

Decision No. \_\_\_\_\_

ORIGINAL

Decision No. 2431

BEFORE THE RAILROAD COMMISSION OF STATE OF CALIFORNIA.

MERCED RANCH COMPANY, a corporation,

Complainant,

vs

CROCKER-HUFFMAN LAND & WATER COMPANY,  
a corporation,

Defendant.

Case No. 755.

Edmond E. Herrscher for complainant.

James F. Peck for defendant.

LOVELAND, Commissioner:

O P I N I O N

In this case the Merced Ranch Company, hereinafter called the complainant, seeks to fix upon the Crocker-Huffman Land & Water Company, hereinafter designated as the defendant, the obligation of caring for, repairing and keeping clean a certain ditch through which water is conveyed from defendant's main canal to the lands of complainant and other users of water in Merced County, California. At the hearing complainant asked for and received permission to amend its complaint to comprehend a demand for reparation for the payment of water rates, as explained later in this opinion.

A history of the circumstances and conditions which have finally resulted in this suit before the Commission are as follows: For many years defendant and its predecessor have been serving water, for the purpose of irrigation, to lands lying

below the gradient of defendant's main canal. In about 1888 John Archer and a Mr. Hooper organized what was known as the Hooper Colony, consisting of about 900 acres of land which was sold in tracts of varying size to different people. Such purchasers and Archer and Hooper at various times, but approximately 1888, entered into a contract with the Merced Canal & Irrigation Company, predecessor of defendant, copy of which contract was filed with the complaint in this case, under the terms of which contract Archer and Hooper, and other purchasers of land in the aforesaid Hooper Colony, agreed to pay the predecessor of defendant \$10.00 an acre initial payment and \$1.00 per acre per year thereafter for each acre owned by said parties who entered into this agreement with the said predecessor of defendant. For this payment said parties were to receive one cubic foot of water per second during the irrigation season, or so much thereof as was necessary to irrigate their land. These contracts, or agreements, were made about 1888, and were to continue until the 3rd day of March, 1933, and thereafter during the existence of the Merced Canal & Irrigation Company, or its successors.

Paragraph 2 of said agreement recites that party of the first part, the Merced Canal & Irrigation Company, predecessor of defendant in this case, as soon as the parties of the second part, predecessors of complainant in this case, were ready to receive the water for their land, would construct and place a suitable box or gate in the bank of the main canal, or branch thereof, at a point most convenient from which to take water to certain land.

Paragraph 3 of said agreement recites that the parties of the second part were to construct a ditch from said box or gate to said land, but paragraph 3 also contains the following language:

"and the party of the first part may at any time assume full control and management of the ditch so constructed and may enlarge the same and use it to convey water to other lands providing, however, that such use and control shall not interfere with the flow of water to the land in the first Sub-division hereof mentioned",

"first Sub-division hereof mentioned" alluding to the land of predecessor of complainant. Other conditions are set forth in the contract which need not be quoted in this opinion and order, as reference is hereby made to the contract.

From the testimony it appears that the land now owned by complainant was owned by Mrs. A.A. Dunn in 1888 at the time the agreement, or contract, above referred to was entered into between the Merced Canal & Irrigation Company, a corporation, predecessor of defendant, and Mrs. A.A. Dunn, predecessor of complainant.

In conformity with the second paragraph of said agreement the Merced Canal & Irrigation Company, party of the first part in said agreement, and predecessor of defendant, constructed a ditch from its main canal a distance of several hundred feet to a point convenient from which to furnish Mrs. A.A. Dunn, party of the second part to the agreement, and predecessor to complainant herein, with water for her land and installed a suitable box or gate to furnish said water according to the terms of the agreement. -

It is in testimony that Mrs. Dunn, party of the second part to the agreement, and predecessor of complainant herein, according to the terms of the third clause of the agreement, caused to be constructed from the point where said gate or box was installed a ditch across her land to receive the water for irrigating purposes; that said ditch was thereafter constructed in a southerly direction beyond the lands of Mrs. Dunn so as to supply other owners and irrigators in the Hooper Colony.

As will be noted in paragraph 3 of the agreement, while the land owners desiring water for irrigation were charged with the construction of their own ditch, the Merced Canal & Irrigation Company, predecessor of defendant, was authorized at any time to assume full control and management of the ditch so constructed, and might enlarge the same and use it to convey water to other lands, provided such use and control did not interfere with the flow of water to the users beyond whose lands the ditch was constructed to supply other users.

The testimony showed that the Merced Canal & Irrigation Company, predecessor of defendant, helped to keep the ditch in order and at times constructed gates or flumes for water users. It further showed that the defendant, up to about nine or ten years ago, had assumed the control, care, management and repair of the ditch in question, had sent teams to plow out the ditch when necessary, had repaired its banks, cut the tules and removed the grass from the ditch. Mr. C.D. Martin, who was manager of defendant <sup>water company</sup> /at the time this was done, testified that he considered, in a general way, that he was following the wishes of the defendant company in thus caring for the ditch. The present manager, Mr. S.F.B. Morse, testified that some years ago he concluded that as this ditch was not built by and did not belong to defendant, or its predecessor, it was not the duty of defendant to clean, repair and care for the ditch, and that such care and repairs have since then been left to the owners of the ditch and of the land served by the ditch.

The testimony of complainant, and others, showed that the ditch across complainant's land was not now in good condition, and this was not controverted by witnesses for defendant but rather admitted with the explanation, however, that much of the

present poor condition of the ditch across and over complainant's land was due to three circumstances; first, the washing out of a certain flume or gate on complainant's land, which permitted water to rush down an incline and carry soil into the ditch; second, to the fact that complainant has a hog pasture on both sides of the ditch and that the hogs root and destroy the banks of the ditch; third, that in order to facilitate the irrigation of his land complainant had cut the banks of his ditch at about twenty to twenty-five different places. Defendant disclaimed any liability for the maintenance or repair of the ditch relying upon the language of the agreement, or contract, above referred to, while complainant maintained that the action of defendant, testified to by witnesses for complainant and admitted by defendant, in caring for the ditch up to about nine or ten years ago places upon defendant the obligation to continue to exercise such care and make such repairs. Careful consideration has been given to the authorities cited by counsel for complainant but I find nothing therein to lead me to depart from my finding above expressed.

I am not unmindful that the decision of this Commission in Case 361, J.A. Andrew Franciscons, et al., vs. Soledad Land and Water Co., decided February 9, 1914 (See Opinions and Orders of the Railroad Commission of California, Volume 4, page 184) seems at first glance to be at variance with the decision in the case at bar; but a proper analysis of both decisions will discover the fact that the circumstances of Case 361, supra, were dissimilar to those found in this case, and the Commission repeats what it has frequently said in former opinions that each case or Application, coming before the Commission for

adjudication, must depend upon and be decided upon its own statement of facts.

The testimony as to the capacity of the ditch in its present condition was conflicting. The witnesses for complainant testified that the ditch in its present condition would carry from one to three second feet, while witnesses for the defendant varied this amount from three to five second feet. The number of acres now being irrigated through this ditch was variously testified to at from 260 to 300 acres and there seems to be no doubt about there being plenty of water if the ditch across complainant's land was put in good condition so that the water would not flow over the banks by reason of the ditch being filled up, and thus lost before it reaches the land of users on lower levels. Testimony for the defendant showed that the wire fence around complainant's hog yard caught the brush and debris running down the ditch thus impairing the flow of the water and causing loss.

thereof. Some of the witnesses living on lower levels than that of complainant found fault, in their testimony, with the manner in which complainant had irrigated his land by putting down the boards of his restraining gate to raise the level of the water to be used in irrigating his land at times when owners below him had notified the ditch-tender that they desired to irrigate, and had a reasonable right to expect the water.

There is no doubt but that some friction has been developed between these neighbors and that each may have some grounds for complaint against the other but there is also no doubt in my mind as to these little differences being amicably adjusted and forgotten when the ditch across complainant's land is cleaned and repaired, and also that a better feeling will prevail if the land owners irrigating from this ditch will join with the defendant in arranging rotation periods for irrigation.

The real question at issue in this case is - who should keep this ditch cleaned, repaired and in proper condition to furnish water to complainant's land and to the lands owned by Mrs. Edwards, Mr. Patterson and others south of complainant's land?

As has been said, the complainant in this case seeks to have the Commission require the defendant to care for and operate the lateral ditch through which complainant, and others, receives water. As is shown from the testimony, it appears that in the original contract, under which water was supplied to the territory in which complainant's lands are situated, it was provided that the defendant company

"may at any time assume full control and management of the ditch so constructed and may enlarge the same and use it to convey water to other lands."

I have already called attention to the fact that the record shows that some years ago defendant did, from time to time,

clean out this ditch and made necessary repairs to the ditch, and that as a part of such work defendant cut and removed the tules which were impeding the flow of the water in the ditch. The record, however, does not contain any other evidence that defendant has taken over the care and operation of the ditch, but does show that during the last six or seven years the owners of the land and not defendant have taken care of the ditch and its operation. Defendant expressly declines to take over and operate this ditch as a public utility, and on the evidence in this case it is impossible to charge defendant with the obligation of operating this lateral ditch as a public utility. I must conclude, therefore, and find as a fact that the complaint, insofar as it seeks to have this Commission compel defendant to take over and operate this lateral ditch, must be dismissed.

I earnestly suggest that the water users along this ditch get together and among themselves undertake to care for and operate this ditch; and I further suggest and urge that the defendant company render them every assistance possible in this work. Handled in this way, and with a desire to get along agreeably together, the expense and trouble of the care for and operation of this ditch will be very slight. In fact, from the attitude of the defendant company at the hearing of this case I am convinced that for a small reasonable sum per acre it might be induced to undertake to permanently care for and operate the ditch.

Another question was raised by complainant, namely, that complainant pays \$1.00 per acre for his total acreage, 140 acres, but that he was not irrigating in excess of 80 acres and that he should be required to pay the \$1.00 per acre only for the amount irrigated. However, I do not regard this claim as having any merit. At the time the contract, or agreement, above



referred to as to the sale and purchase of this water was entered into the Merced Canal & Irrigation Company, predecessor of defendant, had two forms of agreement. Under one agreement the parties desiring water for irrigation were to pay an initial charge of \$10.00 per acre and \$1.00 per year for each acre held by them. Under the agreement they were entitled to receive water by gravity upon their lands but no deductions were to be made for knolls or high places on the land which gravity water would not reach. Under the other form of agreement purchasers of water were to pay an initial charge of \$20.00 per acre and a yearly charge of \$2.00 per acre for their holdings but deductions were to be made for such acreage as could not be irrigated by gravity water.

It was in testimony that the complainant in this case had stated to the manager of defendant that he preferred the contract entered into between his predecessor and the predecessor of defendant rather than the second form of contract just referred to. (See Transcript page 154).

I find as a fact that complainant is not entitled to reparation, as prayed for.

I submit herewith the following form of order:

#### ORDER

The Merced Ranch Company, a corporation, of Merced County, California, having filed a complaint before this Commission against the Crocker-Huffman Land & Water Company, a corporation, asking that the Crocker-Huffman Land & Water Company be compelled to take over and operate a certain lateral ditch through which the complainant's, and other consumers, receive their water for irrigation; and also that reparation be awarded complainant, as set forth in the opinion preceding

this order; and a public hearing having been held at Merced on the 30th day of March, 1915, at which time the matters and things involved in this case were thoroughly gone into, and the Commission having found as a fact that it could not, under the law, compel defendant to take over and operate the lateral ditch in question; and having further found as a fact that complainant was not entitled to reparation as prayed for in its amendment to the original complaint, and that the complaint both as to the prayer that defendant take over and operate the lateral ditch in question, and also as to complainant's prayer for reparation, should be dismissed,

IT IS HEREBY ORDERED that the complaint of the Merced Ranch Company, a corporation, complainant, vs. Crocker-Huffman Land & Water Company, a corporation, defendant, Case 755, be and it 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, this 28th day of May, 1915.

W. D. Loveland  
W. D. Gordon  
Frank R. Berhn  
Commissioners.