merryman to transfer said properties to the Foothill Ditch Company. Among other things, it is stated in Decision No. 2308 as follows:

"A public hearing was held in this matter on March 9, 1915. The consumers, some twenty in number, present at the hearing, offered no objection to this transfer."

In Decision No. 2309, the following statement appears:

"A public hearing was conducted in Exeter on March 9, 1915, at which time a number of consumers testified in regard to the quality of the water service and the propriety of the present established rates, and the company presented evidence to support its contention that rates were inadequate. The consumers were universal in their opinion that under the management of R.C. Merryman, president of the Foothill Ditch Company, improvements will be made and the service greatly improved."

Petitioners claim that the Wallace Ranch Water Company was never represented and never appeared at any of the proceedings before the Railroad Commission involving the establishment of rates and that said company has never acquiesced in the jurisdiction of the Railroad Commission over the Foothill Ditch or its right to charge said company for the conveyance of its three second feet of water.

The record in this proceeding shows that C.E. Goodale, in 1915 and for several years immediately prior thereto, was an officer, to wit, Vice-President and General Manager and also a Director of the Wallace Ranch Water Company, and that he also held the same identical official titles and positions with the Honora Realty Company, which then owned a controlling interest in the Wallace Ranch Water Company. Goodale also farmed, managed and operated the Wallace Ranch properties since 1895 until about three years ago, at which time he retired from active participation in the affairs of these companies. Said Goodale appeared at the hearings held in the above transfer and rate proceedings, which were held jointly in 1915, and testified as a witness therein to the effect that he had no objection at all to the Railroad Commission taking jurisdiction of the Foothill Ditch and that such procedure was acceptable to him. Furthermore, the evidence shows that ever since the rates were first established by this Commission on April 20, 1915, the Wallace Ranch Water

Company has always paid or caused to be paid to the Foothill Ditch Company in its behalf, either by one of its officers or by one of its affiliated companies, the charges substantially as established by the Commission, with the exception of the years 1926 and 1927. The bill for 1927 was offset by repairs made by Wallace Ranch Water Company to certain bridges which, by the terms of the above mentioned Morton Contract of 1907, was to be made at the expense of the California Water and Irrigation Company. The non-payment of the bill presented for 1927 occurred for reasons not clearly set out in the record.

It is to be noted here that C.E. Goodale was the highest official in complete charge of all of the local operations of the Wallace Ranch Water Company, Honora Realty Company and their affiliated interests. The exact nature and scope of the various companies with which Goodale was identified were very obscure and were not generally known to the public in any of the various communities in and about Visalia and Exeter, nor to anyone outside of a few of the officials of the companies. The Honora Realty Company transacted most of the business for its allied or affiliated companies and it was principally with this concern and Mr. Goodale that applicant transacted its business and received payment for water delivered to the Wallace Ranch Water Company. For these reasons, it appears that the claims of petitioners that these acts conceding the rights of applicant to charge the Wallace Ranch Water Company for service were committed solely by C.E. Goodale in his private and individual capacity are without force. For the purposes of this proceeding we are convinced that the past action of C.E. Goodale, as well as the acts of the Honora Realty Company, in paying or causing to be paid the past water bills for the Wallace Ranch Water Company, have operated and acted not only as a constructive acquiescence in and to the public utility status of the

service rendered by the Foothill Ditch Company to the Wallace Ranch Water Company but also have operated to preclude whatever rights the said Wallace Ranch Water Company may have acquired to free water service under the terms of the Morton Contract of 1907 before this Commission.

But one further point remains to be determined herein and that is the claim of the petitioners that, by reason of their ownership of the right to three second feet of water from the Kaweah River at certain stages, the Commission has no authority to determine any charge against the Wallace Ranch Water Company for the water transported for their use.

The service rendered by the Foothill Ditch Company is in some respects peculiar and different from the type of service usually rendered by a public utility irrigation system. The Foothill Ditch Company has the right to divert waters from the Kaweah River and to transport such waters so diverted for the various consumers living along the banks of its canal. The consumers along the Foothill Ditch have themselves acquired by purchase or otherwise, generally through water right agreements, the rights to specific amounts of water from the ditch, said amounts of water being in practically all cases appurtenant to and running with specific parcels or tracts of land. As to these consumers, the company acts merely in the nature of a transporting medium for waters, the ownership of which has been vested in its consumers. The undisputed status of these rights is very clearly set out in Decision No. 18178 involving the application of the Foothill Ditch Company for permission to sell its properties to the Lindsay-Strathmore Irrigation District (29 C.R.C. 610 at 616):

"It is clear from the evidence that while the Foothill Ditch Company as a corporation holds the rights by appropriation to divert certain quantities of water from the Kaweah River, depending upon the stage of the river and the

rights of other appropriators, yet upon diversion the title to such waters lies in the water users themselves. This situation was brought about through the sale to land owners located along the ditch, by the predecessors in interest of the present company, of water rights in the waters appropriated upon the basis of one miner's inch of water to each four and in some cases five acres. This company therefore does not own the water after diversion, but acts rather in the capacity of a common carrier of waters for parties who have vested interest therein."

In this respect these consumers are in identically the same position as the Wallace Ranch Water Company which also claims the right to the waters which are diverted by the Foothill Ditch for its use. Therefore, insofar as the ownership of the water rights is concerned, there is no basis for any difference in the charges made to the Wallace Ranch Water Company from those made to the other consumers.

The evidence in this proceeding indicated conclusively that the services to all water users along the ditch were practically identical in character and class and that there no longer existed any proper basis for a distinction in the rates to any of the water users supplied from the Foothill Ditch. For this reason the new schedule of rates established directed the removal of this inequality in rates and directed that the Wallace Ranch Water Company be billed for water under the same charges as all other consumers. No new evidence has been presented in this proceeding which indicates that the rates established by the Commission in the instant proceeding are not fair and reasonable rates for the service rendered and for this reason the schedule of rates which was suspended by the Commission will, in the following Order, be directed to be placed in effect for all service rendered by the Foothill Ditch Company on and after the date of this Order.

Applicant has requested that the Commission clarify the terms of its Order in Decision No. 19964 requiring the installa-

tion by the Foothill Ditch Company of "such standard measuring devices as shall be necessary to properly determine the amount of water delivered to the Wallace Ranch Company from the ditches or canals of said Foothill Ditch Company." At present, there are fourteen different points along the ditch from which the Wallace Ranch Water Company takes water for irrigation purposes. The testimony of C.H. Holley, consulting engineer, is to the effect that but four points are really necessary at which waters should be diverted. This situation was recognized by the Commission as evidenced by its language in the Order. The establishment of fourteen measuring points would clearly be unreasonable. It is expected that the company and petitioners can easily agree upon a reasonable number of diversion points and the location thereof to supply the Wallace Ranch Water Company. In the event of failure between these two parties to agree, the Commission will be glad to use its good offices to determine the matter informally, or formally if necessary, upon request of either party.

O R D E R

The Commission having by Order directed a rehearing to be held in connection with the above entitled proceeding and having at the same time further ordered that the effectiveness of the original Order in Decision No. 19964 herein, entered on the twenty-eighth day of June, 1928, be suspended pending our determination thereupon, the matter having been submitted and the Commission being now fully advised in the premises,

IT IS HEREBY ORDERED that said Decision No. 19964 be and the same is hereby confirmed except as modified herein.

IT IS HEREBY FURTHER ORDERED that the Foothill Ditch Company, a corporation, be and it is hereby authorized and directed to file with the Railroad Commission, within thirty (30)

days from the date of this Order, the following schedule of rates to be charged for all water transported or carried for or supplied to its consumers on and after the date of the Order herein:

RATE SCHEDULE

Miner's inch day of 24 hours-----14¢
(Miner's inch referred to above shall be equivalent to 1/50 of one cubic foot of water per second.)

IT IS HEREBY FURTHER ORDERED that Foothill Ditch Company, a corporation, be and it is hereby directed to install, within ninety (90) days from the date of this Order, such standard measuring devices as shall be necessary to properly determine the amount of water delivered to the Wallace Ranch Water Company from the ditches or canals of the said Foothill Ditch Company.

IT IS HEREBY FURTHER ORDERED that the Foothill Ditch Company be and it is hereby directed to file with this Commission, within thirty (30) days from the date of this Order, rules and regulations to govern relations with its consumers, said rules and regulations to become effective upon their acceptance for filing by this Commission.

For all other purposes, the effective date of this Order shall be twenty (20) days from and after the date hereof.

Dated at San Francisco, California, this 18th day of

June, 1929.

Frank L. ...

C. L. ...

Leon ...

W. J. ...
Commissioners