Decision No. 1492

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

ORIGINAL

CHARLES MITCHEL WHITAKER,

Complainant,

vs.

SNOWBALL-SULLIVAN COMPANY and PALMDALE WATER COMPANY,

Defendants.

Case No. 510.

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H. W. McNutt for complainant.
Gray, Barker and Bowen and Donald Barker for Palmdale Water Company.
William C. Petchner for Littlerock Fruitland Company and J. F. O'Brien, intervenors.

THELEN, Commissioner.

O P I N I O N.

This is an action to compel the defendant Palmdale Water Company, admittedly a public utility, to supply water for domestic and irrigation purposes to the southwest quarter of Section 4, Township 5 North, Range 11 West, San Bernardino Base and Meridian. This property was purchased by the complainant on August 12, 1912, and is located southeasterly from Palmdale, in Los Angeles county. The amended complaint alleges, in effect, that the land in question was owned on March 23, 1896, by one Jacob Rathke; that Rathke, together with other persons in the vicinity, owned stock in the East Palmdale Water Company; that the South Antelope Valley Irrigation Company purchased these shares of stock and as part consideration therefor entered into a contract, a copy of which is attached to the amended complaint as Exhibit A, whereby the Antelope Valley Company agreed that it would at all times when there is sufficient water on hand for that purpose, provide the parties therein specified, including Rathke, and all subsequent owners and occupiers of lands at that time occupied by said parties, with "sufficient water to properly irrigate and cultivate said lands at the same rates and on like terms and conditions that other users of water obtain the same from said South Antelope Valley

164

Irrigation Company," and without any discrimination whatever against the parties who were assigning their shares of stock in the East Palmdale Water Company; that subsequently, the Palmdale Water Company acquired all the rights of the South Antelope Valley Irrigation Company and that said company, as the successor of the South Antelope Valley Irrigation Company, is now under obligation to supply water to complainant under the contract of March 23, 1896. Complainant accordingly asks this Commission to make an order compelling the Palmdale Water Company to furnish water to him for irrigation and cultivation purposes, and to carry out the terms and conditions of said contract of March 23, 1896.

The Palmdale Water Company, in its answer, denies the material allegations of the complaint. The company, while admitting that it has acquired a portion of the property formerly owned by the South Antelope Valley Irrigation Company, denies that it had any knowledge, either actual or constructive, of complainant's claim. The Company takes the position that any right which the predecessors of the complainant may have had to receive water has long since been lost by the failure to continue the use of the water appropriated from the Little Rock creek by the East Palmdale Water Company. The Palmdale Water Company also contends that the complainant is not at present within the class of persons whom the company is obligated to serve. The company further makes the point that this Commission has no jurisdiction to enforce the contract of March 23, 1896, and that the remedy for the possible breach of contract lies in an action in the courts and not in a proceeding before this Commission.

The Littlerock Fruitland Company and J. F. O'Brien intervened and claimed that they are within the class which the Palmdale Water Company is obligated to serve and that the complainant is not within this class and should not be admitted thereto. The evidence shows that during the early 90's complainant's land was owned by Jacob Rathke; that he cultivated at least ten acres and received water from a ditch

of the East Palmdale Irrigation Company; that this ditch was washed out in 1894 or 1895, and has never been repaired; that Rathke was one of the parties who entered into the agreement of March 23, 1896, to which reference has hereinbefore been made; that Rathke moved away about 1898 or 1899 and that the land now owned by complainant has never since been cultivated; that the last water which was taken into the Harold reservoir of the South Antelope Valley Irrigation Company was taken in in 1902 and that the last water taken out prior to the last year or two, was in 1904; that the South Antelope Valley Irrigation Company became financially embarrassed and that subsequent to 1904, its system was no longer operated and that no water was delivered through the same until a year or two ago, when the Palmdale Water Company bought a portion of the properties formerly owned by the South Antelope Valley Irrigation Company and undertook the rehabilitation of the system.

Under these circumstances, I am of the opinion that the owners of complainant's land lost any legal rights which they may have had to the use of water growing out of the contract of March 23, 1896. That this is the case seems to have been definitely established by the Supreme Court of this State in Smith vs. Hawkins, 110 Cal.122 . After referring to the fact that the Legislature has made no specific declaration as to the period of non-user necessary to work a forfeiture of the right to water, the court, at page 127, says:

> "In this state five years is the period fixed by law for the ripening of an adverse possession into a prescriptive title. Five years is also the period declared by law after which a prescriptive right depending upon enjoyment is lost for nonuser; and for analogous reasons we consider it to be a just and proper measure of time for the forfeiture of an appropriator's rights for a failure to use the water for a beneficial purpose.
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> "Considering the necessity of water in the industrial affairs of this state, it would be a most mischievous perpetuity which would allow one who has made an appropriation of a stream to retain indefinitely, as against other appropriators, a right to the water therein, while failing to apply the same to some useful or beneficial purpose. Though during the suspension of his use other persons might temporarily utilize the water unapplied by him, yet no one could afford to make disposition for the employment of the same, involving labor or expense of any considerable moment, when liable to be deprived of the element at the pleasure of the appropriator, and after the lapse of any period of time, however great.

The court then reaches its conclusion as follows:

"The failure of plaintiffs to make any beneficial use of the water for a period of more than five years next preceding the commencement of the action, as found by the court, results from what has been said in a forfeiture of their rights as appropriators."

Accordingly, it follows that the East Palmdale Water Company and the South Antelope Valley Irrigation Company both lost their rights as appropriators of water from the Little Rock creek, and that the complainant has no right to compel the delivery of water by the Palmdale Water Company, growing out of the contract of March 23,1896.

The question remains whether, irrespective of prior contractual relations, the complainant is now within the class which this Commission can and should direct the Palmdale Water Company to serve.

The evidence in this case shows that early in January, 1913, the Palmdale Water Company bought certain of the property of the South Antelope Valley Irrigation Company (See Application of South Antelope Valley Irrigation Company to sell its water system and appurtenances to Palmdale Water Company, Vol. 2, Opinions and Orders of the Railroad Commission of California, p. 71), and that at this time the Palmdale Water Company obligated itself to supply water to the following lands:

Acreage derived from South Antelope Valley Irrigation Company,	2140 acres
Water users of South Antelope Valley Irrigation Company's system	571 "
Littlerock Fruitland Company	1323 6/10 acres
Total,	4034 6/10 "

The evidence further shows that the engineer of the Palmdale Water Company was instructed to construct an irrigation system on the basis of serving the land hereinbefore indicated, together with some 800 acres of land subsequently purchased by the Palmdale Land Company and 225 acres constituting the townsite of Palmdale, thus making a total acreage to be served amounting to 5059 6/10 acres. The evidence further shows

that complainant's property is located some four miles from the Harold reservoir and at least one mile from any property which the Palmdale Water Company has contracted to serve; that it is physically possible to serve the complainant's land from the Harold reservoir, but that a dirt ditch would be wasteful and that a steel pipeline would cost about $20,000. Mr. T. D. Allin, the engineer of the Palmdale Water Company, testified that the number of acres of land which can be safely irrigated from this system will not exceed 4486 acres, with a probability of some 980 acres additional hereafter, when the property has been fully developed. He testified further that if the lands which the Palmdale Water Company has obligated itself to serve are irrigated, there will be no water remaining for complainant's land.

It is obvious that there must be some method of delimiting the territory which a water utility is obligated to serve. Referring to this question, this Commission in Tyndale Palmer vs. Southern California Mountain Water Company (Vol. 2, Opinions and Orders of the Railroad Commission of California, p. 63) uses the following language:

> "There remains to be determined wherein the power to admit into the class up to the limit of the supply resides. The Supreme Court in the Leavitt case, (Leavitt vs. Lassen Irrigation Company, 157 Cal. 82) has said that the company may restrict its boundaries and even if the position of the complainants were correct, the limitations at the time of the appropriation would be a recognition of this power. This power of limitation given to the company that does not exist with reference to common carriers is warranted only by the public necessity therefor and in confining the agencies so to limit their consumers to water companies having a limited amount of water, the court certainly recognizes that the public necessity should require this limitation. If the public necessity requires it, then, on the failure of the company to respond to this public necessity, the State certainly can require such response through governmental restraint or compulsion. I believe we cannot escape the conclusion that the State has the power to put in the hand of some governmental agent the power to determine the 'class' which has been discussed in the decisions we have been considering."

Subsequent to this decision, and apparently as a result thereof, the Legislature of 1913, in enacting chapter 80 of the Laws of 1913, provided in section 5 thereof as follows:

"Sec.5. Whenever the Railroad Commission, after a hearing had upon its own motion or upon complaint, shall find that any water company which is a public utility operating within this state has reached the limit of its capacity to supply water and that no further consumers of water can be supplied from the system of such utility without injuriously withdrawing the supply wholly or in part from those who have theretofore been supplied by such corporation, the Railroad Commission may order and require that no such corporation shall furnish water to any new or additional consumers until such order is vacated or modified by the said Commission. The Commission shall likewise have the power after hearing upon its own motion or upon complaint, to require any such water company to allow additional consumers to be served when it shall appear that to supply such additional consumers will not injuriously withdraw the supply wholly or in part from those who theretofore had been supplied by such public utility."

It will thus be noted that the Legislature of this State has given to this Commission the power to require, on the one hand, that a water utility shall not furnish water to new or additional consumers, and, on the other hand, to require, in a proper case, that a water company shall allow additional consumers to be served.

This Commission will not compel a water company to extend its mains to serve additional customers, not lying in the territory which the utility has marked out for its service, unless the evidence in the case shows that it is fair and reasonable to make such order. On the evidence introduced in this case I find that under existing conditions, including the amount of water available to the Palmdale Water Company, the acreage which that company has obligated itself to serve, and the expense to which the Palmdale Water Company would be put in order to reach complainant's land, it would not be reasonable to compel the Palmdale Water Company to serve the complainant's land with water. Complainant is not within the territory which the Palmdale Water Company has marked out for its service of water, he is not within the territory for which the water system of the Palmdale Water Company is being constructed, the Palmdale Water Company has not on hand a supply of water sufficient to justify service to the complainant and others in his position, and the expense of extending the system of the Palmdale Water Company to complainant's land would be so great as to make it unreasonable to compel the Palmdale Water Company to make such extension. On all of the facts of the case, I find that this Commission

cannot fairly and reasonably make its order compelling the Palmdale Water Company to serve the complainant's land.

The attention of the Palmdale Water Company, however, should be directed to the fact that if they hereafter undertake to serve any territory outside of the 5059 6/10 acres hereinbefore referred to, they must do so without discrimination and without favor to any particular lands as against other lands.

I recommend that the complaint be dismissed and submit herewith the following form of order:

O R D E R.

A public hearing having been held in the above entitled matter and the case having been submitted and being now ready for decision,

THE RAILROAD COMMISSION FINDS AS A FACT that it would not be fair and reasonable to compel the Palmdale Water Company to extend its water system and to serve water to the complainant's lands.

Basing its order on this finding and on the other findings which are contained in the opinion which precedes this order,

IT IS HEREBY ORDERED that the complaint in the above entitled proceeding be and the same is 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 7th day of May, 1914.

H. D. Loveland

Alex Gordon

Max Thelen

Commissioners.