

Decision No. _____

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

SECURITY INVESTMENT COMPANY,
Complainant,
vs.
PALERMO LAND AND WATER COMPANY,
Defendant.

Case No. 627

Norman A. Eisner for complainant.
McCutchen, Olney & Willard for defendant.

THELEN, Commissioner.

O P I N I O N

Complainant in this proceeding asks the Railroad Commission to make an order directing defendant to supply water to complainant for the irrigation of specified lands in the so-called "Palermo Colony", near Oroville.

The amended complaint alleges, in effect, that defendant Palermo Land and Water Company, hereinafter referred to as the Palermo Company, is engaged in the business of selling and distributing water from its irrigation system in Butte County and of selling land and water rights; that Security Investment Company, the complainant herein, hereinafter referred to as the Investment Company, is the owner of Lots No. 1 and No. 8 of Block 88 and Lot No. 1 of Block 87, of Subdivision No. 1 of the Palermo Citrus Tract and that the Palermo Company, the former owner thereof, sold them to the predecessors of Security Investment Company and conveyed the same by deeds containing certain agreements with reference to the supply of water, to which agreements more detailed reference will hereinafter

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be made; that the Investment Company is the owner of the water rights granted to its predecessors in interest as purchaser of these lots; that each of said lots can be irrigated from the ditches and canals of the Palermo Company; that ~~portion of~~ said lots are under cultivation and have growing thereon olives, oranges and peaches, and that the only source from which the land can be irrigated is the Palermo Company's irrigation system; that the Investment Company has at various times demanded and sought to purchase water from the Palermo Company at its regular rates for the irrigation of said Lot No. 8, in Block 88, but that the Palermo Company has consistently refused to sell or furnish any water for the irrigation of said lot, although the property is under cultivation and in need of irrigation and only irrigable from the Palermo Company's system, which company is alleged to have sufficient water to sell to the Investment Company for the irrigation of said lot; that the easterly portion of said Lot No. 1 of Block 88, has for some time been under cultivation and irrigated by water received from the Palermo Company; that the Investment Company has recently planted the westerly portion of said Lot No. 1, consisting of about $1\frac{1}{2}$ acres, to olives, and has demanded water therefor from the Palermo Company, but that the Palermo Company has refused to supply water, although the property is under cultivation and in need of irrigation and only irrigable from the Palermo Company's system; that said Lot No. 1 of Block 87 has been set out to olive trees; that the Investment Company has demanded water for said lot from the Palermo Company but that the Palermo Company has refused to supply water although the property is under cultivation and in need of irrigation and only irrigable from the Palermo Company's system; that the Palermo Company has discriminated between persons requesting water from the company for the irrigation of lands in the Palermo Citrus Tract and particularly that the company has

discriminated against the complainant in that after having refused water to complainant it supplied water to the lands of other persons who were in the same condition as the complainant; and that the demands of complainant for water from the Palermo Company ante-dated those of the owners of lands to which the Palermo Company has furnished water. The complainant asks that defendant be ordered to deliver water for irrigation purposes on Lots No's 1 and 8 of Block 88 and Lot No. 1 of Block 87 in Subdivision No. 1 of said Palermo Citrus Tract.

The answer to the amended complaint alleges that the Railroad Commission has no jurisdiction in this proceeding on the ground that the complaint shows a controversy between the Investment Company and the Palermo Company with reference to the right of the Investment Company to demand and receive water for its lands from the Palermo Company. Defendant denies that it is obligated to deliver water to complainant and alleges that it has no water to supply to complainant. Defendant denies that it has discriminated in any way as between its customers or between the various persons who have demanded water from it. Defendant alleges that the entire supply of water owned or controlled by it during the last three years has been and now is necessary and requisite for the water users who now are and during the last three years have been receiving water from its system, and that if it is now compelled to deliver water to complainant or to any other applicant for the irrigation of lands not now irrigated from its system, the necessary effect of such action will be to deprive some of its customers who are now receiving and using water for the purpose of irrigation, of a portion of the water now in use for beneficial purposes. Defendant sets up the defense that where it has sold land with a covenant to supply water and the water has not been used for a full period of five years, the defendant is under no

further obligation to supply water to the lands thus sold. Defendant alleges that it is now supplying water for the irrigation of between 2300 and 2400 acres of land in Butte County and that there are at least 439 acres of land which the company heretofore sold under agreements for the delivery of water, which agreements defendant claims have not lapsed and avers that in case of a surplus of water, defendant is legally obligated to supply water first to said 439 acres of land. The defendant prays that the complainant be denied any relief whatsoever.

Public hearings in this proceeding were held at Oroville on November 10, 1914, and in San Francisco on September 16, November 24, 27 and 30, 1914. The parties having expressed a desire to file briefs, the complainant waived the opening brief. Defendant was given 10 days within which to file a brief and complainant 10 days within which to answer. Because of unanticipated delays in the filing of briefs, the decision in this case has been unavoidably withheld for a considerable period of time.

The evidence shows that the Investment Company is the owner of Lot No's 1 and 8 of Block 88, and Lot No. 1 of Block 87, of Subdivision No. 1 of Palermo Citrus Tract at Palermo, Butte County, California. Lot No. 1 of Block 88 contains 8.45 acres; Lot No. 8 of Block 88 contains 8.36 acres; and Lot No. 1 of Block 87 contains about 7.17 acres. These lots were all heretofore owned by the Palermo Company and have now passed by mesne conveyances to the Investment Company.

The Palermo Company's deed conveying Lot No. 1 of Block 87 and Lot No. 1 of Block 88 contains, among others, the following covenant:

"And it is further agreed that if the party of the second part, or his heirs or assigns, shall at any time, plant trees or vines, or otherwise cultivate said lands or any part thereof, the party of the first part will furnish from its ditches up to the line of said land nearest to the main or

branch ditch, pipe or flume of said party of the first part, such water as may be necessary to irrigate such trees, vines or cultivated crops, not exceeding one miner's inch for every seven acres so improved or cultivated, at such rates as may be fixed by law in the district in which said lands are situated; provided, however, that nothing herein contained shall make the party of the first part liable for not furnishing water at such time or times as it may be unable so to do because of drought, breakage of pipes, ditches or flumes, or any other cause not within its control."

The deed from the Palermo Company conveying Lot No. 8 of Block 86 contains, among others, the following covenant:

"And it is further agreed, that if the party of the second part or heirs or assigns shall at any time prior to July 1, 1889 plant trees or vines or otherwise cultivate said land or any part thereof, the party of the first part will furnish from its ditches up to the line of said land nearest to the main or branch ditch, pipe or flume of said party of the first part ^{such} water as may be necessary to irrigate such trees, vines or cultivated crops, not exceeding one miner's inch for every seven acres so improved or cultivated free of charge for four years from and after the commencement of such cultivation and thereafter will furnish said water in proportion to the amount of land cultivated, at such rates as may be fixed by law in the district in which said lands are situated; provided, however, that nothing herein contained shall make the party of the first part liable for not furnishing water at such time or times as it may be unable to do so because of drought, breakage of pipes, ditches or flumes or any other cause not within its control."

The testimony shows that the Palermo Company has sold a total of some 5,000 acres of land at Palermo and that in each case the deed contains an agreement to supply water to the property sold. The testimony further shows that the major portion of the land was sold for \$75.00 per acre, although a few small parcels were sold between 1909 and 1911 for as high as \$100 to \$125 per acre, and that the reasonable value of the land without water would have been \$25.00 per acre. It thus appears that the persons who bought land from the Palermo Company paid from \$50.00 to \$100.00 per acre in excess of the value of the land without water, in reliance on the agreement of the Palermo Company to supply the necessary water.

Lot No. 1 of Block 87 was planted to olive and peach

trees in the spring of 1914. Demand for water to irrigate this lot was made by the Investment Company in the spring of 1914, subsequent to the planting of the peach trees and prior to the planting of the olive trees, but the demand was refused and complainant has been compelled to irrigate the trees by means of buckets from a well. This lot has never received water from the Palermo Company.

Lot No. 8 of Block 88 was planted to olive trees in 1888 or 1889 and was irrigated from the Palermo Company's system up to but not subsequent to the year 1892. In 1912 and 1913, the Investment Company planted olive and orange trees on this lot to take the place of such of the old olive trees as had died. Written demand upon the Palermo Company for the supply of water for this lot was made on February 19, 1912, and was refused. Thereafter, the young olive and orange trees to which I have referred were planted. There is some evidence that a verbal demand for water for this lot was made upon the Palermo Company in the fall of 1911. No water from the Palermo Company has been used on this lot subsequent to 1892.

The easterly 4.78 acres of Lot No. 1 of Block 88 are planted to 400 orange trees and have received water from the Palermo Company ever since 1889. In the spring of 1913, the Investment Company planted the westerly 3.65 acres to young olive ~~and orange~~ trees. Although demand was made for water to irrigate these trees, the Palermo Company has consistently refused to deliver water for any portion of this lot except the easterly 4.78 acres.

Palermo Land and Water Company was incorporated on January 4, 1888, under the laws of California, for the purpose primarily of engaging in the sale of lands in what is known as the Palermo Colony, in Butte County, and of supplying water thereto. This tract of land contains approximately 6000 acres. The company bought an irrigation system which was originally constructed in the early mining days and which diverts water from the South Fork of the Feather River,

near Enterprise. The company, in the years 1888 to 1892 constructed additional canals and commenced the operation of the system for the distribution of water to the Palermo Colony. The company also continued to supply water to the existing consumers near Oroville. Witnesses for the Palermo Company testified that the company's policy has been not to sell water for use on lands outside of the Palermo Colony except lands near Oroville which were being irrigated at the time the company acquired its irrigation system. From 1888 to February, 1912, the company sold some 3000 acres of land agreeing in each case to supply water for the irrigation of the same. Mr. R. A. Clark, the Palermo Company's president, testified that in the fall of 1911 his company became apprehensive that it did not have on hand sufficient water to irrigate the entire Palermo Tract and that thereupon, in the fall of 1911, the company adopted a new policy to the effect that it would supply no water to lands to which so-called water rights were attached but which had not used water for a period of five years subsequent to the date of the respective deeds. In accordance with this policy, the Palermo Company has refused to supply water to the Investment Company and to a number of other parties who have made demand therefor.

Defendant has presented two main issues herein- (1) the company claims that it is under no obligation to supply water to lands of the herein described; the/Investment Company/ (2) the company further claims that the supply of water available to it and under its control is insufficient to permit it to supply water to said lands's lands.

Referring to the first defense, I find as a fact that the Palermo Company dedicated all the waters under its control, except those which were necessary to serve the existing consumers near Oroville to the service of the lands included within the so-

called Palermo Colony. Temporarily, the company has sold a portion of these waters for use by dredgers. The lands owned by the Investment Company and referred to in this proceeding are a part of the lands to which the Palermo Company has dedicated its water. Whatever other effect the Palermo Company's deeds conveying the lots here under consideration may have, which question it is not necessary here to consider, they certainly have the effect of making clear the fact that these lots are within the area to the use of which the Palermo Company's water was dedicated. The deed of November 30, 1891 conveying Lot No. 1 in Block 87 and Lot No. 1 of Block 88, specifically provides that if the purchaser, his heirs or assigns, shall "at any time" plant trees or vines, or otherwise cultivate the land or any part thereof, the Palermo Company will furnish from its ditches "such water as may be necessary to irrigate such trees, vines or cultivated crops, not exceeding one miner's inch for every seven acres so improved or cultivated." The deed of May 25, 1888, conveying Lot No. 8 of Block 88, specifically provides that if the purchaser, his heirs or assigns, shall plant trees or vines or otherwise cultivate the land or any part thereof at any time prior to July 1, 1889, the Palermo Company will supply from its ditches such water as may be necessary to irrigate such trees, vines or cultivated crops, not exceeding one miner's inch for every seven acres so improved or cultivated, free of charge for the first four years after the commencement of the cultivation, and thereafter at such rates as may be established by law. That the Palermo Company held itself out as a public utility and contemplated being dealt with as a public utility in connection with the sale of its water appears from the fact that its deeds all provide that it will sell its water, in certain cases initially and in other cases after a free use of four years, "at such rates as may be fixed by law in the district in which said lots are situated." The only water rates fixed "by law" are the rates of a public utility water company.

It thus appearing that the Palermo Company is a public utility, that it undertook to supply water as a public utility to

the lands which it sold in the Palermo Colony and that the lands of the Security Investment Company, herein under consideration, are included among the lands thus sold, it would seem to follow that those lands are still entitled to the service of water from the Palermo Company unless something has intervened to deprive them of their rights. The Palermo Company's only reliance in support of its contention that these lands have lost their rights is on the fact that in the fall of 1911 the Palermo Company decided that henceforth it would recognize no claims to water for lands which had not used the water for a continuous period of five years subsequent to their conveyance by the Palermo Company. It is admitted that there is nothing in the deeds of the Palermo Company to put the purchaser on notice that any such policy would ever be adopted by the company. The record shows also that prior to the refusal of the Palermo Company to deliver water to the three lots herein under consideration, no notice was ever given by the Palermo Company to the Investment Company that if water were not used during any designated time, the Palermo Company would refuse to deliver water to the lands in accordance with the terms of its contracts and deeds. The Palermo Company claims that the owners of 1399.24 acres of land which were sold with agreements to deliver water have now forfeited their rights to receive water from the company's system and that the owners of 459.42 acres of land, which land has not as yet been irrigated, have the right to demand water from the Palermo Company if such demand is made within a period of five years after the date of the respective deeds to the owners thereof.

The decision of the Supreme Court of California in Coveland, et al., vs. The Fairview Land and Water Company, et al., 165 Cal. 148, decided on March 20, 1913, would seem to show conclusively that there is no merit in the claim of the Palermo Company that the lands of the Investment Company have lost their

right to water. One of the questions in that case was whether the plaintiff McCunn had lost the right to receive water from Fairview Land and Water Company. Referring to this question the Court, at page 166, says:

"Here the right was originally gained by the Fairview Company. If it was by diversion or appropriation, that company made it for use on these particular lands, and the diversion, or appropriation, has ever since that time been made by that company or its intermediaries, for the benefit of all the parties. The plaintiffs all derived their titles from and are holding under that company. Where one thus diverting the water and thereby acquiring a water-right, whether by prescription or statutory appropriation, sells an interest in it to another and thereafter continues to divert the water ~~xx~~ himself for the vendee, the fact that the vendee does not demand or use the water he has bought may, if it is not otherwise beneficially used by some one receiving it from the appropriator, enable some third person to take such unused water and defeat the right of the first appropriator, upon the theory that such part has not been by him applied to a beneficial use. But we do not understand the law to be that such failure to receive or use the water by the vendee will forfeit his right thereto to the vendor who has in the meantime continued the diversion, unless such vendor in some manner informs the vendee that such forfeiture will be claimed because of nonuse, or asserts it against him by some hostile act. Mere failure to take and use the water for which he has, at the time, no need, will not forfeit the right to the vendor in such a case."

Again, at page 167, the Court says:

"The evidence does not show that the Fairview Company in any way manifested its intention to take and hold adversely to them the water to which these lands were entitled. Until it did manifest such intention to them, its title against them by prescription would not begin to run."

In the present proceeding it appears that no notice was given to the Investment Company by the Palermo Company prior to February 19, 1912, that the Palermo Company would claim any forfeiture of rights because of nonuse of water, nor was there any overt act on the part of the Palermo Company, prior to said date, showing any such intention. The statute of limitations accordingly has not run.

On the facts of this case, nothing has been shown to absolve the Palermo Company from its duty to serve the lands of the complainant herein.

Defendant's second defense is that its entire supply of water is required for the 2557.95 acres now irrigated from this system and that it has no water for the irrigation of additional land. Defendant presented testimony to show that from about July 15, until the first rains in the fall of 1912 and 1913, the company diverted from the South Fork of the Feather River all the water flowing in the river at the head of the company's canal, and that during portions of the fall in these two years, particularly in the month of August, the company did not have sufficient water to supply the needs of its consumers. A number of consumers under this system testified that during a portion of the fall of 1912 and 1913 their olives shriveled by reason of the lack of water. While the olives swell out again when water is later applied, these consumers testified that they thus lost a portion of the usual period of growth of the olives, with resultant diminution in their ultimate weight.

The record shows that the rainfall on the lands tributary to this system's water shed, in the year 1912, was 30 per cent below the normal rainfall and that in only two years out of the last 25 years was the rainfall less than in 1912. The year 1912 is the driest of the years for which records of water distribution have been kept by defendant. The year 1913, while not as dry as the year 1912, nevertheless shows a supply of water less than that of the average year. On the other hand, the evidence shows that in 1914, defendant had available more than sufficient water to supply the needs of all its consumers and that even during the month of August, the critical month of the year, considerable water ran to waste.

The inadvisability of taking the driest year known, or one of the driest years, as the measuring rod by which to determine the capacity of an irrigation system is too patent for comment. If the acreage to be irrigated under any irrigation system is only

that which can be irrigated comfortably and with entire satisfaction to everybody concerned during the driest year, it is at once obvious that the capacity of the system will be seriously limited, and that during most years, large quantities of water will run to waste. Large areas of land which would otherwise be cultivated and thereby add to the prosperity of the community would be compelled to remain dry and barren. It is better for the welfare of the State that the lands under an irrigation system should suffer some inconvenience in the driest years than that large amounts of water should run to waste in all the other years. In this connection attention should be drawn to the testimony in this case clearly showing that if olive trees, to which the defendant gave particular consideration, receive water in June of any year, they will not die even if they receive no further irrigation during the year. The effect of a failure to receive water during the month of August would simply be a more or less shriveling of one year's crop, with a consequent impairment in the value thereof.

Mr. C. E. Loveland, one of this Commission's hydraulic engineers, testified after an exhaustive investigation into the capacity of defendant's system, that a minimum safe service capacity of the system, with canals carrying water to capacity when possible, and with the exercise of due care in the operation of the system, is 4544 acres. The acreage actually irrigated during the years 1909 to 1914, inclusive, has been as follows:

<u>Year</u>	<u>Acres under Irrigation</u>
1909	1984
1910	1984
1911	1984
1912	1984
1913 (About)	2100
1914	2357.95

Mr. Loveland, in making his computation, assumed a duty of water, under good management of the system, of 1.4 feet per acre per annum. From the actual records of the Palermo Company, he determined the percentages of the total amount of water delivered which are supplied during each month of the irrigating season. He assumed that in dry years it would be possible to extend the irrigation period from 4 weeks to 5 weeks during July, August and September, and particularly that lands irrigated during the last week in July could go without further irrigation until the first week in September. As his type year for determining the minimum safe service capacity of the system, he used the year 1912 up to and including the month of August, but neutralized the rainfall for September, for the reason that an unusually heavy rain fell in September, 1912, resulting in a much smaller irrigation in September than is normally the case during that month. The water supply in the ditches of the Palermo Company during each day of June to October, inclusive, of 1912, was taken from the records of the United States Geological Survey. The losses in the canals and laterals were the losses as shown by actual measurements on defendant's system, covering a wide range of conditions from April to August, without deductions by reason of excessive losses to which reference will hereinafter be made. Based on these data, Mr. Loveland then presented a tabulation of the use of water in the various ditches and laterals of the Palermo Company, finally reaching the conclusion, as heretofore stated, that the minimum safe service capacity of the system is 4544 acres.

Attention should be drawn to the fact that this computation is based on the driest year during which records of distribution have been kept by the Palermo Company and on the driest year except two during the 23 years during which rainfall records at Palermo have been kept by the United States Weather Bureau.

Defendant presented certain objections to Mr. Loveland's

computations, based principally on the duty of water, the available supply of water and the time when the water must be supplied.

The data with reference to the acre feet supplied and the acres under irrigation during the year 1913 were reported by Mr. Loveland to be incomplete, for the reason that he had been unable to secure the acreage irrigated and the acre feet supplied to the Palermo Company's Oroville consumers. The record does not show whether the use of this additional data, if he had been able to secure it, would have increased or diminished the average depth per acre of 1.31 feet assumed by Mr. Loveland for the year 1913. As contrasted with Mr. Loveland's duty of 1.4 feet of water per acre per annum, defendant claims an average during the last 6 years of 1.57 feet per acre per annum. This figure, however, is based in part on the amount of water supplied in the years 1909, 1910 and 1911, before the company entertained any fears as to the sufficiency of its water supply and before any careful means were taken to conserve the supply.

Referring to the available supply, defendant points out that the rainfall in September, 1912, was unusually heavy, which fact was reported by Mr. Loveland and commented upon by him. By reason of this fact, Mr. Loveland, as already stated, made allowances for the September supply.

Much testimony was presented by the defendant to show that the olive and orange trees under its system could not conveniently go for five weeks between the last week in July and the first week in September without irrigation. Defendant claims that the periods for irrigating these trees should not extend beyond 20 to 30 days, particularly in the months of July, August and September, and considerable evidence was presented by consumers of water under the system, in support of this contention. Mr. Loveland's computations show that if the maximum period of irrigation

was 4 weeks instead of 5 weeks, the minimum safe service capacity of the system, assuming the other bases of his computations to be correct, would be 3594 acres.

As bearing further on the question of acreage which can be irrigated under this system, I desire to draw attention to the evidence as to the amount of water which can be saved or added for the use of consumers under this system.

Mr. J. A. Totman, who is defendant's ditch walker from the point of diversion to the Whitewashed Trees and whose duty it is to repair the flumes on this portion of defendant's system, testified that there are a great many old flumes on the ditch and that it is hard to keep them tight, although he does all the caulking he can. Mr. George S. Nickerson, a witness for the complainant, testified that there is a larger leakage or waste of water through the company's flumes than is necessary and that the proper maintenance of these flumes would result in saving a considerable amount of water. He reported that at least 30 miner's inches of water is leaking through the flume nearest the intake and that there is a total preventable loss between the intake and Whitewashed Trees of 2.94 second feet of water or 147 miner's inches. Mr. Loveland testified that by repairing the flumes so as to prevent their extraordinary leakage, approximately $3\frac{1}{2}$ second feet of water, amounting to 175 miner's inches, could be saved. Both Mr. Nickerson and Mr. Loveland recommended that the flumes be lined with the roofing paper which has been successfully used on the system of Cuyamaca Water Company, in San Diego county. They testified that this work could be done for \$2800.00.

Attention was further drawn to the fact that a considerable amount of water has hitherto been supplied by this system to dredgers and that at the time of the hearing three dredgers were still in operation. Based on computations made by Mr. Arthur L. Adams, who testified in behalf of the Palermo Company, in Applica-

tion No. 357, it was assumed in this proceeding that each dredger uses an average of .75 second feet of water at the Whitewashed Trees. On this basis, the three dredgers still in operation would use 2.19 second feet of water at the Whitewashed Trees, or 109.5 miner's inches. The testimony shows that one of the dredgers will cease operations very soon, that another will probably be dismantled in June, 1915 and that the third will probably operate for about two years longer. On the basis of five acres of land irrigated by 1 miner's inch of water, the water used by the remaining three dredgers could irrigate, if applied at Whitewashed Trees, 547.5 additional acres of land. Some losses, of course, would be incurred in the transmission of the water to the point of application to the land.

In accordance with this Commission's suggestions to Volume 3, Opinions and Orders of Railroad Commission of California, p. 1247, the Palermo Company in Application No. 357, the company in the spring of 1914 put into effect a rotation system of delivery of water for the purpose of assisting in the conservation of the water of this system. The testimony shows that the institution of the rotation system has resulted in materially increasing the efficiency of the system.

Mr. A. S. Riehl, the Palermo Company's superintendent, testified that a large number of the consumers under the system ask for more water than is necessary to irrigate their lands and that the consumers waste a considerable amount of water by running it through the roads and creeks.

Defendant's system has no storage capacity. As the system is at present constructed, there is no way by which the company can conserve the large amounts of water which run to waste during most months of the year, so as to use the water to tide over the critical month of August in dry years. Mr. R. W. Hawley, this Commission's hydraulic engineer, presented a report on possible storage under the system, which report was introduced in

evidence as Railroad Commission's Exhibit No. 3. In this report Mr. Hawley draws attention to a possible reservoir site covering portions of Sections 28 and 35, in Township 19 North, Range 4 East, M. D. B. and M., together with the approximate location of a possible canal carrying water from a reservoir at this site to lands about Palermo. Mr. Hawley reports that this dam site is such as to be particularly well adapted for a multiple arch dam, such as has been constructed near Bangor on Dry Creek. Mr. Hawley reports that there is a sufficient supply of water available in the South Fork of the Feather River to fill such reservoir by the flow between January and April of any year, and the construction of such reservoir will practically double the capacity of the system. While the construction of such reservoir is not taken into consideration in this proceeding for the purpose of ascertaining the minimum safe service capacity of the system, the matter is drawn to the Palermo Company's attention for its serious investigation and consideration. It goes without saying that the Railroad Commission is very much interested in the development of an additional water supply on the part of the Palermo Company, so as to enable the company to irrigate not merely all the lands which it has already sold with agreements to supply water, but also the remaining acreage in the Palermo Colony still owned by the Palermo Company. Needless to say, it is distinctly to the advantage of the Palermo Company to develop a supply of water sufficient to irrigate this entire additional acreage, so as to enable the company to sell its remaining lands at considerably in excess of the ~~amount of the~~ value of the land without water.

If we confine our attention solely to the water at
three
present used by the remaining dredgers, amounting to 2.19 second feet, and assume a saving of 2 second feet from the proper repair of the Palermo Company's flumes, it is apparent that from these two sources alone there will be available for the irrigation of

additional lands in the driest years, 4.19 second feet of water, amounting to 209.5 miner's inches or 259.79 acre feet. The records of defendant's system show that 18 per cent of the entire water delivered to consumers, or .25 feet for each acre, is normally delivered in the month of August. On this basis, 259.79 acre feet of water could irrigate 1039.16 additional acres of land in August, less the losses to the point of application to the land, which losses resulting from the placing of this additional amount of water in the defendant's canals, would not be large.

I find as a fact from the evidence in this proceeding that with reasonable repair of the defendant's flumes, and a reasonably careful management of the system and the use of the water now delivered to the three dredgers, from time to time, as needed, the Palermo Company can reasonably and safely irrigate at least 750 to 1000 acres of land in addition to those now irrigated by the company. I am of the opinion that I could ^{reasonably} ~~fix~~ fix the figure at 1000 acres but in order to err on the side of safety, I am finding between 750 and 1000 acres. This finding is made without reference to increased supply resulting from the construction of a reservoir and without reference to the use of the waters of McCabe Creek, from which source engineers Nickerson and Loveland testified that .25 second feet could be secured by the construction of a ditch conveying these waters into the Palermo Company's main canal.

Assuming that at least 750 to 1000 acres of additional land can safely and reasonably be irrigated by the Palermo Company, I am next confronted with the question whether there is any reason why the Palermo Company should not be directed to supply water for the irrigation of complainant's acreage, amounting to about 20 acres. Defendant presented a list of some 25 persons owning land outside of the Palermo Colony who have made request for water. As defendant's first duty, apart from the consumers near Oroville who were taking water from the system at the time the Palermo

Company acquired it, is to supply water for the irrigation of the lands of the Palermo Colony, it will not be necessary to give consideration herein, at the present time, to the claims of these outside land owners. Defendant also presented a list of land owners within the Palermo Colony who have made demand for water and who have been refused. Defendant did not report the acreage owned by these persons and the amount of water desired by them. In cases of this kind in which a water utility is directed to supply additional land with water and there is a possibility of an inadequate supply for the irrigation of all the lands which may desire water, some principle must be established to determine who shall have the right to the available water. In the present proceeding, the land owners who have bought land from the Palermo Company and who are within the area to which the Palermo Company's water has been dedicated, have the first right to the water. If none of these lands had been planted to trees, the first claimant in point of time would presumably have the first right, provided that he shows within a reasonable time that he still desires the water. If he makes no such showing within a reasonable time, the man who made the next demand in point of time would usually have the first right, and so on. In the present proceeding, however, this particular complainant not merely made his demand within a few months after the company adopted the policy of refusing water to certain purchasers of its lands, but also has planted its acreage to trees which are in need of irrigation from defendant's system. On the facts of this case, I find that the complainant herein is at the present time entitled to receive water from defendant's system at defendant's regular rates for the irrigation of the lands herein described.

Claim was made by complainant that the Palermo Company has discriminated against complainant in that it has permitted other lands which had not been irrigated within five years from the

date of the conveyance to receive water, while denying the same privilege to complainant's land. The evidence shows that the Ed Elsner lands were deeded by the Palermo Company on April 7, 1907, and that the Palermo Company permitted the owner thereof to commence the use of water for the irrigation of trees thereon in May, 1912, being a few days beyond the five year period. The Palermo Company permitted W. P. Hammon, its largest consumer, to irrigate 1 3/4 acres which was used as a garden plot, in lieu of other land theretofore irrigated and used for the same purpose. This tract of 1 3/4 acres had not received water within five years from the date of the deed of conveyance. The testimony also shows that Mr. Hammon irrigated a tract of about 2 1/2 acres planted to 250 olive trees and located on the northwest corner of the Daily and Sargent Tract, for the first time in 1914, although this tract had not been irrigated for five years. The evidence further shows that Mr. Hammon's representatives twice called upon the president of the Palermo Company for the purpose of securing water for another tract of 70 acres on which it was desired to plant olive trees, but that the Palermo Company refused the water. The owners of this tract planted olive trees on the land in May, 1914, taking the water to irrigate the trees from the hydrants of the Palermo Company. The Palermo Company's defense with reference to the last two transactions is that it did not know that the water was being used on these two tracts. This defense is made notwithstanding the fact that the Palermo Company's attention had been twice specifically drawn to the fact that Mr. Hammon desired water for these 70 acres. I am willing to accept the statement of the Palermo Company that it did not know that water was being used on these tracts. Even assuming that discrimination could not be proved without showing a knowledge of the facts on the part of the Palermo Company, the instances are significant as bearing on the question of the degree

of care which has hitherto been exercised by the Palermo Company's employees in watching the distribution of the water and taking care to conserve the supply. In view of the findings herein made, it is not necessary to give further consideration to this branch of the case. When complainant receives water such discrimination, if any, as may have existed against him will be removed.

I submit the following form of order:

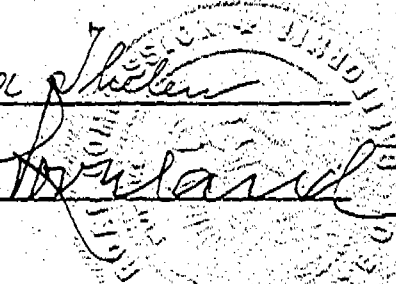
O R D E R.

Public hearings having been held in the above entitled proceeding and the proceeding having been submitted and being now ready for decision,

IT IS HEREBY ORDERED that PALERMO LAND AND WATER COMPANY, within 20 days from the date of the order herein, supply and thereafter continue to supply water, at the Palermo Company's regular rates for irrigation now or hereafter in effect, for the irrigation of Lot No. 1 of Block 87, Lot No. 8 of Block 88 and the Westerly 5.65 acres of Lot No. 1 of Block 88, of Subdivision No. 1 of the Palermo Citrus Tract.

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 17th day of June, 1915.


Manuel J. ...
H. B. ...
Edwin C. ...
Frank R. ...
Commissioners.