

Decision No. 23196

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

SARAH E. LUDY,

Complainant,

vs.

GREAT WESTERN POWER COMPANY OF CALIFORNIA and WESTERN CANAL COMPANY,

Defendants.

ORIGINAL

Case No. 2847.

In the Matter of the Investigation on the Commission's own motion into the operations, practices, rates, rules and regulations, services, service area, contracts, intercorporate relations, classifications, or any of them, of GREAT WESTERN POWER COMPANY OF CALIFORNIA and WESTERN CANAL COMPANY in the distribution and sale of water in the Counties of Butte, Glenn, Sutter and Colusa, State of California.

Case No. 2858.

Ware & Ware, by Allison Ware,
for Complainants.
Chaffee E. Hall and W.E. Spaulding,
for Defendants.
Douglas Brookman and Isaac Frohman,
for Sutter-Butte Canal Company.
Milton M. Hogle and Duard F. Geis,
for John E. Graves and J.S. Robinson
and in behalf of Mr. Belieu for
Frank Spencer.
J.J. Deuel, Edson Abel and L.S. Wing,
for California Farm Bureau Federation
and Butte County Farm Bureau.

LOUTTIT, COMMISSIONER:

O P I N I O N

Case No. 2847 is a proceeding filed by Sarah E. Ludy

who claims to be the owner of certain lands located in the County of Glenn and more particularly described as all of Section 30, the North $\frac{1}{2}$ and the Southwest $\frac{1}{2}$ of Section 31, all in Township 19 North, Range 1 East, M.D.B. & M., 866 acres of which lands it is alleged have heretofore been irrigated with water delivered by the Western Canal Company. Complainant alleges that during the year 1927 she undertook to secure water for the irrigation of said lands from defendant Western Canal Company which was refused and said company notified her that she would be required to purchase water stock in said company for said lands at the price of twenty dollars per acre before the requested service would be given.

Complainant prays that the Railroad Commission declare defendants to be public utilities engaged in the development, distribution and sale of water for irrigation purposes, that said defendants be required to file with the Commission rules, regulations and rates governing the distribution of water to the lands entitled thereto and that they further be required to sell and distribute water to all persons entitled thereto, including complainant.

Joint answer was filed by defendants Great Western Power Company of California and Western Canal Company in which the essential allegations of the complaint were denied.

Subsequent to the filing of the above complaint and for the purpose of broadening the issues involved therein in order to be in a position without further proceedings to fix service areas, establish rules and regulations and determine other

essential matters with reference to consumers other than the single complainant in this action in the event the evidence indicated the defendants herein or either of them to be public utilities or a public utility, as the case might be, the Commission on the fifth day of May, 1930, issued its order instituting an investigation on its own motion into the operations, practices, rates, rules and regulations, services, service area, contracts, intercorporate relations, classifications, or any of them, of Great Western Power Company of California and Western Canal Company, in so far as their operations concern the distribution and sale of water in the Counties of Butte, Glenn, Sutter and Colusa. These two proceedings were combined for hearing and decision.

The testimony and evidence presented in these proceedings indicate that in the year 1908 Duncan McCallum, S. J. Norris and Carlton Gray caused to be organized the Feather River Canal Company, articles of incorporation of which are dated May 29, 1908. The purpose of this canal company was to divert water from the Feather River and to distribute the same for domestic and irrigation purposes. On or about the same year, Norris posted and recorded an appropriation of 60,000 miner's inches of water claimed to be for irrigation and other beneficial and lawful purposes. Not long thereafter, a second appropriation for the same amount and for the same purpose was made by one W. B. Ward for the purpose of safeguarding the appropriation recorded by said Norris. The rights accruing under these filings were turned over to the Feather River Canal Company

by Norris. The plans of the original organizers and promoters of this canal company apparently followed the scheme of irrigation development generally adopted in the early days of irrigation in California which required the prospective irrigators to sign a contract to purchase from the owners or operators of the canal system the right to receive water service at a price usually from ten to twenty-five dollars per acre with the understanding that an additional charge per acre would be collected annually for water actually supplied. This company never served any consumer with water and very early in its career met with financial reverses and was unable to complete its construction work or finish the excavation of its projected canal system. Thereafter Norris gained full control of the company, and, although he expended approximately twenty-thousand dollars in engineering and construction during the period from 1909 to 1911, he was unable to bring the project to the point of operation.

The original organizers of the Feather River Canal Company were not the owners of any large tracts of farm land nor did their operations contemplate or embrace a joint land and water-selling scheme. However, on the thirteenth day of March, 1911, an agreement was entered into by and between S. J. Norris and F. L. Brown and G. D. Greenwood, the latter two being the owners of certain large tracts of land lying under and adjacent to the proposed ditch system. This agreement granted to Brown and Greenwood the exclusive right or option to purchase from said Norris two hundred and thirteen thousand one hundred and eight (213,108) shares of the capital stock of the Feather River Canal Company

out of a total number of shares issued and outstanding of four hundred thousand (400,000), together with "three thousand (3,000) acres of water rights" theretofore acquired by Norris from said company. On March 13, 1913, Norris entered into a further contract with said Brown and Greenwood agreeing to sell all of his stock and water rights to them. Very shortly after the agreement of March 13, 1911, Brown and Greenwood assumed the active control and management of the affairs of the Feather River Canal Company, combining the selling of lands owned or controlled by them with agreements to serve said lands with water by the Feather River Canal Company upon the completion of the irrigation system as originally projected. The new operators of the Feather River Canal Company were not successful in completing the construction of the irrigation project and caused to be organized the Feather River Mutual Water Company. The evidence presented in connection with this mutual company is so vague and elusive that nothing definite can be stated as to its rights, property, ownership and interests, if any, in the canal system and its water rights. An agreement under date of July 10, 1912, entered into by and between one George L. Walker, Secretary of Brown, Walker, Simmonds Company, which firm is purported to have acted as the agents of Brown and Greenwood, provided among other things that the Feather River Canal Company would convert its organization into a mutual water company within six months of date of agreement and a memorandum to Mr. M. Fleishacker dated February 16, 1914, the origin of which is unknown and of questionable authenticity, indicated that at that time "the canal water rights and rights of way (of Feather River Canal Company) are all incorporated into Feather

River Mutual Water Company." The intimation very probably is correct that the operators of the Feather River Canal Company intended to attempt the disposal and distribution of water under a mutual or cooperative form of organization and the sale of stock therein to the landowners. At all events the organizers and operators of these two companies soon became financially embarrassed and entered into negotiations with the Great Western Power Company which terminated in the sale of the canal company's properties for the sum of \$30,923.14.

The power company organized or caused to be organized as a mutual water company the Western Canal Company, articles of incorporation of which are dated January 28, 1915. The Feather River Canal Company and the Feather River Mutual Water Company by deed dated August 27, 1915, transferred all their properties and interests with the exception of water rights to the Western Canal Company, the water rights being transferred to the Great Western Power Company under separate deed of even date. There are also several other agreements among certain of the above parties, the most important of which as far as the issues herein are involved is one dated January 1, 1915, providing for the sale of water to the Western Canal Company and the completion of the canal system by the Great Western Power Company.

Counsel contends that the operators of the Feather River Canal Company intended to serve water as a public utility and by their acts and intentions did so conduct themselves as to dedicate the waters under their control to the public use. It is true that during the regime of Brown and Greenwood an agreement was entered into under date of February 13, 1912, with Agricultural Lands Com-

pany wherein it was provided among other things that water would be furnished to its lands by the Feather River Canal Company at the rate of five dollars per acre per year, provided, however, that

all rates for water*to be delivered and sold for use upon said lands shall be subject to such regulations as may be lawfully exercised by the proper officers of the State of California, acting under the laws of said State,"

and again in the above agreement of July 10, 1912, between the canal company and George L. Walker there was the following provision:

***provided, of course, that said transfer shall be approved by the Railroad Commission of the State of California."

Nevertheless the evidence very definitely discloses the fact that neither the Feather River Canal Company nor the Feather River Mutual Water Company had any ditch or canal completed or connected with the Feather River, nor were they possessed of any diversion works thereon by or through which water could be diverted and transported through the canal system or any part thereof. As a consequence of this physical situation, no water for irrigation or any other purpose was ever delivered to a consumer by any of the owners or operators of the Feather River Canal Company or of the Feather River Mutual Water Company. As a matter of fact, no water was ever carried through this canal system at any time or at all until final completion thereof which did not take place until after acquisition of the properties by the Western Canal Company during the year 1915. There can be no doubt therefore that prior to the sale to the Western Canal Company whatever the

purported intent of any of the former owners or operators of this canal system might have been at some particular moment in the past there was no consummation of said intent accomplished by the actual delivery of water and consequently no completed act or acts on the part of said former owners or operators which under any conception of the law properly could be considered as a dedication of water to the public use.

Counsel for complainant further takes the position that defendants are public utility water corporations by reason of the fact that there have been certain irregularities in the conduct of the affairs of the mutual water company through failure to record by-laws; the intermittent holding of meetings by the Board of Directors of the Western Canal Company; through the delivery of water in certain instances to consumers who merely were holders of options to purchase land or mere lessees and to consumers who had contracted to purchase stock but were not in fact actual paid-up stockholders as set forth in the company's articles of incorporation; and because the Great Western Power Company of California keeps in its own offices the books and accounts of the canal company, for which and other reasons it is alleged that both defendants are acting under a subterfuge in an attempt to avoid the provisions of the Public Utilities Act. In this connection it is sufficient to say that the record of this case shows that every apparent effort was made at the time of its organization to form and operate the Western Canal Company as a mutual water company and no water has ever been delivered by it to anyone except under a signed written agreement wherein was stipulated the rates and charges for water, method of delivery and a definite description

of the lands to be served. All consumers who received water from the company furthermore were required to sign an agreement to purchase capital stock of the company or it was further required that purchasers of stock be landowners or purchasers of land, except, however, that in some instances water was supplied to users who held only an option to purchase land and in one case to a lessee of lands. Water was also delivered at one time under temporary conditions for dredging purposes and is now being supplied to a consolidated group of drainage districts, individuals and gun clubs to maintain a certain water level in a particular area in mutual cooperation to eliminate drainage problems. In each of these cases the deliveries were fully covered by written contracts. Water delivered to former owners of so-called Feather River Canal Company "water rights" was furnished only after the exchange of said rights for stock in the Western Canal Company and to specifically designated lands to which the issued stock had become appurtenant.

Water was furnished to one I.G. Zumwalt and used upon certain lands of which he was the owner subject to a mortgage held by Sarah E. Ludy, complainant herein; however, Zumwalt defaulted in the performance of the covenants of the mortgage and through foreclosure proceedings this property became the property of plaintiff herein. The testimony shows that the canal company offered to Mrs. Ludy, after she had become the owner of the property, the option of completing Zumwalt's contract to purchase stock by assuming the obligation of paying the balance due thereunder or the privilege of purchasing new stock under unusu-

ally favorable terms, both of which proposals were refused.

While the evidence discloses certain irregularities in the internal conduct of the affairs of the canal company and a most solicitous paternalism therein on the part of the power company indicating probably to some extent a disregarding of some of the rights and privileges of its stockholders, yet clearly these all are matters which are more properly the individual concern of said stockholders but certainly are not acts which are sufficient to establish as a matter of law a dedication of the waters of the canal company to the use of the public generally, or to the lands of this plaintiff.

The record shows that the Western Canal Company from its inception has intended and attempted to serve its consumers as a mutual company and that such consumers, relying upon the apparent mutual status of this concern, up to May 27, 1930, have purchased and fully paid for twenty thousand eight hundred and eighty-eight (20,888) shares of stock therein and contracted for four thousand two hundred and forty-five (4,245) additional shares as yet only partially paid up, resulting in a total investment of \$502,903 made by shareholder consumers for stock, together with obligations to pay an additional sum of \$69,905 on the unpaid balance. A finding by the Railroad Commission that this canal company is a public utility would practically nullify and make useless and unnecessary, as far as the right to obtain water is concerned, expenditures in excess of one-half a million dollars made by these consumers in good faith for their rights to receive water and their interests in the properties. It is

obvious that under these circumstances and conditions only the most clear, definite and conclusive evidence would justify such a finding. There was no evidence presented in these proceedings of that character which would warrant or justify a finding that either the Great Western Power Company of California or the Western Canal Company is at this time, as to the general territory involved in this proceeding, a public utility water corporation subject to the jurisdiction and control of the Railroad Commission, or that the plaintiff is entitled to the relief prayed for herein.

I am constrained therefore to recommend that these proceedings be dismissed.

O R D E R

Complaint as above entitled having been filed and an investigation upon the Commission's own motion having been instituted into certain of the affairs of defendants, Great Western Power Company of California and Western Canal Company, public hearings having been held thereon, the matters having been submitted and the Commission being now fully advised in the premises,

IT IS HEREBY ORDERED that the above entitled proceedings be and they are hereby dismissed.

The foregoing opinion and order are hereby approved and ordered filed as the Opinion and Order of the Railroad Commission of the State of California.

Dated at San Francisco, California, this 19th day
of December, 1930

[Signature]
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Commissioners.