Decision No. 24605

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

Charles A. Miller and Edward I. Hopkins, Complainants, vs. La Rinconada Golf Club and L. Bogner, Defendants.	Case No. 3051.

ORIGINAL

Niles E. Wretman, for Complainants.
Brooks Tompkins, for Defendants.

BY THE COMMISSION:

O P I N I O N

This is a proceeding involving the question of dedication to public use of a certain water well located upon property formerly owned by one L. Bogner, defendant, and now alleged to be owned by La Rinconada Country Club. The complaint alleges that Edward I. Hopkins and Charles A. Miller, complainants, jointly entered into an agreement with said Bogner for the drilling of a well upon the latter's land to supply water for orchard irrigation to their own respective lands and those of adjoining ranchers. The complaint further alleges that Bogner caused Miller and Hopkins to withdraw from the enterprise with the understanding that Bogner was to handle the undertaking alone but would supply them with water; that after the well had been drilled, water was sold for compensation in 1930

to complainants Miller and Hopkins and also to eight other individuals but that thereafter defendants Bogner and the Country Club deprived complainants of service from the said well at the time when water was most seriously needed for crop irrigation. The Commission is asked to order defendants to resume water service to complainants upon demand at the rate of two dollars ($2.00) per hour.

The answer admits that complainants were denied water but states that the refusal was based upon the fact that complainants have no right to that service; that Bogner's well was drilled to supply his ranch alone; that only the surplus water was to be sold to others and that the water sold in 1930 to complainants and others was surplus water for accommodation purposes only. The Commission is asked to declare that the well has no public utility obligations attached to it and to dismiss the complaint.

Public hearings in this proceeding were held at Campbell before Examiner Satterwhite.

At the initial hearing the complaint was amended to correct the name of defendant from "La Rinconada Golf Club" to "La Rinconada Country Club."

The testimony shows that complainamts own two small prune ranches near the Town of Campbell in Santa Clara County, totaling approximately thirty-four acres. Neither of these parties has a well or a water supply for irrigation use but both have depended on purchasing water from neighbors for this purpose. In the past one Niels Andersen furnished complainants with most of the water used upon their lands. However, on October 20, 1928, Mr. Andersen entered into a ten-year agreement with La Rinconada Country Club which, among other things, granted said club a sole right to all surplus waters

produced from the well. Upon learning of the above arrangements, complainants approached defendant L. Bogner and proposed that all three equally share the cost of drilling a well on Bogner's property. On May 3, 1929, complainants and Bogner jointly signed a contract with a well-driller named E.J. Mattocks for the sinking of the well on the Bogner ranch but before the work was started, however, Bogner decided that the proposal as set out in the agreement might result in casting a cloud upon the title to his property and he prevailed upon both Miller and Hopkins to withdraw their names from said agreement and he thereupon proceeded to make the installation entirely at his own expense.

Complainants testified that Bogner exacted a promise from them in 1929 that they would purchase water from him for irrigation uses. The well was completed and a pumping plant installed late in the irrigation season of 1929 at a total cost of $6,500. During this year water was supplied for a few hours only to Miller but in 1930 both complainants and eight other orchardists in the immediate vicinity of the pumping plant were furnished water from the Bogner well for irrigation purposes. The total acreage irrigated during 1930 was approximately one hundred and the rate charged was two dollars ($2.00) per hour for the so-called "run of the pump."

The evidence shows that in September of 1930 Bogner requested the individuals who had been supplied with water from his well to sign a statement which, among other things, set forth that said water users were not obligated by contract to take water from Bogner and that Bogner was not obligated by contract to furnish the users with water; that Bogner had constructed the well with his own funds; that no arrangements had been made for the sale of water in the future other than that, if he (Bogner) had more water than

he could use, he would not object to selling such excess water as an accommodation. All parties who had received water from Bogner except Hopkins and Miller signed the above statement or "release." On or about October 1, 1930, Bogner sold the well to La Rinconada Country Club and discontinued furnishing water to all of the users mentioned.

Complainants Miller and Hopkins endeavored to obtain water service in April, 1931, from the former Bogner well, which was then purported to be owned by La Rinconada Country Club, but were informed by the officials of said club that water would be furnished to them only as an emergency matter at the rate of three dollars ($3.00) per hour run of the pump and upon the understanding that such service was rendered solely as an accommodation and that it should not be construed as an admission of any obligation whatsoever on the part of the club to furnish water on demand. The offer to supply this water for the year of 1931 was made at the instance of the Railroad Commission; however, neither Miller nor Hopkins were willing to accede to the conditions imposed by the club and, being unable to obtain water from Andersen, filed this proceeding with the Railroad Commission.

Mr. Bogner testified that he has a forty-acre ranch, of which twenty-six acres, more or less, are planted to prunes and grapes; that he did not desire to drill the well in accordance with the former joint agreement as it would lessen the value of his property by granting to complainants joint ownership in the parcel upon which the well and pump were located and rights of ingress and egress thereto; and that he gave no promise or assurance that he would or intended to render water service on demand to complainants and others when the former removed their names from the well-drilling

contract. He testified further that the sales of water from his well in 1929 and 1930 prior to the transfer thereof to La Rinconada Country Club were from excess or surplus water and that no promise or agreement had ever been made by him to any one that permanent public utility irrigation service would be provided. Bogner flatly denied that he ever at any time intended to dedicate all or any part of his water supply to the public use or to the use of any particular individuals.

No certificate of public convenience and necessity was ever applied for by or in behalf of either defendant herein nor have either thereof ever filed rates and/or rules and regulations with this Commission. No pipe lines or conduits were ever installed by Bogner to supply water to those who received it before the sale of the plant to the Country Club, the irrigators having constructed their own ditches or laid their own temporary pipe lines to the well. These pipes were mostly all portable sheet-iron, surface-irrigation pipes, such as are generally used for short distance water transportation in this territory. The record also shows that defendant Bogner kept no regular accounts of the expenses incurred by him in the operation of the pumping plant other than perhaps the amounts of the power bills. The determination of the charge of two dollars per hour evidently was purely arbitrary and apparently based upon a comparison with the charges made by other pumping plant-owners for similar service in the general vicinity.

The evidence presented in this proceeding is most decidedly conflicting and contradictory. The testimony of complainants relative to the intent, desire and motives of defendant Bogner in installing a pumping plant and serving certain neighbors with water is flatly denied by Bogner. The overt acts of defendant

might reasonably be interpreted either as intent to dedicate the waters of the well to the public or as intent to supply water temporarily only as an emergency measure or for purposes of accommodation. It might well be inferred from the record that, as Bogner had only a small acreage capable of receiving irrigation water and that in the past he had never used water for such purposes upon his own lands, there could be no justification for the expenditure of so large a sum of $6,500 for the well and pumping plant other than the intent to sell water to the public generally. However this may be, the fact remains that there is insufficient evidence presented in this proceeding to warrant such a finding as conclusive. It is the custom not only in the Santa Clara Valley but practically throughout the entire State of California for those ranchers who have their own private pumping plants to serve water to their neighbors for compensation when they have available water over and in excess of their own individual requirements. It is doubtful that any such water would ever be sold by such ranchers to neighbors or even furnished free and without charge in times of stress, emergency and serious drought if by so doing a servitude would be placed upon their pumping plants which would practically preclude them from using their own wells for their private requirements and purposes.

We do not believe that either the Public Utilities Act or the Act for the Regulation of Water Companies intended to place a public utility servitude on private agricultural pumping plants when operated under such circumstances and conditions as exist in this case, and we are furthermore of the opinion that the above statutes should not be so construed without clear, definite and conclusive evidence of intent to so dedicate the service to the public. The

Amendment of 1923 to the Act for the Regulation of Water Companies set out below evidences an intent and desire on the part of the Legislature to prevent such service as has been here rendered from placing the water plant and its operation in the class of a public utility subject to State control and regulation:

> "*****provided, however, that whenever the owner of a water supply not otherwise dedicated to public use and primarily used for domestic purposes by such owner or for the irrigation of such owner's lands, shall sell or deliver the surplus of such water for domestic purposes or for the irrigation of adjoining lands, or whenever such owner shall, in an emergency water shortage sell or deliver water from such supply to others for a limited period not to exceed one irrigation season, or whenever such owner shall sell or deliver a portion of such water supply as a matter of accommodation to neighbors to whom no other supply of water for domestic or irrigation purposes is equally available then such owner shall not be subject to the jurisdiction, control and regulation of the railroad commission of the State of California;***"

That this is the attitude and interpretation of our State Supreme Court is clearly indicated by the following cases which, in the main, may reasonably be considered as substantially parallel in their facts to the case at bar: Klatt v. Railroad Commission, 192 Cal. 689; Richardson v. Railroad Commission, 191 Cal. 716. See also Rilovich v. Raymond, 26 C.R.C. 28, reversed in 27 C.R.C. 182.

Should it be held otherwise, it is clear that a great many other pumping plants in this territory, including very probably the Andersen well, have also been operated as public utilities and would likewise be subject to State regulation.

Upon the findings set out above, we believe this matter should be dismissed.

O R D E R

Complaint as above entitled having been filed, public

hearings having been held thereon, the matter having been submitted and the Commission being now fully advised in the premises,

IT IS HEREBY ORDERED that the above entitled proceeding be and it is hereby dismissed.

Dated at San Francisco, California, this 21st day of March, 1932.

C. L. Jones

Leon O. Whitsell

M. A. Cox

M. B. Harris

Fred G. Athearn

Commissioners.